MIDDLE TEMPLE

ADDISON'S

TREATISE

ON THE

LAW OF CONTRACTS.

TENTH EDITION.

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A

TREATISE

ON THE

LAW OF CONTRACT

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TENTH EDITION

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PREFACE

TO THE TENTH EDITION.

It is hoped that this, the Tenth Edition of Addison on Contracts, will not be found in any way inferior to its predecessors.

Every effort has been made to reduce the bulk of the book, without impairing its value, by the judicious excision of such matter as appeared to the Editors to increase the volume without adding to the utility of the Work.

Since the publication of the last edition, eleven years ago, a large number of Statutes have been passed, and nearly a thousand New Cases, bearing on the subject of Contracts, have been decided. The difficulty in dealing with such a mass of new material has been very considerable, but it is hoped that the Editors have succeeded in inserting the New Cases and Statutes in their proper places without increasing the bulk of the Work.

The passing of the Sale of Goods Act, 1893, has necessitated the re-writing and re-arrangement of the Chapter dealing with the Sale of Goods; and while the new Act has been incorporated in the text, it

has been deemed advisable to retain such of the old decisions as may still throw light on the interpretation of its provisions.

The whole of the foot-notes have been revised and verified, and special care has been taken to give references to the "Law Journal Reports."

In conclusion, the Editors desire to express their great obligation to Mr. Walter Hussey Griffith, of the South Eastern Circuit, for much valuable assistance rendered in connection with the re-writing of the Chapter on the Sale of Goods.

A. P. P. K.
W. E. G.

Temple,
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ADDENDA.

Page 94, note (*i*), *Driefontein Gold Mines* v. *Janson*, *Add reference*, "(1902) A. C. 484."

Page 281, note (*l*), *add*—

"The lessee of a person bound by a restrictive covenant can be sued whether 'assigns' are mentioned in the covenant or not. (*Holloway Brothers* v. *Hill*, (1902) 2 Ch. 612; 71 L. J. Ch. 818.)"

Page 911, line 7, *add*—

"The carriage by a shipowner of goods destined for an alien enemy without the knowledge and consent of the other shippers, is a breach of duty towards them, and the shipowner is liable for damages for delay in delivering their goods if the ship be seized by reason of having enemies' goods on board. (*Dunn* v. *Bucknall Bros.*, (1902) 2 K. B. 614.)"

Page 996, note (*b*), *add*—

"There is no rule of law that damages cannot be recovered for loss of market on a contract of carriage by sea. (*Dunn* v. *Bucknall Bros.*, (1902) 2 K. B. 614.)"

[*To face first page of text.*

THE

LAW OF CONTRACT,

ETC.

BOOK I.

LAW OF CONTRACTS IN GENERAL.

CHAPTER I.

THE FORMATION OF CONTRACTS.

SECTION I.

NATURE OF CONTRACTS.

Definition of a Contract.—A contract is defined by Pothier to be "an agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act" (*a*). Every contract includes a concurrence of intention between two parties, one of whom promises something to the other, who on his part accepts such promise; but it does not necessarily include a mutuality or reciprocity of contract and liability. There must be two parties to every contract, a promisor or party making the promise, and a promisee or party to whom the promise is made; but there may be only one contracting party. When there is a mutual contract binding each party to the other, the contract is bilateral. When the contract binds one person to another without any engagement being made by the latter, it is unilateral. Contracts, also, are either principal or accessorial.

(*a*) Pothier, Traité des Obligations, § 3.

The first are those which are entered into by the parties on their own account as principals; the second are those which are entered into for assuring the performance of another principal contract, such as guarantees or engagements of sureties. Contracts, whether bilateral or unilateral, principal or accessorial, are made and authenticated either by parol, by deed, or by matter of record.

Sub-section I.

(1.) *Parol or simple contracts* are contracts which are either made by word of mouth, or are inferred from the silent language of men's conduct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered. Such contracts cannot be enforced unless they are founded upon some good or valuable consideration. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other" (*b*); or again, "any act of the plaintiff from which the defendant derives, or expects to derive, a benefit or advantage, or any labour, detriment or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed or such inconvenience suffered by the plaintiff, at the request or with the consent, either expressed or implied, of the defendant" (*c*).

The consideration—Absence of consideration.—When, at the desire of the promisor, the promisee, or any other person, has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise (*d*). Bracton, who wrote in the time of Hen. III., is the first of our lawyers who treats of naked promises and promises clothed with a consideration, and advocates, in the language of the civilians, the well-known principle, "*ex nudo pacto non oritur actio*" (*e*). But if a man is entrusted with and receives money or goods on the faith of a promise to deal with them in a particular manner, whether for reward or gratuitously, an action can be maintained against him for any loss or injury that may be sustained by reason of a breach

(*b*) *Currie* v. *Misa*, L.R. 10 Ex. 153, at p. 162; 44 L.J. Ex. 94.

(*c*) 1 Selw. N.P. 55 (ed. 13), adopted by Tindal, C.J., in *Laythoarp* v. *Bryant*, 5 L.J. C.P. 217, 220; 2 Bing. N.C. 735; and by Bowen, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256, 271; 62 L.J. Q.B. 257, 264.

(*d*) This is the definition of "consideration" given in the Indian Contract Act of 1872.

(*e*) Bracton, lib. 3, cap. 1, fol. 99, ed. 1569. Doct. & Stud., Dial. 2, chap. 24; Shep. Touch. 224, 225. *Elsee* v. *Gatward*, 5 T.R. 143, 148.

of the promise, if he does not use ordinary diligence or skill in respect of the same (*f*).

A promise to give any particular thing, such as a horse, or a watch, to another, unaccompanied by an actual or constructive transfer or change of possession, is a mere *nudum pactum*, and cannot be enforced by compulsion of law (*g*). A promise by one man to pay a debt already incurred by another is a *nudum pactum;* so also, speaking generally, is a promise by a creditor to accept less than the full amount of an admitted debt, or to give time for the payment thereof (*h*); also a promise to pay money to a person not entitled to receive it (*i*); a promise by the heir to pay the bond of his ancestor, when the heir is not bound by the bond (*k*). And, where a specific sum is fixed as the price of goods sold and delivered, or as an agreed remuneration for work and services, a subsequent promise, without any new consideration, to pay an additional sum for the same work or the same services is a *nudum pactum* (*l*). Where, however, a man makes a representation on the faith of which another man alters his position, the man making the representation is bound to perform it, for in the eye of a Court of Equity it is a contract (*m*). Where a husband promised before his marriage to leave property by will to his wife for life and afterwards conveyed the property to a third person, the conveyance constituted a breach of contract which entitled the wife to sue at once for damages (*n*).

A promise or agreement to make a duty of a limited nature more extensive, and to undertake a greater liability than is imposed by law upon the party making the promise, is a *nudum pactum*, unless there be some fresh consideration. The bare promise of an executor or administrator, for example, to pay the debt of his testator or intestate does not alter or extend his liability; the executor does not, by such a promise, render himself personally liable, but is only chargeable to the extent of the assets (*o*).

(*f*) Cf. notes to *Coggs* v. *Bernard*, 1 Smith's L. C. 167 (ed. 10).

(*g*) *Donaldson* v. *Donaldson*, Kay, 718; 23 L.J. Ch. 788; *Milroy* v. *Lord*, 31 L.J. Ch. 798.

(*h*) *Fitch* v. *Sutton*, 5 East, 232; *Pinnell's case*, 5 Co. 117, a, 117, b; *Cooper* v. *Phillips*, 1 C. M. & R. 649; see further, *post*, pp. 168, 169.

(*i*) *Clay* v. *Willis*, 1 B. & C. 364; 1 L.J. (O.S.) K.B. 144.

(*k*) *Barber* v. *Fox*, 2 Saund. 135, 137, h; 1 Vent. 159; *Lloyd* v. *Lee*, 1 Str. 94; *Goodwin* v. *Willoughby*, Latch. 142; *Fabian* v. *Plant*, 1 Show. 178.

(*l*) *Harris* v. *Watson*, Peake, R. 102; *Brown* v. *Crump*, 1 Marsh. 567; *Newman* v. *Walters*, 3 B. & P. 612.

(*m*) *Per* Bacon, V.-C., in *Dashwood* v. *Jermyn*, 12 Ch.D. 776, 781; citing *Hammersley* v. *De Biel*, 12 Cl. & F. 45, 61, n.; *Fickus, In re*, (1900) 1 Ch. 331; 69 L.J. Ch. 161; and see *post*, p. 68, *Estoppels in pais*, and *post*, p. 283.

(*n*) *Synge* v. *Synge*, (1894) 1 Q.B. 466; 63 L.J. Q.B. 202; *Hochster* v. *De la Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455.

(*o*) *Pearson* v. *Henry*, 5 T.R. 6; *Rann* v. *Hughes*, 7 T.R. 350, n.; see also Williams on Executors, vol. 2, p. 1666 (ed. 9).

Neither "love and affection," nor "blood relationship" (*p*), nor "friendship," constitute a sufficient cause or consideration for the fulfilment by coercion of law of an undertaking or promise not under seal (*q*).

The performance of an act which the party is under a legal obligation to perform cannot constitute a good consideration for a promise (*r*). So, if a debt is released or discharged, the giving up of a deed or collateral security originally deposited with the creditor to secure the payment of the debt cannot form a good consideration for a promise; for, by the release of the debt, the security is released, and the creditor is no longer justified in retaining it (*s*). But the performance of an act which a person has agreed with another to perform is a good consideration to support a promise by a third person, if the latter derives a benefit from the performance (*t*).

A promise to pay money to a sheriff in consideration of his executing a writ is also a *nudum pactum* (*u*); so, also, is a promise to pay money to a witness regularly subpœnaed to give evidence at a trial, as a compensation for his loss of time, because, in each of these cases, the parties are bound by law to do the acts in question, without compensation or reward (*x*). A promise to pay money to the crew of a vessel, as an incitement to exertion during a storm, is a *nudum pactum*, and cannot be enforced, because the sailor is bound to do his utmost to save and preserve the vessel (*y*). Where, however, any extraordinary and additional services have been rendered beyond what the parties were in strictness bound to perform, there is a sufficient foundation for the promise, and the law will enforce its faithful performance (*z*); if, therefore, a vessel is so short-handed as to render it dangerous to life to proceed to sea, and the crew are not bound under their articles to sail with so small a complement of seamen, a promise of additional remuneration in consideration of the increased risk is valid and binding (*a*). A promise not to abuse the process of the law, as, for instance, to conduct proceedings in bankruptcy so as to avoid, as far as possible, injury to the debtor's credit, will form no consideration for a promise by the debtor (*b*).

(*p*) *Tweddle* v. *Atkinson*, 1 B. & S. 393; 30 L.J. Q.B. 265.

(*q*) *Harford* v. *Gardner*, 2 Leon. 30; *Holliday* v. *Atkinson*, 5 B. & C. 501; 8 D. & R. 163; *Cluff* v. *Moore*, 1 Sid. 413; *Lampleigh* v. *Brathwait*, Hob. 105.

(*r*) Pothier, by Evans, p. 25.

(*s*) *Cowper* v. *Green*, 7 M. & W. 633, 641; 10 L.J. Ex. 346.

(*t*) *Scotson* v. *Pegg*, 6 H. & N. 295; 30 L.J. Ex. 225.

(*u*) *Bridge* v. *Cage*, Cro. Jac. 103.

(*x*) *Willis* v. *Peckham*, 4 Moore, 300; *Collins* v. *Godefroy*, 1 B. & Ad. 956; 9 L.J. (O.S.) K.B. 158.

(*y*) *Harris* v. *Watson*, Peake, 102; *Stilk* v. *Myrick*, 2 Campb. 317; *Newman* v. *Walters*, 3 B. & P. 615.

(*z*) *England* v. *Davidson*, 11 Ad. & E. 856; 9 L.J. Q.B. 287.

(*a*) *Hartley* v. *Ponsonby*, 7 E. & B. 872; 26 L.J. Q.B. 322.

(*b*) *Bracewell* v. *Williams*, L.R. 2 C.P. 196.

Fraudulent consideration.—A corrupt or fraudulent consideration will not support a promise. Thus, where the defendants, in consideration of the plaintiff promising to obtain a contract from a company in relation to which he was in a position of trust, contracted to pay him a commission, it was held that he could not recover, for although the jury found that he had not been induced by such consideration to act corruptly, yet such consideration was in itself corrupt (*c*). So, also, illegal and immoral contracts, and such as are against public policy, cannot be enforced, either because the consideration for the promise is bad, or because, although the consideration is good, yet the promise is bad (*d*).

Sufficient consideration—Work and services.—If, at the request of the promisor, any act which the promisee is under no legal obligation to do is done as the consideration for the promise, there is a sufficient consideration to render the promise obligatory in law, whether the promisor has obtained for himself any advantage or the promisee has suffered any disadvantage. Thus, the mere delivery of a document which the promisee has a right to retain in his possession is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party, nor prejudice to the other, from the delivery of the document (*e*). If one person agrees to transfer, and another person agrees to accept, shares in a public company, upon which shares nothing has been paid, and which have no marketable value at the time of the transfer, the agreement constitutes a binding contract (*f*). If the defendant has promised the plaintiff to pay him a sum of money in consideration of the plaintiff's procuring a tenant for the defendant, or getting him a sale or purchase and conveyance of a particular estate, there is a good and valid consideration for the promise (*g*).

A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself. It is sufficient, if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking (*h*). If the plaintiff has become security for the promisor,

(*c*) *Harrington* v. *Victoria Graving Dock Co.*, 3 Q.B.D. 549; 47 L.J. Q.B. 594.

(*d*) See *post*, p. 71.

(*e*) *Wilkinson* v. *Oliveira*, 1 Bing. N. C. 490; 1 Scott, 461; *Haigh* v. *Brooks*, 10 Ad. & E. 309, 320, 334; 9 L.J. Q.B. 194; *Hart* v. *Miles*, 4 C.B. N.S. 371; 27 L.J. C.P. 218; *Westlake* v. *Adams*, 5 C.B. N.S. 248; 27 L.J. C.P. 271; *Smith* v. *Smith*, 13 C.B. N.S. 429; 32 L.J. C.P. 49; *Fleming* v. *Bank of New Zealand*, (1900) A.C. 577; 69 L.J. P.C. 120.

(*f*) *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L.J. Ch. 784.

(*g*) *Seaman* v. *Price*, 1 Ry. & M. 195.

(*h*) *Bunn* v. *Guy*, 4 East, 190, 194; *Jones* v. *Ashburnham*, *ib.* 455, 463.

or has accepted bills, or imposed upon himself any legal liability at the request of the latter, there is a sufficient consideration to support a promise and render it binding in law, although no actual advantage has resulted to the promisor (*i*). Any trouble or labour, too, however slight, undertaken by the plaintiff at the request of the defendant, will support a promise by the latter, and render it binding, although such trouble and labour may have been unsuccessful, and productive of no advantage to the defendant (*k*). Where the defendant promised a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave the necessary information, it was held that the service rendered was a sufficient consideration for the promise, and that the plaintiff was entitled to recover the reward (*l*). And, where the father of an illegitimate child promised the mother to pay her 2*s*. 6*d*. a week for its maintenance if she would abstain from affiliating the child, and the mother did abstain, it was held that the father was bound by the promise, the consideration having been executed (*m*). But a promise, on the abandonment of an immoral connexion with a woman, to pay her a sum of money, or an annuity, in consideration that she will thenceforth lead a good and virtuous life, is not binding (*n*).

Work and services rendered to third party at request of promisor.—Any service, benefit or advantage rendered to a third person at the request of the promisor is a sufficient consideration for the promise. Thus, if one person should say to another, "heal such a poor man of his disease," or "make an highway, and I will give thee so much," and he does it, an action lies at the common law (*o*). A captain of a company of foot soldiers, at the request of the defendant, gave leave of absence to a soldier on the faith of a promise by the defendant that the soldier should return in ten days, or that the defendant would pay the captain 20*l*.; and it was held that the leave of absence so given was a sufficient consideration for the defendant's promise (*p*). So, where the defendant promised the plaintiff to pay him 100*l*. if the plaintiff would bail the defendant's servant, who had been cast into prison, it was held that there was a sufficient consideration for the promise (*q*). Where

(*i*) *Bailey* v. *Croft*, 4 Taunt. 611; *Williamson* v. *Clements*, 1 Taunt. 523.

(*k*) *Sturlyn* v. *Albany*, Cro. Eliz. 67; *March* v. *Culpepper*, Cro. Car. 70.

(*l*) *England* v. *Davidson*, 11 Ad. & E. 856; 9 L.J. Q.B. 287; *Smith* v. *Moore*, 1 C.B. 438; *Thatcher* v. *England*, 3 C.B. 254; 15 L.J. C.P. 241; *Lockhart* v. *Barnard*, 14 M. & W. 674; 15 L.J. Ex. 1; *Turner* v. *Walker*, L.R. 2 Q.B. 301; 36 L.J. Q.B. 112; *Bent* v. *Wakefield Bank*, 4 C.P.D. 1.

(*m*) *Linnegar* v. *Hodd*, 5 C.B. 437; 17 L.J. C.P. 106; *Crowhurst* v. *Laverack*, 8 Exch. 208, 213; 22 L.J. Ex. 57.

(*n*) *Binnington* v. *Wallis*, 4 B. & Ald. 650; *Jennings* v. *Brown*, 9 M. & W. 496, 501; 12 L.J. Ex. 86; *Beaumont* v. *Reeve*, 8 Q.B. 483, 487; 15 L.J. Q.B. 142.

(*o*) 1 Rolle Abr. Action sur Case.

(*p*) *Taylor* v. *Jones*, 1 Raym. 312.

(*q*) *Hunt* v. *Bate*, Dyer, 272, a.

the father of an illegitimate child promised to pay the mother an allowance of 60*l.* a year during her life, in consideration that she had at his request undertaken, and then had, the care and nurture of the child, and would thenceforth continue to take charge thereof, it was held that there was a sufficient consideration for the promise, and that the executors of the father, after his decease, were bound to continue the payment of 60*l.* a year to the mother (*r*). And, where the promise was to pay the mother of an illegitimate child 100*l.* a year for life if she would bring it up properly, and the mother did so, it was held that the annuity could not be withdrawn (*s*).

Past consideration.—Bygone acts or services cannot, unless coupled with a previous request, be made a good consideration for a promise; but where there is a request and an act done in pursuance thereof, that is sufficient to support a subsequent promise. A promise to pay the plaintiff 20*l.* in consideration that the plaintiff "had delivered" to the defendant twenty sheep, or a promise to lend the plaintiff 20*l.* in consideration that the plaintiff "had formerly lent" that sum to the defendant, is a *nudum pactum* and incapable of sustaining an action (*t*); for the thing having been done and executed before the promise was made cannot be said to be a consideration for it. A mere moral obligation arising from a past benefit not conferred at the request of the defendant is not a good consideration (*u*). But if the act has been performed pursuant to the previous request of the party making the promise, then the promise is coupled to the consideration by the request, and is not a *nudum pactum* (*x*). Thus, where the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff 20*l.* in consideration that the plaintiff, at the instance of the defendant, had taken to wife the cousin of the defendant, it was held that the action was maintainable, although the marriage was executed and past before the undertaking and promise were made, because the marriage ensued at the instance of the defendant (*y*). So, where the defendant, having feloniously slain one Patrick Mahume, required the plaintiff to endeavour to obtain a pardon for him from the king, and the plaintiff journeyed and laboured, at his own charges and by every means in his power, to effect the desired object, and the defendant, afterwards, and in consideration of the premises, promised to give the plaintiff 100*l.*, it was held that,

(*r*) *Jennings* v. *Brown*, 9 M. & W. 496; 12 L.J. Ex. 86.

(*s*) *Hicks* v. *Gregory*, 8 C.B. 378; 19 L.J. C.P. 81.

(*t*) *Jeremy* v. *Goochman*, Cro. Eliz. 442; *Dogget* v. *Vowell*, Moore, 643; *Moore* v. *Williams*, *ib.* 220; Bacon's Abr. Assumpsit, D.; *Eastwood* v. *Kenyon*, 11 Ad. & E. 438, 451; 9 L.J. Q.B. 409.

(*u*) *Eastwood* v. *Kenyon*, *supra*.

(*x*) 1 Wms. Saund. 264.

(*y*) Dyer, 272, b; 1 Wms. Saund. 264, 264 a.

although the consideration was past and gone before the promise was made, yet, inasmuch as the consideration was moved by the previous suit or request of the party, the promise was binding (*z*). But the thing done must, of course, have been advantageous to the defendant, or detrimental or troublesome or inconvenient to the plaintiff, and must be such an act or service as the law recognises as a legal consideration for a promise (*a*).

If a man pays a sum of money or buys goods for A. without his knowledge or request, and afterwards A. agrees to the payment or receives the goods, this subsequent assent is equivalent to a previous request, in accordance with the ancient maxim of the civil law, *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (*b*). A request, too, is frequently implied by law for the purpose of enabling a man to enforce an express promise founded upon a meritorious claim not amounting to a strict legal right.

When the defendant retains the benefit of the consideration, the law will, under some circumstances, imply a request, or permit the jury to infer it, for the purpose of enforcing a meritorious claim (*c*).

Failure of consideration.—Although there be an apparent consideration for the promise, yet, if this consideration should turn out to be false, or to be a nullity, the contract has no legal force or effect (*d*). So, if the consideration prove to be a nullity, the promise founded upon it is void, as if the consideration be the forbearance of a suit when there is no cause of action, or the relinquishment of a contract void in law, or a discharge from an arrest illegally made, or a promise to pay a debt which never had an existence in point of law (*e*).

Written promises without consideration.—Generally speaking, no difference is recognised in law between a written contract and a contract by word of mouth (*f*). Where the defendant signed a written undertaking to the following effect, "I hereby agree to remain with Mrs. Lees for two years from the date hereof for the purpose of learning the business of a dressmaker, &c.," it was held that, as the engagement was all on one side, nothing being contracted to be done by Mrs. Lees as a consideration or inducement

(*z*) *Lampleigh* v. *Brathwait*, Hob. 105; 1 Smith's L. C. 136 (ed. 10); *Sidnam* v. *Worthington*, Cro. Eliz. 42; *Harris' case*, Dyer, 272, a, n. 31.

(*a*) *Kaye* v. *Dutton*, 7 M. & Gr. 807, 816; 13 L.J. C.P. 187; *Victors* v. *Davies*, 12 M. & W. 759; 13 L.J. Ex. 214.

(*b*) 1 Saund. 264, n. 1; notes to *Osborne* v. *Rogers*.

(*c*) *Post*, p. 412.

(*d*) *Gough* v. *Findon*, 7 Exch. 48; 21 L.J. Ex. 58.

(*e*) *Rosyer* v. *Langdale*, Sty. 248; *Hammon* v. *Roll*, March, 202; *Atkinson* v. *Settree*, Willes, 482; *King* v. *Hobbs*, Yelv. 25; *Randal* v. *Harvey*, Godb. 358; *Courtenay* v. *Strong*, 2 Ld. Raym. 1217; *Cockrane* v. *Willis*, L.R. 1 Ch. 58; 35 L.J. Ch. 36.

(*f*) *Rann* v. *Hughes*, 7 T.R. 350, 351, n.

for the defendant's remaining two years in her service, it was a *nudum pactum* (*g*). So, where a memorandum of agreement was made in the following terms, "I, ..., do agree that I will work for and with J. S. at such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end, until I shall give the said J. S. twelve months' notice in writing that I shall quit his service," it was held that the agreement was a *nudum pactum* (*h*).

Moral obligations.—The moral obligation which a parent is under to provide for his child imposes on him no liability to pay the debts incurred by the child, even for necessaries (*i*); and he cannot be made liable in respect thereof, unless he has given the child authority to incur them, or has contracted to pay them (*k*), or the child has become chargeable upon the parish, and the parish authorities take the proper steps to enforce the performance of the parent's legal duty (*l*).

In certain early cases (*m*), which, however, were not assented to in a later case (*n*), authority was inferred on very slight evidence. The only duties of the nature of mere moral obligations that will support an express promise are those which could be enforced at common law but for the intervention of some positive rule of law or statutory enactment, which, with a view to the general benefit, exempts the party in that particular instance from liability. Such are legal claims and demands barred by the Statute of Limitations, where the remedy is taken away by a positive rule of law, or by express legislative enactment, and the payment of the debt remains a voluntary duty, binding only *in foro conscientiæ*.

The consideration which would have been sufficient to support the promise if the law had not forbidden the promise to be made originally does not cease to be sufficient when the legal restriction is abrogated; thus, a man by express promise may render himself

(*g*) *Lees* v. *Whitcomb*, 5 Bing. 34; 6 L.J. (O.S.) C.P. 213.

(*h*) *Sykes* v. *Dixon*, 9 Ad. & E. 693; 8 L.J. Q.B. 102; *Bates* v. *Cort*, 2 B. & C. 474; 3 D. & R. 676; *James* v. *Williams*, 5 B. & Ad. 1109; 3 L.J. K.B. 97; *Young* v. *Timmings*, 1 Cr. & J. 331, 340; 9 L.J. Ex. 68; *Hulse* v. *Hulse*, 17 C.B. 725; 23 L.J. C.P. 177; but see *Pilkington* v. *Scott*, 15 M. & W. 657; 15 L.J. Ex. 359; and *Whittle* v. *Frankland*, 2 B. & S. 49, 57; 31 L.J. M.C. 81. Probably at the present day an agreement to employ and retain would be inferred from the terms of the contract where they were not actually inconsistent with such a promise. See *Hartley* v. *Cummings*, 5 C.B. 247; 17 L.J. C.P. 84; *Reg.* v. *Welch*, 2 E. & B. 355; 22 L.J. M.C. 145.

(*i*) *Shelton* v. *Springett*, 11 C.B. 452.

(*k*) *Mortimore* v. *Wright*, 6 M. & W. 482; 9 L.J. Ex. 158; *Seaborne* v. *Maddy*, 9 C. & P. 497; *Urmston* v. *Newcomen*, 4 Ad. & E. 899; 5 L.J. K.B. 175; *Ruttinger* v. *Temple*, 4 B. & S. 491; 33 L.J. Q.B. 1.

(*l*) *Shelton* v. *Springett*, *supra*.

(*m*) *Law* v. *Wilkin*, 6 Ad. & E. 718; 6 L.J. Q.B. 166; *Blackburn* v. *Mackey*, 1 C. & P. 1.

(*n*) *Mortimore* v. *Wright*, 6 M. & W. 482; 9 L.J. Ex. 158.

liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt (*o*). But although an express promise revives a good precedent consideration, it can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision (*p*). With regard to the duties and obligations arising out of the debts and contracts of persons under age, it is to be observed that the Infants' Relief Act, 1874 (*q*), specially enacts that all contracts entered into by infants for loans or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void; and no action can be brought on any promise made after full age to pay any debt contracted during infancy or upon a ratification of any promise or contract made during infancy.

Forbearance of legal or equitable rights forms a good consideration for an undertaking, and will make it binding (*r*), and this even though no actual benefit accrue to the party undertaking. If the plaintiff, for example, at the request of the defendant, forbears to institute legal proceedings, or discontinues legal proceedings already commenced, against a third party for the enforcement of a lawful claim or demand, for any convenient or reasonable period, or suspends or withdraws an execution or a distress against the goods or the person of such third party, the suspension or withdrawal of such execution or distress, or the forbearance of further proceedings, forms a sufficient consideration for a promise by the defendant to pay money to the plaintiff, or to satisfy the full amount of his claim (*s*). The loss of collateral rights by the promisee is sufficient to support a promise, even though the main part of the consideration has failed (*t*). The abandonment and discontinuance of an action brought to enforce a doubtful right or claim are a sufficient consideration for a promise (*u*); and so is the compromise of a disputed claim made *bonâ fide*, even although it ultimately appears that the claim was wholly unfounded (*x*); and,

(*o*) *Flight* v. *Reed*, 1 H. & C. 703, 715, 716; 32 L.J. Ex. 265, 269.

(*p*) *Wennall* v. *Adney*, 3 B. & P. 249, n. a; *Eastwood* v. *Kenyon*, 11 Ad. & E. 438, 447; 9 L.J. Q.B. 409.

(*q*) 37 & 38 Vict. c. 62, ss. 1, 2.

(*r*) *Alliance Bank* v. *Broom*, 2 Dr. & S. 289; 34 L.J. Ch. 256; *Bracewell* v. *Williams*, L.R. 2 C.P. 196.

(*s*) *Smith* v. *Algar*, 1 B. & Ad. 603; 9 L.J. (O.S.) K.B. 79; 1 Roll. Abr. 24, pl. 33; *Morton* v. *Burn*, 7 Ad. & E. 19; 7 L.J. Q.B. 104; *Pilkington* v. *Green*, 2 B. & P. 151; *Sugars* v. *Brinkworth*, 4 Campb. 46.

(*t*) *Mather* v. *Maidstone* (*Lord*), 18 C.B. 273; 25 L.J. C.P. 300.

(*u*) *Longridge* v. *Dorville*, 5 B. & Ald. 117; *Stracey* v. *Bank of England*, 4 Moo. & P. 639; 8 L.J. (O.S.) C.P. 234; *Llewellyn* v. *Llewellyn*, 15 L.J. Q.B. 4. But not the abandonment of a suit, when the plaintiff knows and has admitted that he had no cause of action at all: *Wade* v. *Simeon*, 2 C.B. 548; 15 L.J. C.P. 114.

(*x*) *Callisher* v. *Bischoffsheim*, L.R. 5 Q.B. 449, 452; 39 L.J. Q.B. 181; *Miles* v. *New Zealand Co.*, 32 Ch.D. 266; 54 L.J. Ch. 1035.

if there be an admitted debt due from one person to another, but disputes and doubts exist as to the exact amount due, the compromise and settlement of the disputes, and the abandonment of the claim to its full extent, form a sufficient consideration for a promise to pay a smaller sum than the amount claimed (*y*); and, in the case of all unliquidated claims, where the precise amount due has not been reduced to a certainty by the agreement of the parties, the payment or satisfaction of part of the demand is a good consideration for the discharge of the residue (*z*), although litigation has not been actually commenced (*a*). But unless the debt is unliquidated, or some doubt exists as to the exact amount due, a promise by the creditor to discharge the residue on receiving payment of part is *nudum pactum* (*b*), because the debtor is under a legal obligation to pay the whole demand. The mere putting an end to certain disputes and controversies, or ceasing to make complaints, or to bore or annoy a man, is an insufficient consideration for an express promise (*c*).

Adequacy of consideration.—From the preceding remarks it will be perceived that the consideration for a simple contract or promise need not be adequate in point of value. "If there be *any* consideration, the court will not weigh the extent of it" (*d*); it has no means of scrutinizing the varied hidden motives and reasons that may have influenced the parties, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction; and therefore will not enter into such an enquiry (*e*). If parties choose to enter into unwise and improvident bargains, they must abide by the consequences of their own rashness and folly; they have contracted for themselves, and the court cannot contract for them (*f*).

Thus, in the case of guarantees:—"Suppose I say, if you will furnish goods to a third person, I will guarantee the payment; there you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me upon my

(*y*) *Edwards* v. *Baugh*, 11 M. & W. 641; 12 L.J. Ex. 427.

(*z*) *Wilkinson* v. *Byers*, 1 Ad. & E. 106, 113; 3 L.J. K.B. 144; *Watters* v. *Smith*, 2 B. & Ad. 889; 1 L.J. K.B. 31.

(*a*) *Cook* v. *Wright*, 1 B. & S. 559; 30 L.J. Q.B. 321.

(*b*) *Cumber* v. *Wane*, 1 Str. 425; 1 Smith's L.C. 325 (ed. 10); *Foakes* v. *Beer*, 9 App.Cas. 605; 54 L.J. Q.B. 130; *Underwood* v. *Underwood*, (1894) P. 204; 63 L.J. P. 109. See *post*, p. 138.

(*c*) *Edwards* v. *Baugh*, *supra*; *Kaye* v. *Dutton*, 7 M. & Gr. 807; 13 L.J. C.P. 183; *White* v. *Bluett*, 23 L.J. Ex. 36.

(*d*) Ellenborough, C.J., *Phillips* v. *Bateman*, 16 East, 356, 372; *Hitchcock* v. *Coker*, 6 Ad. & E. 457; *Pinnell's case*, 5 Co. 117 a, 117 b.

(*e*) *Westlake* v. *Adams*, 5 C.B. N.S. 248, 265; 27 L.J. C.P. 271.

(*f*) But the consideration must be of some value. *Smith* v. *Smith*, 3 Lcon. 88; 1 Roll. Abr. 23. See, as to the rule in equity, *Townend* v. *Toker*, L.R. 1 Ch. 446, 458; 35 L.J. Ch. 608, 614; *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L.J. Ch. 784.

guarantee" (*g*). So, if a person says, "In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you," the party indemnified is not therefore bound to employ the person designated by the guarantee; but, if he does employ him, then the guarantee attaches and becomes binding on the party who gave it (*h*). So where a railway company advertised for tenders for the supply of stores for a period of twelve months, and the defendant sent in a tender to supply the stores "in such quantities as the company's storekeeper might order from time to time," and the company accepted the tender, it was held that the defendant was bound to supply goods ordered before any notice had been given by the defendant to the company of withdrawal of the tender (*i*). In these cases there is an offer which is intended to be accepted by the other party doing the act, which forms the consideration; and when the defendant has had the benefit of the consideration for which he bargained, it is no answer to an action brought against him to say that the plaintiff was not bound by the contract to do the act (*k*). But it does not follow that, because a householder applies to a gas company for a supply of gas, and is promised a supply, and fits up his premises with stoves and fittings for the purpose of having them warmed and lighted with gas, there is any contract on the part of the company to supply, or on the part of the householder to consume and pay for, gas any longer than either of them may think fit; the householder is not bound to take gas, nor the company to supply it, for a single minute longer than each is minded so to do (*l*). So an advertisement of a sale by auction does not amount to a contract with anyone who may act upon it that all the things advertised will actually be put up for auction, and that such person will have an opportunity of bidding for them; it is a mere declaration of intention, and not an offer; and persons who attend the sale cannot maintain an action against the auctioneer, if the articles advertised are not put up for sale (*m*).

Bilateral contracts, also, being founded upon mutual promises, are perfected and made binding by the bare consent of the parties; the promise or undertaking of the one party to do one thing being the consideration for the promise of the other to do another.

(*g*) *Morton* v. *Burn*, 7 Ad. & E. 19, 23; 7 L.J. Q.B. 104.

(*h*) *Kennaway* v. *Treleavan*, 5 M. & W. 501; 9 L.J. Ex. 20; *Offord* v. *Davies*, 12 C.B. N.S. 748; 31 L.J. C.P. 319.

(*i*) *G. N. Ry.* v. *Witham*, L.R. 9 C.P. 16; 43 L.J. C.P. 1.

(*k*) *Fishmongers' Co.* v. *Robertson*, 6 Sc. N.R. 56, 106; 12 L.J. C.P. 185; *Jones* v. *Robinson*, 1 Exch. 454; 17 L.J. Ex. 36; *Mills* v. *Blackall*, 11 Q.B. 358; 17 L.J. Q.B. 31.

(*l*) *Hoddesdon Gas Co.* v. *Haselwood*, 6 C.B. N.S. 249; 28 L.J. C.P. 268.

(*m*) *Harris* v. *Nickerson*, L.R. 8 Q.B. 286; 42 L.J. Q.B. 171.

Such are all contracts of sale, where the promise or undertaking of the one party to sell forms the consideration for the promise of the other to buy, and where the "bargain is struck," and the contract concluded, by the mere assent of the parties (*n*). Such, also, are all agreements by simple contract between creditors for compounding their debts and releasing their debtor from their several claims, on receiving a part only of the amount due to them, the agreement by one to compound his debt and release the debtor being the consideration for the agreement of the other to do the same (*o*); also all contracts of marriage, where the promise of the one party is the consideration for the promise of the other party; also all contracts or agreements to enter into partnership, or to make exchanges of lands and chattels, or to refer disputes to arbitration (*p*); and, whenever several parties simultaneously agree for the performance of several duties or services to or for the benefit of each other, there is a binding contract (*q*). By-laws for the government of corporations are binding upon all persons who consent to become members of the corporation, as being in the nature of a contract founded upon mutual promises (*r*). All contracts founded upon mutual promises between persons of full age must be obligatory upon both parties (*s*), so that each may have an action upon it, or neither will be bound. A written agreement, therefore, to submit disputes and differences to arbitration must be signed by all parties before anyone can be made liable upon it, as the obligation by all to obey the award of the arbitrator is the consideration to each for his entering into the contract; and, before a plaintiff can succeed in an action upon such a contract, he must show that he had himself engaged to be bound by the award (*t*). The mutuality of obligation is the very essence of all contracts founded upon mutual promises (*u*).

Assent of the parties.—In order to make a contract, there must be an offer made by the one party to the other, an acceptance of that offer, and, unless it was clearly not required by the proposer in the first instance, a communication of such acceptance to him or his agent (*x*). A communication of acceptance to his own agent

(*n*) 2 Bl. Com. 447; Noy's Maxims, c. 42.

(*o*) *Boothbey* v. *Sowden*, 3 Campb. 175; *Wood* v. *Roberts*, 2 Stark. 417.

(*p*) *Gower* v. *Capper*, Cro. Eliz. 543; *ib.* 703, 888; *Mansfield* v. *Stephen*, Comb. 256; *Hebden* v. *Rutter*, 1 Sid. 180; *Holder* v. *Dickeson*, 1 Freem. 95; *Gibbons* v. *Prewd*, Hardr. 102.

(*q*) *Tipper* v. *Bicknell*, 4 Sc. 462; 6 L.J. C.P. 194.

(*r*) *Tobacco Pipe, &c. Co.* v. *Loder*, 16 Q.B. 765; 20 L.J. Q.B. 414.

(*s*) *Nichols* v. *Raynbred*, Hob. 88; *Arnold* v. *Poole* (*Mayor*), 4 M. & Gr. 860, 896; 12 L.J. C.P. 97.

(*t*) *Kingston* v. *Phelps*, Peake, 299; *Biddell* v. *Dowse*, 6 B. & C. 255. An action will lie on a judge's order to refer made by consent, the consent being evidence of an agreement to perform the award. *Lievesley* v. *Gilmore*, L.R. 1 C.P. 570; 35 L.J. C.P. 351.

(*u*) *Holt* v. *Ward*, 2 Str. 938.

(*x*) *McIver* v. *Richardson*, 1 M. & S. 557; *Mozley* v. *Tinkler*, 1 C. M. & R. 692; 4 L.J. Ex. 84.

would not bind the acceptor. If the terms of a contract founded upon mutual promises have not been finally agreed upon, the contract is incomplete (*y*). Where a proposal or tender is accepted, subject to the terms of a contract being arranged and drawn up for signature, there is no concluded bargain until the terms have been arranged and a written contract executed (*z*); but an acceptance enclosing a more formal memorandum for signature is sufficient, if the memorandum contains no new terms (*a*). Where there is a reference made in a written acceptance of a building contract to the fact that a contract will afterwards be prepared, that may only be for the purpose of expressing the agreement already made in more formal language (*b*). It has been doubted whether the words "subject to the title being approved by our solicitor" would show that the contract is not complete (*c*). But it has been held that the words "this offer has been made subject to the conditions of the lease being modified to my solicitor's satisfaction" did not prevent the completion of the contract (*d*). If a man applies for shares in a company, and the directors allot them to him, and, after the allotment, but before it is communicated to the applicant, he withdraws his application, there is no complete contract, and he is not bound to accept them (*e*). But although the applicant must have notice of the fact of the allotment, yet it is not necessary that a formal notice should be sent to him. It is enough if he is made aware that the company have accepted his application; but the mere entry of his name on the register of shareholders is not sufficient for this purpose (*f*). An advertisement, offering a sum of money to any person who should contract influenza after using a specific remedy according to directions supplied by the advertiser, when coupled with the performance of the contract, constitutes a contract on the part of the advertiser to pay the sum of money, although no notification was

(*y*) *Routledge* v. *Grant*, 4 Bing. 653; 6 L.J. (O.S.) C.P. 166; *Cope* v. *Albinson*, 8 Exch. 185; 22 L.J. Ex. 37; *Felthouse* v. *Bindley*, 11 C.B. N.S. 869; 31 L.J. C.P. 204.

(*z*) *Kingston-upon-Hull* v. *Petch*, 10 Exch. 610; 24 L.J. Ex. 23; *Chinnock* v. *Ely* (*Marchioness*), 4 De G. J. & S. 638; *Honeyman* v. *Marryat*, 6 H.L. Cas. 112; 26 L.J. Ch. 619; *Appleby* v. *Johnson*, L.R. 9 C.P. 158; 43 L.J. C.P. 146; *Brogden* v. *Metropolitan Ry.*, 2 App.Cas. 666; *Winn* v. *Bull*, 7 Ch.D. 29; 47 L.J. Ch. 139. And see *Heyworth* v. *Knight*, 17 C.B. N.S. 298; 33 L.J. C.P. 298.

(*a*) *Gibbins* v. *N.E. Metropolitan Asylum District*, 11 Beav. 1; 17 L.J. Ch. 5; *Jones* v. *Daniel*, (1894) 2 Ch. 332; 63 L.J. Ch. 562.

(*b*) *Lewis* v. *Brass*, 3 Q.B.D. 667; *Rossiter* v. *Miller*, 3 App.Cas. 1124; 48 L.J. Ch. 10; *Bristol Bread Co.* v. *Maggs*, 44 Ch.D. 616; 59 L.J. Ch. 472; *Lloyd* v. *Nowell*, (1895) 2 Ch. 744; 64 L.J. Ch. 744. See *post*, p. 43.

(*c*) *Hussey* v. *Horne Payne*, 4 App.Cas. 311; 48 L.J. Ch. 352. As to what amounts to evidence of a concluded contract, see *Lever* v. *Koffler*, (1901) 1 Ch. 543; 70 L.J. Ch. 395.

(*d*) *Bonnewell* v. *Jenkins*, 8 Ch.D. 70; 47 L.J. Ch. 758.

(*e*) *Hebbs' case*, L.R. 4 Eq. 9; 36 L.J. Ch. 748; *Graham, Ex parte*, 30 L.J. Bk. 42; 30 L.J. Ch. 861; *Pellatt's case*, L.R. 2 Ch. 527; 36 L.J. Ch. 613.

(*f*) *Gunn's case*, L.R. 3 Ch. 40; 37 L.J. Ch. 40.

given to him of the acceptance of the contract (*g*). An offer of a contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not in the ordinary course of the post arrive until after the offer has been accepted (*h*). A promise of marriage, so long as it remains unaccepted, amounts to a mere proposal or offer, which may be retracted at any time; the acceptance may be proved by the conduct of the party, as well as by express words (*i*). If an offer is made, coupled with a request, express or implied, that the other party must signify his acceptance by doing some particular thing, then, as soon as he does that thing, he is bound (*k*). Where in a lease there is an option to purchase upon giving notice, there is a binding contract as soon as notice is given (*l*). A party who gives time to another to accept or reject a proposal is not bound to wait till the time expires, but may withdraw his proposal before acceptance or rejection (*m*). The mere statement by a vendor of the lowest price at which he will sell contains no implied contract to sell at that price (*n*). A proposal once made is always open for acceptance until it is withdrawn to the knowledge of the other party, and such other party has the option of accepting the proposal until the moment when he receives notice of withdrawal (*o*). Where there was a proposal by the defendant to take a lease from the plaintiff on certain terms, and to this proposal the plaintiff was to give a definite answer within six weeks, it was held that, if six weeks are given by one party to accept an offer, the other has the same period to put an end to it; the contract must be mutual; and the one party cannot be bound without the other (*p*). If, however, anything has been given or done as the consideration for the promise—if, for instance, the party to whom it is made has agreed to incur any expense or labour in consideration of the offer being continued or kept open for a certain time—then the party making the offer is not at liberty to retract it; when the promise has been accepted, the acceptance cannot be revoked, and neither party is at liberty, without the consent of the other, to rescind the contract (*q*). But, if the party to whom the offer is made does not accept it in the very terms in which it is made, and some new qualification or condition is annexed to the acceptance, the party making the offer is, of

(*g*) *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256; 62 L.J. Q.B. 257.
(*h*) *Byrne* v. *Van Tienhoven*, 5 C.P.D. 345; 49 L.J. C.P. 316.
(*i*) *Daniel* v. *Bowles*, 3 C. & P. 553; *Hutton* v. *Mansell*, 3 Salk. 16.
(*k*) *Brogden* v. *Metropolitan Ry.*, 2 App. Cas. 666, 691.
(*l*) *Mills* v. *Haywood*, 6 Ch.D. 196.
(*m*) *Cooke* v. *Oxley*, 3 T.R. 653; *Stevenson* v. *McLean*, 5 Q.B.D. 346, 351.
(*n*) *Harvey* v. *Facey*, (1893) A.C. 552; 62 L.J. P.C. 127.
(*o*) *Byrne* v. *Van Tienhoven*, *supra*; *Henthorn* v. *Fraser*, (1892) 2 Ch. 27; 61 L.J. Ch. 377.
(*p*) *Routledge* v. *Grant*, 4 Bing. 653; 6 L.J. (O.S.) C.P. 166.
(*q*) *Grant* v. *Hunt*, 1 C.B. 44; 14 L.J. C.P. 106.

course, not bound by the acceptance (*r*). But an acceptance is not made conditional by an addition which is immaterial (*s*), nor by the existence of a misunderstanding between the parties as to the construction of collateral terms not part of the agreement itself (*t*). So if there is a conditional application for shares and an unconditional allotment, there is no contract (*u*). If a time is prescribed within which the proposal must be accepted, the offer comes to an end at the expiration of that time, and a subsequent acceptance is ineffectual; but if no time is prescribed the acceptance must be made and notified within a reasonable time (*x*). An offer to sell may be withdrawn before acceptance without any formal notice, as where the person who makes the offer sells the thing to a third person; even, as it should seem, although the person to whom the offer was made has no knowledge of the sale (*y*). The contract dates from the acceptance, not from the date of the offer (*y*). Where a person accepts an offer he must not vary the proposed terms without calling the attention of the party making the offer to the fact of the variation (*z*).

Biddings at an auction are mere offers, which may be retracted at any time before the hammer is down. "An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to" (*a*). Sect. 58, sub-sect. 2, of the Sale of Goods Act, 1893, now provides that "a sale" of goods "by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made, any bidder may retract his bid" (*b*).

Acceptance of offers by post.—Where the defendants wrote to the plaintiffs, making them an offer of merchandise at a fixed price, they "receiving an answer in course of post," it was held that there was a binding contract of sale the moment the letter accepting the offer was posted, and that the defendants were not at liberty to retract their offer before the arrival of the time for

(*r*) *Duke* v. *Andrews*, 2 Exch. 290; 17 L.J. Ex. 231; *Gilkes* v. *Leonino*, 4 C.B. N.S. 485, 501; *Jordan* v. *Norton*, 4 M. & W. 155, 161; 7 L.J. Ex. 281; *Addinell's case*, L.R. 1 Eq. 225; 35 L.J. Ch. 75; *Crossley* v. *Maycock*, L.R. 18 Eq. 180; 43 L.J. Ch. 379; *Stanley* v. *Dowdeswell*, L.R. 10 C.P. 102; *Jackson* v. *Turquand*, L.R. 4 H.L. 305; 39 L.J. Ch. 11; *Wynne's case*, L.R. 8 Ch. 1002; *Beck's case*, L.R. 9 Ch. 392; 43 L.J. Ch. 531.

(*s*) *Clive* v. *Beaumont*, 1 De G. & S. 397; *Bolton* v. *Lambert*, 41 Ch.D. 295; 58 L.J. Ch. 425.

(*t*) *Baines* v. *Woodfall*, 6 C.B. N.S. 657, 676; 28 L.J. C.P. 338.

(*u*) *Shackleford's case*, L.R. 1 Ch. 567; 35 L.J. Ch. 818; *Roger's case*, L.R. 3 Ch. 633.

(*x*) *Ramsgate Victoria Hotel Co.* v. *Montefiore*, L.R. 1 Ex. 109; 35 L.J. Ex. 90; *Baily, Ex parte*, L.R. 3 Ch. 592; 37 L.J. Ch. 670.

(*y*) *Dickinson* v. *Dodds*, 2 Ch.D. 463; 45 L.J. Ch. 777.

(*z*) *English and Foreign Credit Co.* v. *Arduin*, L.R. 5 H.L. 64; 40 L.J. Ex. 108.

(*a*) *Payne* v. *Cave*, 3 T.R. 148; *Warlow* v. *Harrison*, 1 E. & E. 395; 28 L.J. Q.B. 18.

(*b*) 56 & 57 Vict. c. 71, s. 58 (2).

receiving the answer; otherwise, it was observed, no contract could ever be completed by post. In this case the defendants misdirected a letter, and so caused a delay in its receipt and in the return of the answer, and, not having received the answer at the expected time, they sold their merchandise to another person; and it was held that, as the delay had been occasioned by their own neglect, and not by any omission or default on the part of the plaintiff, the answer must be taken to have come back in due course of post (*c*). If the letter in acceptance of the offer miscarries, and never reaches its destination, the contract is nevertheless complete (*d*), unless the miscarriage is owing to the fault of the sender. The true rule is that if the person making the offer may be deemed to have contemplated that the receiver of the offer will send an answer by post, the person making the offer is bound when the letter containing the acceptance is posted, on the ground that he has constituted the Post Office his agent to receive the acceptance; but that when there is no such inference from the facts, the person making the offer is only bound when the acceptance actually reaches him (*e*). A postman is not an agent of the Post Office to receive letters, and the delivery to him of a letter accepting an offer does not, for the purpose of fixing the time of the acceptance, amount to a posting of the letter (*f*).

Contracts by telegram.—Where an order is sent by telegram, the post-office authorities are only agents to transmit the message in the terms in which it is delivered to them, and if the telegraph clerk makes a mistake in the transmission there is no binding contract (*g*).

Contracts by deed are contracts in writing sealed and delivered by the parties to them. No cause, motive, or consideration beyond the mere will of the party making the contract, is necessary to give them validity; and no one can be permitted (except on the ground of fraud or deceit) to aver or to prove anything in contradiction to what he has avowed by deed (*h*). The courts, however, will not enforce specific performance of a voluntary covenant (*i*); and, for

(*c*) *Adams* v. *Lindsell*, 1 B. & Ald. 681; *Potter* v. *Saunders*, 6 Hare, 1; *Newcombe* v. *De Roos*, 2 E. & E. 270; 29 L.J. Q.B. 4; *Taylor* v. *Merchants' Fire Insurance Co.*, 9 How. S. C. 390 (Amer.).

(*d*) *Dunlop* v. *Higgins*, 1 H.L.C. 381; *Duncan* v. *Topham*, 8 C.B. 225; *Household Fire Insurance Co.* v. *Grant*, 4 Ex.D. 216; 48 L.J. Ex. 577; overruling *British American Telegraph Co.* v. *Colson*, L.R. 6 Ex. 108; 40 L.J. Ex. 97.

(*e*) *Henthorn* v. *Fraser*, (1892) 2 Ch. 27; 61 L.J. Ch. 377; *Household Fire Insurance Co.* v. *Grant*, *supra*; *Brogden* v. *Met. Ry.*, 2 App.Cas. 666, 691.

(*f*) *London and Northern Bank, In re, Jones, Ex parte*, (1900) 1 Ch. 220; 69 L.J. Ch. 24.

(*g*) *Henkel* v. *Pape*, L.R. 6 Ex. 7; 40 L.J. Ex. 15.

(*h*) *Sharington* v. *Strotton*, Plowd. 1, 308 a, 309; *Morley* v. *Boothby*, 3 Bing. 111; 10 Moore, 404; *Fallowes* v. *Taylor*, 7 T.R. 477; *Shubrick* v. *Salmond*, 3 Burr. 1639; 1 Fonbl. Eq. 344, n. a.; 2 Finch, 108, 110.

(*i*) *Kekewich* v. *Manning*, 1 De G. M. & G. 176, 188; 21 L.J. Ch. 577.

the purpose of ascertaining whether a covenant is voluntary or otherwise, it may be shown that there was in fact no consideration although one is expressed on the face of the deed (*k*), or that there was a good consideration, although the deed only expresses a nominal one (*l*), or none at all (*m*).

Requisites of deeds.—Every deed ought to have writing, sealing, and delivery; and, if the parties be illiterate, it ought also to be read over to them. It may be printed, or written on parchment or paper; and it is good and valid, although it mention no time, or date, or place of making, or be dated at one time and delivered at another, or have a false or impossible date. It is essential only that it be sealed and delivered; for "any agreement in writing sealed and delivered becometh a deed" (*n*). Where a deed purported to be sealed, but bore no seal, and there was no evidence of any sealing, it was held to be invalid (*o*). Signing is not essential to the validity of a deed at common law (*p*); the Statute of Frauds and the Sale of Goods Act, 1893 (*q*), which require certain contracts to be authenticated by a signed writing, do not extend to deeds, although this point has not been directly decided (*r*). It now rarely happens that the party executing a deed actually seals it with his own hands, or with his own seal. The seal is fixed or impressed on the deed by the person professionally employed, the executing party merely acknowledging, in the presence of witnesses, the seal to be his seal. It has been held also that one and the same seal may be the seal of half-a-dozen persons at the same time (*s*); but they must all be actually present consenting to the act; otherwise the execution is not good (*t*). The sealing, or the acknowledgment of the seal, must be made after the deed has been written, and before its delivery; for, if a blank piece of paper or parchment be sealed and delivered, and afterwards written upon, it is no deed (*u*); and, if indorsements or schedules are written or annexed to deeds after their execution, the deed must be re-sealed and re-delivered, or the subsequent addition to the contract will be nugatory and invalid (*x*). A bail bond, which had been executed before the condition was filled up, has been held to be void (*y*);

(*k*) *Wilson* v. *Keating*, 28 L.J. Ch. 898.

(*l*) *Leifchild's case*, L.R. 1 Eq. 231.

(*m*) *Llanelly Railway and Dock Co.* v. *L. & N.W. Ry.*, L.R. 8 Ch. 942.

(*n*) 11 Co. 27 b, 28 a; Co. Litt. 171 b; Shep. Touch. 1 ch. 4.

(*o*) *National Provincial Bank* v. *Jackson*, 33 Ch.D. 1.

(*p*) 1 Sugd. Powers, 297; Prest. Shep. Touch. 56 b; *Cooch* v. *Goodman*, 2 Q.B. 597; *Tupper* v. *Foulkes*, 9 C.B. N.S. 797, 803; 30 L.J.C.P. 214.

(*q*) 56 & 57 Vict. c. 71, s. 4.

(*r*) *Cherry* v. *Heming*, 4 Exch. 637; 19 L.J. Ex. 63.

(*s*) *Ball* v. *Dunsterville*, 4 T.R. 313; *R.* v. *Longnor*, 4 B. & Ad. 647; 2 L.J. M.C. 62.

(*t*) *Harrison* v. *Sykes*, 7 T.R. 207.

(*u*) Perkins, s. 118; Com. Dig. Fait. A. 1.

(*x*) *Weeks* v. *Maillardet*, 14 East, 570; *Sellin* v. *Price*, L.R. 2 Ex. 189; 36 L.J. Ex. 93.

(*y*) *Powell* v. *Duff*, 3 Camp. 181.

and so has a deed of conveyance or transfer of shares, executed by the proprietor of such shares with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser (*z*). If a deed be delivered, and a blank left therein be afterwards improperly filled up (at least, if that be done without the grantor's negligence), it is not the deed of the grantor (*a*).

Delivery of deeds.—Until the sealed writing is delivered, it is not a deed. The delivery "may be made by the party himself that doth make the deed, or by any other, by his appointment or authority precedent, or assent or agreement subsequent" (*b*). Delivery of the deed to the party who is to take by it, or any other party for his use, is not essential; thus, where an instrument is formally sealed and delivered and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, and nothing to show that he did not intend it to operate immediately, that is a valid and effectual deed (*c*). The law has not laid down any precise form in which delivery must be made, and there may be circumstances which are equivalent to it without actual delivery; thus, where the party to a deed was shown to have acted under the instrument, and to have done a variety of things confirmatory of the contract, Lord Mansfield held that the acts so done amounted to an acknowledgment of the delivery of the deed (*d*). If it is proved that the defendant signed and sealed the deed, and the plaintiff has possession of and produces the instrument, this is *primâ facie* evidence of a delivery to the plaintiff (*e*); and, if a party sends forth a deed to the world as his deed, he will be estopped, as against a party who has acted on the faith of the representation, from showing that the deed is not his deed, and that he never executed it. The mere placing of a seal to a written contract will not make the contract a deed. Thus, if seals have been affixed to a document through ignorance and by mistake, the placing of a seal opposite to the name of a party, though evidence of a deed and one of the formalities belonging to it, is not conclusive; and if the parties did not mean to contract by deed, the ignorance of the parties as to the effect of a seal, could not make

(*z*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; 9 L.J. Ex. 217. See *post*, p. 602.

(*a*) *Swan* v. *North British Australasian Land Co.*, 2 H. & C. 175; 32 L.J. Ex. 273.

(*b*) Shep. Touch. 1 ch. 4, p. 57; *Tupper* v. *Foulkes*, 9 C.B. N.S. 797; 30 L.J. C.P. 214.

(*c*) *Doe* v. *Knight*, 5 B. & C. 689, 692; 4 L.J. (O.S.) K.B. 161; *Thoroughgood's case*, 9 Rep. 163 a; *Tupper* v. *Foulkes*, *supra*; *Xenos* v. *Wickham*, L.R. 2 H.L. 296; 36 L.J. C.P. 313.

(*d*) *Goodright* v. *Straphan*, Cowp. 201.

(*e*) *Hall* v. *Bainbridge*, 12 Q.B. 699; 17 L.J. Q.B. 317.

it so (*f*). A contract, bad as a deed, may yet, under certain circumstances, operate as a common agreement (*g*).

Delivery as escrow.—If a party signs and seals a deed, and places it in his drawer or on his table, and another person comes and takes it away, this is not a delivery (*h*); and, if it should appear that the document was delivered conditionally, and not with a view to its immediately taking effect as a deed, it is said to be delivered as an *escrow*, and an action cannot be maintained upon it until the condition has been performed (*i*). But it does not follow that, because a deed is to be executed in duplicate, its operation is suspended until both parts have been executed and interchanged (*k*).

Deeds inter partes *and deeds poll.*—When a deed is made between several persons, it is called a deed *inter partes*, and also an indenture. When it is made by one person alone, it is called a deed poll. The indenture or deed indented takes its name from the ancient practice of writing as many copies or parts of the deed as there were parties on one large sheet of parchment, in order that each party might have his part, and then cutting them off in a notched or wavy line, by which means they could at any time be compared together and identified. The deed poll was so called because the paper was polled or cut even, there being, as there was only one party to the deed, no necessity for a counterpart.

Contracts by matter of record are contracts acknowledged in open court before an officer of the court, and recorded in the presence of the party making the acknowledgment. A record thus made forms unimpeachable evidence of the contract, so that the contract is proved and established by the mere production of the record. Contracts by statutes merchant and statutes staple are contracts of record; and so also are the recognizances entered into by witnesses to enforce their attendance to give evidence at a trial.

(*f*) *Clement* v. *Gunhouse*, 5 Esp. 83; *Goodright* v. *Gregory*, Lofft, 339; *Davidson* v. *Cooper*, 13 M. & W. 343; 13 L.J. Ex. 276.

(*g*) *R.* v. *Ridgwell*, 6 B. & C. 665; 5 L.J. (O.S.) M.C. 67; *Hunter* v. *Parker*, 7 M. & W. 322; 10 L.J. Ex. 281.

(*h*) *Stanton* v. *Chamberlain*, Ow. 95; Cro. Eliz. 122.

(*i*) *Per* Parke, B., *Bowker* v. *Burdekin*, 11 M. & W. 147; 12 L.J. Ex. 329; *Gudgen* v. *Bessett*, 6 E. & B. 986; 26 L.J. Q.B. 36; *Furness* v. *Meek*, 27 L.J. Ex. 34; *Millership* v. *Brookes*, 5 H. & N. 797; 29 L.J. Ex. 369; *Johnson* v. *Baker*, 4 B. & Ald. 440; *Watkins* v. *Nash*, L.R. 20 Eq. 262; *Pattle* v. *Hornibrook*, (1897) 1 Ch. 25; 66 L.J. Ch. 144.

(*k*) *Kidner* v. *Keith*, 15 C.B. N.S. 35. See as to qualified execution of a deed, *Exchange Bank of Yarmouth* v. *Blethen*, 10 App.Cas. 293; 54 L.J. P.C. 27.

SECTION II.

OF THE AUTHENTICATION OF CONTRACTS.

Contracts requiring authentication by a signed writing.—Contracts for the sale of interests in land.—By sect. 4 of the Statute of Frauds (*l*), no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto (*m*) by him lawfully authorised. This refers to agreements not operating as an immediate transfer or conveyance of an estate or interest in land, but as contracts to make or execute a grant, or transfer, or conveyance, at some subsequent period (*n*). Agreements for leases and for the sale, assignment, or surrender of leasehold estates, being contracts for a grant or transfer of an estate or interest in land, are within this clause of the statute, and must consequently be authenticated by a signed writing (*o*). Where anything is to be done which substantially amounts to a sale or parting with an interest in land, the contract is within the statute (*p*). A grant of a right to shoot and take away game has been held to be within the statute (*q*). Where it was agreed that the plaintiff should surrender her tenancy and prevail on her landlord to accept the defendant as tenant in her place, and that the defendant should then pay her for so doing 100*l.*, it was held that the contract amounted to a sale of an interest in land within the statute (*r*); so also a sale of debentures creating a floating charge on the property of a company which consisted in part of leaseholds is within the statute (*s*). Although a partnership in land may be proved by parol evidence, yet an agreement by one of the partners to retire and assign his share of the partnership assets is within the statute (*t*). A contract to receive a ship into a graving dock has been held not to be a contract for an interest in land (*u*). Generally, whenever the contract or promise sued upon forms part of one entire contract for an

(*l*) 29 Car. 2, c. 3, s. 4.

(*m*) *Griffiths Cycle Corporation* v. *Humber & Co.*, (1899) 2 Q.B. 414; 68 L.J. Q.B. 959, explaining *Smith* v. *Webster*, 3 Ch.D. 49; 45 L.J. Ch. 528.

(*n*) Sugd. V. & P. 122, n. (ed. 14).

(*o*) *Anon.*, Ventr. 361; *Poulteney* v. *Holmes*, Str. 405.

(*p*) *Kelly* v. *Webster*, 12 C.B. 290; 21 L.J. C.P. 163; Willes, J., *Smart* v. *Jones*, 15 C.B. N.S. 717; 33 L.J. C.P. 156.

(*q*) *Webber* v. *Lee*, 9 Q.B.D. 315; 51 L.J. Q.B. 485.

(*r*) *Cocking* v. *Ward*, 1 C.B. 868; 15 L.J. C.P. 245.

(*s*) *Driver* v. *Broad*, (1893) 1 Q.B. 744; 63 L.J. Q.B. 12.

(*t*) *Gray* v. *Smith*, 43 Ch.D. 208; 59 L.J. Ch. 145.

(*u*) *Wells* v. *Kingston-upon-Hull*, L.R. 10 C.P. 402; 44 L.J. C.P. 257.

interest in land, it will fail to support an action, if it is not authenticated by writing (*x*), unless there has been a part performance of the agreement, in which case it may generally be enforced (*y*); for the courts will not allow the Statute of Frauds to cover a clearly fraudulent act (*z*). In order to constitute a part performance, the parties must have put themselves in a different position from that in which they would have been had there been no contract, as, for instance, when possession is accepted (*a*), or when a tenant expends money upon a farm (*b*), or pays an increased rent (*c*). Where it is evident that the parties have pursued a course of action as if there were a contract, the Court will enforce such contract (*d*). In order to constitute part performance, the act relied on must be unequivocal; it must have relation to the agreement in question, and to no other, and it must be sufficient of itself to satisfy the court of the existence of a contract which equity will enforce (*e*). Part payment of rent, unless possession is taken by a tenant, is not such a part performance as to take the case out of the statute (*f*). Where a father verbally promised his daughter a house as a wedding present, and put her in possession, and paid instalments to a building society in respect of it, and at his death there was still 110*l.* due to the society, it was held that the possession took the case out of the statute, and that the 110*l.* must come out of the father's estate (*g*). The mere payment of purchase-money is not a part performance (*h*), unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement (*i*). Where the defendant served as housekeeper to the intestate, who had made an unattested will, in which he left the defendant a life estate in a farm, it was held there was no part performance sufficient to exclude the statute (*k*). The above doctrine only applies to contracts in respect of land, or at all events does not apply to contracts of service (*l*).

Interest in land.—Contracts for furnished houses and lodgings.—These contracts, whether by the day, week, or month, are contracts

(*x*) *Hodgson* v. *Johnson*, E. B. & E. 685; 28 L.J. Q.B. 88; but see *Pulbrook* v. *Lawes*, 1 Q.B.D. 284; 45 L.J. Q.B. 178.

(*y*) *Nunn* v. *Fabian*, L.R. 1 Ch. 35; 35 L.J. Ch. 140.

(*z*) *Haigh* v. *Kaye*, L.R. 7 Ch. 469; 41 L.J. Ch. 567.

(*a*) *Dale* v. *Hamilton*, 5 Hare, 381; 16 L.J. Ch. 126; *Morphett* v. *Jones*, 1 Swanst. 172; *post*, p. 608; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; 22 L.J. Ch. 419; *post*, p. 275.

(*b*) *Mundy* v. *Jolliffe*, 5 Myl. & Cr. 167; 9 L.J. Ch. 95; *post*, p. 608.

(*c*) *Miller* v. *Sharp*, (1899) 1 Ch. 622; 68 L.J. Ch. 322.

(*d*) *Blachford* v. *Kirkpatrick*, 6 Beav. 232; 12 L.J. Ch. 108.

(*e*) *Alderson* v. *Maddison*, 8 App.Cas. 467; 52 L.J. Q.B. 737.

(*f*) *Thursby* v. *Eccles*, 70 L.J. K.B. 91.

(*g*) *Ungley* v. *Ungley*, 5 Ch.D. 887; 46 L.J. Ch. 854.

(*h*) *Per* James, L.J., *Hall, Ex parte*, 10 Ch.D. 619; 48 L.J. Bank. 79; *Clinan* v. *Cooke*, 1 Scho. & Lef. 40 (Ir.).

(*i*) *Per* Baggallay, L.J., in *Humphreys* v. *Green*, 10 Q.B.D. 148; 52 L.J. Q.B. 140.

(*k*) *Alderson* v. *Maddison*, 8 App.Cas. 467; 52 L.J. Q.B. 737.

(*l*) *Britain* v. *Rossiter*, 11 Q.B.D. 123; 48 L.J. Q.B. 362; *M'Manus* v. *Cooke*, 35 Ch.D. 681; 56 L.J. Ch. 662.

for an interest in land, and must be authenticated by a signed writing, if the contract gives the party a right to any specific apartments (*m*); but a contract to receive a man into a house and provide him with board and lodging generally, not giving him a right to any specific rooms, has been held not to be a contract for an interest in land (*n*). An agreement to furnish a house, entered into between a landlord and an intended tenant, where the occupation of the house forms the substance of the contract, and the furnishing of it is bargained for only in connection with such occupation, is a contract for an interest in land (*o*); if the agreement does not form part of a contract for the letting and hiring of a house, it is then, of course, only a sale and purchase of goods and chattels, and has nothing whatever to do with an interest in land.

Interest in land.—Agreements for the sale of a milk-walk, by which the plaintiff agrees to let the defendant into the occupation of premises, and the defendant agrees to pay rent, rates, and taxes, is a contract for an interest in land within the statute (*p*).

Interest in land.—Agreements to make alterations and repairs in buildings entered into between a landlord and an intended lessee or tenant, where the principal subject-matter of the agreement is the letting of the buildings, and the improvements and alterations are accessorial thereto, and contracted for only in connection with the lease, are contracts involving an interest in land within the statute and cannot be enforced unless they are authenticated by writing (*q*). But where a tenant in the actual occupation of a house under an existing demise orally agreed, in consideration that the landlord would put another story upon the house, to pay him 10*l.* per annum upon the cost of the erection, in addition to the rent, and the additional story was built, and the landlord brought his action for the increased payment, it was held that the want of a written contract formed no objection to the action (*r*); a contract of this kind made by a tenant in the actual occupation and enjoyment of the land, and not forming part of the original contract of demise, seems to be a contract for work and labour and the supply of materials, rather than a contract involving an interest in land. Where the defendant agreed to make good all damage done by his workmen in quarrying stone from the

(*m*) *Inman* v. *Stamp*, 1 Stark. 12; *Edge* v. *Strafford*, 1 C. & J. 391; 9 L.J. (O.S.) Ex. 101.

(*n*) *Wright* v. *Stavert*, 2 E. & E. 720; 29 L.J. Q.B. 161.

(*o*) *Vaughan* v. *Hancock*, 3 C.B. 766; 16 L.J. C.P. 1; *Simmons* v. *Simmons*, 12 Jur. 1.

(*p*) *Smart* v. *Harding*, 15 C.B. 652; 24 L.J. C.P. 76.

(*q*) *Vaughan* v. *Hancock*, 3 C.B. 766; 16 L.J. C.P. 1; *Buttemere* v. *Hayes*, 5 M. & W. 456; 9 L.J. Ex. 44; *Falmouth (Earl)* v. *Thomas*, 1 Cr. & M. 89; 2 L.J. Ex. 57.

(*r*) *Hoby* v. *Roebuck*, 7 Taunt. 157; 2 Marsh. 433; *Seago* v. *Deane*, 1 Moo. & P. 227; 4 Bing. 459.

plaintiff's land, it was held that this was not an agreement respecting land within the statute (*s*).

Interest in land.—Contracts for services in connection with the transfer of an interest in land.—Where a lessee, who was restrained from assigning his lease without licence, agreed to assign the lease for 100*l.*, to be paid by the assignee, and to pay to his landlord 40*l.* out of the 100*l.* for a licence, and the licence being given, and the assignment executed, and the money received, he then refused to pay the 40*l.*, on the ground that there was no written agreement, it was held that the landlord might recover the 40*l.* in an action for money had and received (*t*); so where the plaintiff had made an oral agreement with one Emmanuel for the purchase of an estate for 600*l.*, and then agreed in writing with the defendant to sell him the bargain for 40*l.*, and the estate was afterwards at the plaintiff's request conveyed to the nominee of the defendant, it was held that the defendant was responsible for the payment of the 40*l.* (*u*); in these cases, the contract being executed, the action is in truth an action for a stipulated remuneration for services rendered. Where the defendant, having no interest in a public-house, agreed to get the plaintiff a lease of it, it was held that this was a contract for an interest in land within the statute (*x*). Where a contract consists of two collateral agreements, one only of which relates to an interest in land, then, if that part of the contract has been executed, the fact of the whole contract not being in writing will not preclude an action on the other part founded on a promise to be performed after such execution; but one contract founded upon one consideration cannot be bi-sected so as to make a new contract and a new consideration out of one half (*y*).

Interest in land—Agreements concerning landmarks and boundaries.—If two occupiers of adjoining lands agree that a wall or fence shall be built by one of them as a boundary common to both, and that the other shall pay his proportion of the expense, this is not a contract for an interest in land within the meaning of the statute (*z*), and need not consequently be authenticated by a signed writing.

Interest in land—Contracts respecting growing crops, grass, timber, &c.—An agreement for the sale and purchase of growing grass, growing timber or underwood, growing fruit and hops,

(*s*) *Griffiths* v. *Jenkins*, 10 Jur. N.S. 207.

(*t*) *Griffith* v. *Young*, 12 East, 513, 515. As to exaction of fine for licence to assign, see *post*, p. 623, 55 & 56 Vict. c. 13, s. 3.

(*u*) *Seaman* v. *Price*, 1 Ry. & M. 195; *Green* v. *Saddington*, 7 E. & B. 503.

(*x*) *Horsey* v. *Graham*, L.R. 5 C.P. 9; 39 L.J. C.P. 58.

(*y*) *Hodgson* v. *Johnson*, E. B. & E. 685; 28 L.J. Q.B. 88; *Pulbrook* v. *Lawes*, 1 Q.B.D. 284; 45 L.J. Q.B. 178.

(*z*) *Stuart* v. *Smith*, 7 Taunt. 158.

not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land (*a*), as such things are not distinguishable from the land itself in legal contemplation until actual severance (*b*); but *fructus industriales*, such as growing crops of turnips, potatoes, and corn, and the annual productions of the soil raised by the labour of man, which are seizable by the sheriff under a *fi. fa.*, are considered goods and chattels; and contracts for the sale of them are considered to be contracts for the sale of goods and chattels, and not of an interest in land, although they are to remain in the soil and derive a nutriment therefrom until they have arrived at maturity; and the mere licence to come upon the land for the purpose of gathering and securing the crop, which is incident to such a contract, is not a sale of an interest in land within the meaning of the statute (*c*). If fruit is sold at so much a bushel, and timber at so much a foot, with a view to its immediate severance from the soil and delivery as a chattel to the vendee, the contract is not a contract for the sale of an interest in land, but for the sale of goods and chattels, "the produce of the trees when they should be cut down and severed from the freehold" (*d*). It is the same as if the parties had contracted for so much fruit already picked, or for so many feet of timber already felled (*e*). But, where a man agrees to hire the land and take the crops growing thereon at a valuation, and to pay a certain sum for work and labour and materials expended in getting the lands ready for tillage, this is an entire contract for an interest in land; and the growing crops cannot in such a case be treated as goods and chattels (*f*); and a contract for the sale of the building materials of a house, with a proviso that all the materials were to be taken down and cleared off the ground within two months, has been held to be a contract for the sale of an interest in land (*g*).

(*a*) *Crosby* v. *Wadsworth*, 6 East, 610; *Carrington* v. *Roots*, 2 M. & W. 248; 6 L.J. Ex. 95; *Scorell* v. *Boxall*, 1 Y. & J. 398; Sugd. V. & P. ch. 4, s. 2 (3) (ed. 14); *Petch* v. *Tutin*, 15 M. & W. 115; 15 L.J. Ex. 280.

(*b*) *Rodwell* v. *Phillips*, 9 M. & W. 504; 11 L.J. Ex. 217; *Waddington* v. *Bristow*, 2 B. & P. 455.

(*c*) *Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 M. & S. 208; *Mayfield* v. *Wadsley*, 3 B. & C. 357; 3 L.J. (O.S.) K.B. 31; *Evans* v. *Roberts*, 5 B. & C. 829; 4 L.J. (O.S.) K.B. 313; *Watts* v. *Friend*, 10 B. & C. 446; 8 L.J. (O.S.) K.B. 181. Growing crops are not, however, goods and chattels within the Bills of Sale Acts until severed. See *Brantom* v. *Griffiths*, 2 C.P.D. 212; 46 L.J. C.P. 408; *National Mercantile Bank, Ex parte*, 16 Ch.D. 104; 50 L.J. Ch. 231. They will pass in a will under the words farming stock. See *Roose, In re*, 17 Ch.D. 696; 50 L.J. Ch. 197.

(*d*) *Smith* v. *Surman*, 9 B. & C. 561, 568; 7 L.J. (O.S.) K.B. 296; *Marshall* v. *Green*, 1 C.P.D. 35; 45 L.J. C.P. 153.

(*e*) Lord Abinger, *Rodwell* v. *Phillips*, 9 M. & W. 505; 11 L.J. Ex. 217; Rolfe, B., *Washbourn* v. *Burrows*, 1 Exch. 115; 16 L.J. Ex. 266.

(*f*) *Falmouth (Earl)* v. *Thomas*, 1 Cr. & M. 89; 2 L.J. Ex. 57; *Harvey* v. *Grabham*, 5 Ad. & E. 51, 62; 5 L.J. K.B. 235.

(*g*) *Lavery* v. *Pursell*, 39 Ch.D. 508; 57 L.J. Ch. 570.

Where a contract was entered into for the sale of a crop of corn on the land and the profit of the stubble afterwards, and the vendor was to have liberty for his cattle to run with the purchaser's, and the purchaser was to have some potatoes growing on the land and whatever lay grass was in the fields, and was to harvest the corn and dig up the potatoes, and the vendor was to pay the tithe, it was held that this was not a contract for any interest in land, but a sale of goods and chattels as to all but the lay grass; and, as to that, a contract for the agistment of the purchaser's cattle (*h*).

If the contract is within sect. 4 of the Statute of Frauds as a contract for the sale of an interest in land, it must be authenticated by writing; and, if it does not fall within that section, but within sect. 4 of the Sale of Goods Act, 1893 (*i*), which re-enacts the repealed sect. 17 of the Statute of Frauds, as a contract for the sale of goods and chattels, it must still be in writing, unless the value of the subject-matter of the contract does not amount to 10*l.*, or the growing produce has been severed and delivered, or earnest has been given, or a part payment made, or there has been a part acceptance and receipt (*k*).

Authentication of executory contracts for sale of goods or chattels.—By sect. 4, sub-sect. 1, of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which reproduces in somewhat different language sect. 17 of the Statute of Frauds, "a contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf." And by sub-sect. 2 of sect. 4, "the provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or delivery thereof, or rendering the same fit for delivery" (*l*). The Statute of Frauds clearly applied to "a sale" of goods, but it being doubtful whether it applied to an "agreement to sell," sect. 7 of 9 Geo. 4, c. 14, was passed. That section has been repealed and is now reproduced in sect. 4, sub-sect. 2, of the Act of 1893, the pro-

(*h*) *Jones* v. *Flint*, 10 Ad. & E. 753; 9 L.J. Q.B. 252.

(*i*) 56 & 57 Vict. c. 71, s. 4.

(*k*) *Marshall* v. *Green*, 1 C.P.D. 35; 45 L.J. C.P. 153.

(*l*) As to "existing or future goods," see sect. 5 (1); and as to definition of "future goods," see sect. 62 of the Act of 1893, *post*. *Lee* v. *Griffin*, 30 L.J. Q.B. 252; 1 B. & S. 272.

visions of which now apply to a contract of sale, including "an agreement to sell," as well as "a sale" (*m*). The note or memorandum must, in order to be available in an action on the contract, have been in existence when the action commenced (*n*).

Contracts for sale of fixtures and shares.—By the Sale of Goods Act, 1893 (*o*), "goods" include things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Contracts for the sale of unsevered fixtures are not within the operation either of the Act of 1893 or of the Statute of Frauds, inasmuch as they are not goods and chattels within the meaning of the former statute, nor do they constitute, although annexed to the freehold, an interest in land (*p*). Railway shares also, and shares in the profits of a mine, are neither interests in land, nor are they goods and chattels; and contracts for the purchase and sale of them are not, consequently, within the statute, and do not require to be authenticated by writing (*q*); but the transfer of the share in fulfilment of a contract of sale must, in general, be made in writing or by deed. If each shareholder in a mine has a joint interest in the land itself, that interest cannot pass except in the mode prescribed by sect. 4 of the Statute of Frauds; but, if each shareholder has merely a right to a divisible proportion of the profits of the adventure, the case is not within the statute (*r*).

Promises by executors and administrators.—By sect. 4 of the Statute of Frauds, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. The promise of an executor or administrator to pay the debt of his testator or intestate is a mere *nudum pactum*, and does not impose any personal liability upon the latter, or make him chargeable in his own right, unless there is some consideration for the promise (see *ante*, p. 3). The putting of the promise into writing pursuant to the statute does not do away with the necessity of a consideration; "the statute was made for the relief of personal representa-

(*m*) See definition of "contract of sale" in sect. 62 of the Act of 1893.

(*n*) *Lucas* v. *Dixon*, 22 Q.B.D. 357; 58 L.J. Q.B. 161.

(*o*) 56 & 57 Vict. c. 71, s. 62.

(*p*) *Hallen* v. *Runder*, 1 C. M. & R. 266; *Lee* v. *Risdon*, 7 Taunt. 191; Park, J., *Marson* v. *Short*, 2 Sc. 243, 249; 9 L.J. C.P. 270; *Pinner* v. *Arnold*, 2 C. M. & R. 613; 5 L.J. Ex. 1; *Lee* v. *Gaskell*, 1 Q.B.D. 700; 45 L.J. Q.B. 540.

(*q*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200, 214; 9 L.J. Ex. 217; *Humble* v. *Mitchell*, 11 Ad. & E. 205; 9 L.J. Q.B. 29; *Bradley* v. *Holdsworth*, 3 M. & W. 422; 7 L.J. Ex. 153; *Tempest* v. *Kilner*, 3 C.B. 249; *Bowlby* v. *Bell*, 3 C.B. 284; 16 L.J. C.P. 18.

(*r*) *Watson* v. *Spratley*, 10 Exch. 222, 243; 24 L.J. Ex. 53; *Powell* v. *Jessop*, 18 C.B. 336, 354; 25 L.J. C.P. 199.

tives and others, and did not intend to charge them further than by common law they were chargeable" (*s*).

Promises to answer for debt, default, or miscarriage of another.—The Statute of Frauds further enacts (sect. 4), that no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. This clause does not apply to the case where a party giving a guarantee is himself liable to the demand which he is purporting to guarantee; it must be exclusively the debt, default, or miscarriage of another (*t*). But it applies to a promise to be answerable for a tortious act as well as a breach of contract; such as a promise to the lender of a horse to be answerable for the safe riding and re-delivery of it by the borrower, or a promise to the owner of a horse injured by an act of trespass, to make good the damage on condition that he would not sue the trespasser (*u*). It has, however, been held that the statute applies only to promises made to the person to whom another is answerable (*x*), and the promise must be one to answer for a debt of, or a default in some duty by, that other person towards the promisee (*y*), and, therefore, a promise by B. to indemnify A. against all liability, if he would become bail for the appearance of C. to answer a charge of misdemeanour, is not a promise to answer for the debt or default of another within the statute, since no debt or duty was owing from C. to A. (*z*), nor is a promise to indemnify another against liability in any event, which promise is not conditional upon default being made by a third party, a promise within the section (*a*); so where it was verbally agreed between the defendant and stockbrokers that the defendant should introduce to them clients for whom the brokers were to carry out transactions on the Stock Exchange, upon the terms that the defendant should receive one-half the commission earned and should pay the brokers one-half of any loss sustained, it was held that this agreement was not a promise to answer for the debt of another within the statute (*b*). On the

(*s*) *Rann* v. *Hughes*, 7 T.R. 350, n.

(*t*) *Orrell* v. *Coppock*, 26 L.J. Ch. 269; *Couturier* v. *Hastie*, 8 Exch. 56; 22 L.J. Ex. 97.

(*u*) *Birkmyr* v. *Darnell*, Salk. 27; 1 Sm. L. C. (ed. 10) 287; *Kirkham* v. *Marter*, 2 B. & Ald. 613.

(*x*) *Eastwood* v. *Kenyon*, 11 Ad. & E. 438, 446; 9 L.J. Q.B. 409.

(*y*) *Hargreaves* v. *Parsons*, 13 M. & W. 561, 570; 14 L.J. Ex. 250; *Thomas* v. *Cook*, 8 B. & C. 728; *Reader* v. *Kingham*, 13 C.B. N.S. 344; 32 L.J. C.P. 108; *Harburg India Rubber Comb Co.* v. *Martin*, (1902) 1 K.B. 778; 71 L.J. K.B. 529.

(*z*) *Cripps* v. *Hartnoll*, 4 B. & S. 414; 32 L.J. Q.B. 381; *Wildes* v. *Dudlow*, L.R. 19 Eq. 198; 44 L.J. Ch. 341.

(*a*) *Guild & Co.* v. *Conrad*, (1894) 2 Q.B. 885; 63 L.J. Q.B. 721.

(*b*) *Sutton* v. *Grey*, (1894) 1 Q.B. 285; 63 L.J. Q.B. 663.

other hand, a promise to indemnify another from the consequences of becoming bail for a third person in a civil action has been held to be within the statute, a decision which is to be supported, if at all, on the ground that the person bailed is legally bound to indemnify his bail by surrendering or paying the debt (*c*). There can be no suretyship unless there be a principal debtor, who may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time; but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt to be guaranteed (*d*). A promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe is not a promise to be responsible for the default of another, but a promise to pay what the promisee may lose by defending the promiser's interests in a suit (*e*). If A., in consideration that B. will stay proceedings in an action he has commenced against C., to recover a sum of money due to him from C., promises to pay that money, such promise is a promise to answer for the debt of another within sect. 4 of the statute (*f*).

The operation of the statute is not confined to collateral undertakings to be answerable for a subsisting debt or duty; it extends to undertakings made before the debt accrues or the duty arises; and a guarantee, consequently, which a tradesman, before he sends out goods on credit, requires from a third party, because he does not like to trust the person for whose use the goods are intended, is within the statute, if the latter has been treated by the tradesman as his debtor (*g*). Thus, where the plaintiff, having commenced certain business for one Fox, refused to go on with it, without a promise by the defendant to pay the further expenses to be incurred, it was held that this promise was within the statute (*h*): and, where the defendant verbally promised that, if the plaintiff would supply A. with iron and take A.'s acceptances, he would discount them, it was held that this was a promise to answer for the default of another, and, not being in writing, could not be enforced, on the ground that a contract to give a guarantee is required to be in writing as much as a guarantee itself (*i*).

But the sale may be to one man, although the goods are to be delivered to another; and a person may promise to pay for goods

(*c*) *Green* v. *Cresswell*, 10 Ad. & E. 453; 9 L.J. Ex. 63; but see *Batson* v. *King*, 4 H. & N. 739; 28 L.J. Ex. 327; and *Cripps* v. *Hartnoll*, *supra*.

(*d*) *Lakeman* v. *Mountstephen*, L.R. 7 H.L. 17, 24; 43 L.J. Q.B. 188.

(*e*) *Adams* v. *Dansey*, 6 Bing. 506; 8 L.J. (O.S.) C.P. 165.

(*f*) *Fish* v. *Hutchinson*, 2 Wils. 94.

(*g*) *Peckham* v. *Faria*, 3 Doug. 13; *Parsons* v. *Walter*, *ib.* 14, n. c; *Matson* v. *Wharam*, 2 T.R. 80.

(*h*) *Barber* v. *Fox*, 1 Stark. 270.

(*i*) *Mallet* v. *Bateman*, L.R. 1 C.P. 163; 35 L.J. C.P. 40.

supplied to, or for work done at his request or by his directions for a third party, as the real debtor, and not in the character of a surety; and, if he has been treated by the person who has furnished the goods, or done the work, as the party liable, and credit has been given to him, his promise or undertaking to pay is not a collateral promise to answer for the debt of another, and the case consequently is out of the statute (*k*). If two come to a shop, and one buys, and the other to gain him credit promises the seller, "if *he* does not pay you, *I* will," this is a collateral undertaking, void without writing by the statute. But, if he says, "Let him have the goods, I will be your paymaster," this is an undertaking as for himself; and he shall be intended to be the very buyer (*l*). Where the defendant, in consideration that the plaintiff, at the request of the defendant, would provide a workman with materials for his work, promised the plaintiff to pay him a reasonable sum for such materials out of such monies received by him as should become due to the workman in respect of the work, it was held that this was not a promise by a surety to answer for the debt or default of another, within the meaning of the statute, but an original independent contract (*m*). If goods are furnished to an infant at the request of the defendant, the defendant's undertaking or promise to pay for them is not a collateral promise to answer for the debt of another, inasmuch as the infant is not liable to pay for them, and cannot be indebted, by reason of his minority (*n*).

The contract of a factor binding him in the terms implied by a *del credere* commission is not within the Statute of Frauds. The contract is the factor's own contract; and the debt of another comes in incidentally only as a measure of damages (*o*). Where the defendant, in consideration that the plaintiff would discharge a debtor out of custody, promised the plaintiff to pay him the debt, it was held that this was not a collateral promise to answer for the debt of another, the debt being extinguished by the discharge of the debtor (*p*). Where the defendant, in order to get rid of an incumbrance on his own property, or to obtain some direct personal advantage to himself, promises to pay the debt of another, the promise is not within the statute. And, if the original debt

(*k*) *Hargreaves* v. *Parsons*, 13 M. & W. 561; 14 L.J. Ex. 250; *Mountstephen* v. *Lakeman*, L.R. 7 Q.B. 196; 41 L.J. Q.B. 67.

(*l*) *Birkmyr* v. *Darnell*, Salk. 27; *Watkins* v. *Perkins*, Raym. 224; *Seaman* v. *Price*, 1 C. & P. 586; 10 Moore, 34.

(*m*) *Andrews* v. *Smith*, 2 C. M. & R. 627; 5 L.J. Ex. 80; *Sweeting* v. *Asplin*, 7 M. & W. 165, 173; 10 L.J. Ex. 3; *Gerish* v. *Chartier*, 1 C.B. 13; 14 L.J. C.P. 84.

(*n*) *Harris* v. *Huntbach*, 1 Burr. 373; *Duncombe* v. *Tickridge*, Aleyn, 94; 1 Wms. Saund. 211, d.

(*o*) *Wolff* v. *Koppell*, 5 Hill, 458 (Amer.); *Couturier* v. *Hastie*, 8 Exch. 56; 22 L.J. Ex. 97.

(*p*) *Goodman* v. *Chase*, 1 B. & Ald. 297; *Butcher* v. *Steuart*, 11 M. & W. 857; 12 L.J. Ex. 391; *Lane* v. *Burghart*, 1 Q.B. 933; 10 L.J. Q.B. 343; *Bird* v. *Gammon*, 3 Bing. N.C. 883; 6 L.J. C.P. 258.

be discharged and extinguished by the substitution in lieu thereof of a new contract by a third person to pay the amount of that debt, such new contract is not a collateral promise to answer for the debt or default of another (*q*). Thus where a purchaser of goods, being unable to pay for them, transferred and delivered them to the defendant, and the latter promised the vendor to pay for them, it was held that this was a substitution of a new contract of sale and a new purchaser, in lieu of the original contract of sale; that the original purchaser was discharged from all liability in respect of the goods; and that, his debt being extinguished, the promise was not a promise to be answerable for the debt of another (*r*).

A contract or promise, although made concerning the debt or default of a third party, may yet be an original contract not within the statute (*s*). If the plaintiff has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods, or to part with his securities, upon the faith of a promise, made by the defendant, to pay the amount of the plaintiff's claim thereon, the promise so made is not within the mischief intended to be provided against by the Statute of Frauds (*t*). Where the plaintiff had distrained upon his tenant for rent in arrear, and afterwards delivered up the goods and chattels to the defendants, for the use of the tenant, upon the faith of an undertaking by the defendants to pay the rent, it was held that the undertaking was not within the statute (*u*). The consideration need not appear in writing, see *post*, p. 1003.

Agreements in consideration of marriage.—The 4th section of the Statute of Frauds further enacts that no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. This does not extend to the marriage contract itself. Promises of marriage, consequently, are binding, though not reduced into writing, and signed by the party sought to be charged thereon (*x*).

(*q*) *Hodgson* v. *Anderson*, 5 D. & R. 746, 747; 3 B. & C. 842, 856; *Lacy* v. *M'Neile*, 4 D. & R. 7; *Taylor* v. *Hilary*, 1 C. M. & R. 743; 4 L.J. Ex. 72.

(*r*) *Browning* v. *Stallard*, 5 Taunt. 450.

(*s*) *Walker* v. *Hill*, 5 H. & N. 419.

(*t*) *Barker* v. *Birt*, 10 M. & W. 61; 11 L.J. Ex. 375; *Barrell* v. *Trussell*, 4 Taunt. 117; *Meredith* v. *Short*, Salk. 25; *Castling* v. *Aubert*, 2 East, 325; *Walker* v. *Taylor*, 6 C. & P. 752; *Fitzgerald* v. *Dressler*, 7 C.B. N.S. 374; 29 L.J. C.P. 113.

(*u*) *Edwards* v. *Kelly*, 6 M. & S. 204; *Bampton* v. *Paulin*, 12 Moore, 497; 5 L.J. (O.S.) C.P. 168; 1 Wms. Saund. 211, d, 211, e (ed. 5).

(*x*) *Cork* v. *Baker*, 1 Str. 34; *Harrison* v. *Cage*, 1 Raym. 386.

But all promises and agreements made by one person in consideration of the completion of a marriage by another are within the statute, and must be reduced into writing. The solemnization of the marriage does not take the case out of the operation of the statute (*y*). A letter written by a father, signifying his assent to the marriage of his daughter with J. S., and that he would give her a marriage-portion of 500*l*., was held a sufficient promise in writing within the statute (*z*). A promise before marriage, by the husband to the wife, that, if she will forego a contemplated settlement, he will make the same provision for her by his will, is within the statute, and cannot be enforced if not made in writing (*a*).

Agreements not to be performed within a year.—Sect. 4 of the Statute of Frauds further enacts that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised. This extends to all contracts which are not by the terms of them to be fully and completely executed within a year. A part performance of the contract will not, consequently, take it out of the provisions of the statute. Thus, where a person had become a subscriber to the "Boydell Shakspeare," a work which was published in numbers, and could not be, and was not intended to be, completed within a year, and had taken and paid for several numbers as they came out, and then refused to continue his subscription and complete the set, it was held that an action could not be maintained against him for his subscription, as there was no written contract signed by him according to the section (*b*). But, if the contract has been wholly performed on the part of the plaintiff, it is no answer that there is no memorandum in writing; for the section does not apply where the consideration is executed (*c*). If the contract be for more than a year, the fact that it is defeasible within the year will not take it out of the operation of the section (*d*). A contract whereby a coachmaker agrees to let a carriage for a term of five years, in consideration of an annual payment for the use of it, but which, by the custom of the trade, is determinable at any time

(*y*) *Caton* v. *Caton*, L.R. 1 Ch. 137; 35 L.J. Ch. 292; L.R. 2 H.L. 127; 36 L.J. Ch. 886.

(*z*) *Mountacue* (*Countess*) v. *Maxwell*, 1 Str. 236; *Bird* v. *Blosse*, 2 Ventr. 361; Bac. Abr. Agreements (C) 3.

(*a*) *Caton* v. *Caton*, *supra*; but see *Williams* v. *Williams*, 37 L.J. Ch. 854.

(*b*) *Boydell* v. *Drummond*, 11 East, 154, 158; *Sweet* v. *Lee*, 4 Sc. N.R. 90; *Roberts* v. *Tucker*, 3 Exch. 632.

(*c*) *Knowlman* v. *Bluett*, L.R. 9 Ex. 307; 43 L.J. Ex. 151.

(*d*) *Dobson* v. *Collis*, 1 H. & N. 84; 25 L.J. Ex. 267.

within that period, on payment of a year's hire, is an agreement not to be performed within a year, within the meaning of the section (*e*); so also is a contract for a year's service to commence on a day subsequent to the making of the contract—for a contract which extends one minute beyond the time pointed out by the section falls within its prohibition (*f*). But a contract or general hiring for one year from the time of the making of the contract, and so on from year to year so long as the parties shall respectively please, has been held not to extend beyond the time limited by the section, and is not consequently within the provisions of the section (*g*).

The section does not extend to contracts which are to be performed upon the happening of some uncertain event, and which consequently may or may not be completed within a year (*h*); but, where it appears, by the whole tenor of the agreement, that it is to be performed after the year, a note is necessary (*i*). An agreement to pay the plaintiff so many guineas on the day of his marriage, was held not within the statute, although the marriage did not take effect for nine years, for it might have happened within a year (*k*). So too a verbal promise founded upon a good consideration, to leave the plaintiff a legacy of a certain amount, has been held to be binding (*l*). And where an oral promise was made to pay so much money on the return of a ship, which did not happen for two years, it was held that the promise was not within the statute, for the ship might have returned within the year, though by accident it happened that it did not (*m*). Neither does the statute apply where the contract is wholly executed, or intended to be so, by one of the parties thereto, within the year, although there are some acts to be done by the other party beyond the prescribed limit. Thus, where a landlord agreed to lay out 50*l.* in improvements upon the demised premises, and the tenant agreed to pay 5*l.* per annum for the remainder of his term, of which several years were then unexpired, in addition to the reserved rent, and the 50*l.* was expended within the year, and the landlord afterwards brought his action for the arrears of the 5*l.*, it was held that he was entitled to recover, though the agree-

(*e*) *Birch* v. *Liverpool* (*Earl*), 9 B. & C. 392.

(*f*) *Bracegirdle* v. *Heald*, 1 B. & Ald. 722; *Snelling* v. *Huntingfield* (*Lord*), 1 C. M. & R. 25; 4 L.J. Ex. 232; see *Cawthorn* v. *Cordrey*, 13 C.B. N.S. 406; 32 L.J. C.P. 152; and *Britain* v. *Rossiter*, 11 Q.B.D. 123; 48 L.J. Ex. 362.

(*g*) *Beeston* v. *Collyer*, 4 Bing. 309; 5 L.J. (O.S.) C.P. 180; *Giraud* v. *Richmond*, 2 C.B. 835; 15 L.J. C.P. 180.

(*h*) *McGregor* v. *McGregor*, 21 Q.B.D. 424; 57 L.J. Q.B. 591; questioning *Davey* v. *Shannon*, 4 Ex.D. 81; 48 L.J. Ex. 459.

(*i*) *Wells* v. *Horton*, 4 Bing. 43, 44; 5 L.J. (O.S.) C.P. 41; *Smith* v. *Neale*, 2 C.B. N.S. 67; 26 L.J. C.P. 143.

(*k*) *Peter* v. *Compton*, Skin. 353; Holt, 326; *Smith* v. *Westall*, 1 Raym. 316.

(*l*) *Ridley* v. *Ridley*, 34 L.J. Ch. 462.

(*m*) *Anon.*, Salk. 280; *Fenton* v. *Emblers*, 3 Burr. 1282; 1 W. Bl. 353.

ment had not been put into writing and signed (*n*). A contract, which is not enforceable by reason of the provisions of sect. 4, is nevertheless not void but existing, and no fresh contract can be implied from acts done in pursuance of it (*o*).

Requisites of written memorandum of contract.—If one person signs and forwards to another a written proposal, and this proposal is accepted and acted upon by the party to whom it is sent, there is a sufficient memorandum of the contract to satisfy sect. 4 of the Statute of Frauds, and charge the sender, provided the terms of the contract can be ascertained from the written proposal construed in connexion with the surrounding circumstances (*p*). A letter making an offer or tendering certain terms for acceptance may be interpreted by the aid of other letters between the same parties referring to the same subject-matter for the purpose of establishing the terms of a contract within sect. 4 of the statute (*q*), provided no extrinsic evidence is required to connect them (*r*). Indeed, any printed papers or communications in writing which may have passed between the parties, forming on the face of them part of one connected transaction, may be incorporated and construed together, and made to establish the requisite written evidence of an "agreement" (*s*). But the names of the parties and the terms of the contract must appear from a comparison of the writings themselves; and they must manifestly refer to the same contract and transaction, and must not be contradictory to each other (*t*); so where the defendants' clerk drew up with their authority a letter addressed to them containing the terms upon which the plaintiff was to serve them for three years, and the plaintiff signed the letter, it was held that the letter constituted a sufficient memorandum of the contract within the section (*u*). It has also been held that parol evidence might be admitted to identify an unsigned agreement as being the one referred to in a signed minute in a minute-book (*x*); or a receipt

(*n*) *Donellan* v. *Read*, 3 B. & Ad. 899, 906; 1 L.J. K.B. 269; *Cherry* v. *Heming*, 4 Exch. 631; 9 L.J. Ex. 63; *Mavor* v. *Pyne*, 11 Moore, 2; 4 L.J. (O.S.) C.P. 36.

(*o*) *Britain* v. *Rossiter*, 11 Q.B.D. 123; 48 L.J. Ex. 362.

(*p*) *Smith* v. *Neale*, 2 C.B. N.S. 67; 26 L.J. C.P. 143; *Reuss* v. *Picksley*, L.R. 1 Ex. 342; 35 L.J. Ex. 218; *Peek* v. *North Staffordshire Ry.*, 4 B. & S. 627; 32 L.J. Q.B. 241; *Warner* v. *Willington*, 3 Drew. 523; 25 L.J. Ch. 662; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 143; 28 L.J. Ex. 122.

(*q*) *Peek* v. *North Staffordshire Ry.*, *supra*; *Ridgway* v. *Wharton*, 6 H.L.C. 238; 27 L.J. Ch. 46.

(*r*) *Chapman* v. *Callis*, 9 C.B. N.S. 769; 30 L.J. C.P. 241; *Peek* v. *North Staffordshire Ry.*, *supra*.

(*s*) *Bird* v. *Blosse*, 2 Ventr. 361; *Dobell* v. *Hutchinson*, 3 Ad. & E. 355; 4 L.J. K.B. 201; *Coe* v. *Duffield*, 7 Moore, 252; *Stead* v. *Liddard*, 8 *ib.* 2; 1 L.J. (O.S.) C.P. 52; *Baumann* v. *James*, L.R. 3 Ch. 508.

(*t*) *Kenworthy* v. *Schofield*, 2 B. & C. 945, 948; 2 L.J. (O.S.) K.B. 175; *Cooper* v. *Smith*, 15 East, 103; *Jackson* v. *Lowe*, 1 Bing. 9; *Smith* v. *Surman*, 9 B. & C. 561; 7 L.J. (O.S.) K.B. 296; *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1.

(*u*) *Evans* v. *Hoare*, (1892) 1 Q.B. 593; 61 L.J. Q.B. 470.

(*x*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q.B.D. 314; 46 L.J. Q.B. 219.

by the defendant for a deposit as being given in respect of the same subject-matter as an agreement signed only by the plaintiff (*y*); or a reference in a signed letter by the defendant to a memorandum signed by the plaintiff (*z*); or to connect an envelope addressed to a vendee with a letter which it enclosed and which set out the terms of the contract but did not contain the name of the vendee (*a*).

If two parties have entered into an agreement for the performance of particular acts or duties, it is not necessary to show that the memorandum of the agreement has been signed by both parties, in order to render the one who has signed it liable upon the contract (*b*). But, although it is not necessary that both parties should sign the memorandum, they must be specified either nominally or by a sufficient description or reference (*c*), unless the plaintiff has estopped himself from repudiating the contract (*d*). Thus, in the case of a bargain and sale of goods and chattels, it must appear from the memorandum signed by the purchaser that the plaintiff is the vendor; for, if that is left wholly uncertain, the memorandum will be insufficient (*e*). But parol evidence may be given of the relative trades of the parties; and if from that it can be inferred with reasonable certainty which was the seller and which the buyer, that will be sufficient (*f*). Where a price is agreed upon at the time of the sale, it must be set forth on the face of the memorandum (*g*). So also before the court will decree specific performance of a contract for sale of real property, it must be sufficiently described in the receipt or memorandum (*h*). Again, if the contract is a contract for the performance by the parties of mutual recurring acts and services from time to time, both must be

(*y*) *Long* v. *Millar*, 4 C.P.D. 450; 48 L.J. C.P. 596; *Shardlow* v. *Cotterell*, 20 Ch.D. 90; 51 L.J. Ch. 353; *Studds* v. *Watson*, 28 Ch.D. 305; 54 L.J. Ch. 626; *Oliver* v. *Hunting*, 44 Ch.D. 205; 59 L.J. Ch. 255.

(*z*) *Cave* v. *Hastings*, 7 Q.B.D. 125; 50 L.J. Q.B. 575.

(*a*) *Pearce* v. *Gardner*, (1897) 1 Q.B. 688, 691; 66 L.J. Q.B. 457.

(*b*) *Hatton* v. *Gray*, 2 Ch.C. 164; *Fowle* v. *Freeman*, 9 Ves. 351; *Seton* v. *Slade*, 7 Ves. 264; *Laythoarp* v. *Bryant*, 2 Bing. N.C. 735; 5 L.J. C.P. 217; *Egerton* v. *Mathews*, 6 East, 307; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 143; 24 L.J. Ex. 122; *Allen* v. *Bennet*, 3 Taunt. 169.

(*c*) *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1; *Sale* v. *Lambert*, L.R. 18 Eq. 1; 43 L.J. Ch. 470; *Commins* v. *Scott*, L.R. 20 Eq. 11; 44 L.J. Ch. 563; *Catlin* v. *King*, 5 Ch.D. 660; 46 L.J. Ch. 384; *Williams* v. *Jordain*, 6 Ch.D. 517; 46 L.J. Ch. 681; *Coombs* v. *Wilkes*, (1891) 3 Ch. 77; 61 L.J. Ch. 42; *Filby* v. *Hounsell*, (1896) 2 Ch. 733; 65 L.J. Ch. 852; *Carr* v. *Lynch*, (1900) 1 Ch. 613; 69 L.J. Ch. 345.

(*d*) *Thomas* v. *Brown*, 1 Q.B.D. 714; 45 L.J. Q.B. 811.

(*e*) *Champion* v. *Plummer*, 1 N.R. 252; *Graham* v. *Musson*, 5 Bing. N.C. 603; 8 L.J. C.P. 324; *Sarl* v. *Bourdillon*, 1 C.B. N.S. 195; 26 L.J. C.P. 78; *Vandenbergh* v. *Spooner*, L.R. 1 Ex. 316; 35 L.J. Ex. 201; *Potter* v. *Duffield*, L.R. 18 Eq. 4; 43 L.J. Ch. 472; *Jarrett* v. *Hunter*, 34 Ch.D. 182; 56 L.J. Ch. 141.

(*f*) *Newell* v. *Radford*, L.R. 3 C.P. 52; 37 L.J. C.P. 1.

(*g*) *Goodman* v. *Griffiths*, 1 H. & N. 574, 576; 26 L.J. Ex. 145. As to the requisites of the memorandum of a contract of sale, see further, *post*, p. 491.

(*h*) *Shardlow* v. *Cotterell*, 20 Ch.D. 90; 51 L.J. Ch. 353.

bound by the contract, or neither can be made liable upon it (*i*), except in respect of acts done and services actually rendered. Thus, if a servant signs a memorandum of agreement by which he undertakes to serve his employer for more than a year, and enters upon the service, he is, nevertheless, not bound by his agreement to serve for a year, unless the memorandum is also signed by the employer; for, if the latter is not bound to employ for the term specified, the servant is not bound to serve (*k*); but in all other respects, as regards work actually done and services rendered, the servant would be bound by the terms of his signed writing (*l*).

In the case of a written memorandum of an agreement for a lease, if the memorandum, construed in connexion with other writings therein referred to and with surrounding circumstances, leaves the commencement or the duration of the term wholly uncertain, there is no binding contract (*m*). If a party writes a letter admitting the essential particulars of the contract, but containing a repudiation of the bargain upon bad or insufficient grounds, the letter will constitute a good memorandum of the contract within the statute (*n*). The agreement must be completed before the letter can be evidence of a binding contract (*o*).

It was formerly held that the note or memorandum of a promise to answer for the debt, default, or miscarriage of another must disclose upon the face of it the consideration for the promise (*p*); but by the Mercantile Law Amendment Act, 1856, s. 3 (*q*), "no such promise, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document." The consideration, therefore, may be supplied by oral evidence, but not the nature and extent of the promise itself (*r*). In the case of a guarantee the name of the party to whom it is given must be stated on the face of the memorandum; for parol evidence is inadmissible to supply the

(*i*) *Hoddesdon Gas Company* v. *Haselwood*, 6 C.B. N.S. 249; 28 L.J. C.P. 268.

(*k*) *Sykes* v. *Dixon*, 9 Ad. & E. 693; 8 L.J. Q.B. 102.

(*l*) *Collis* v. *Botthamley*, 7 W.R. 87; *Souch* v. *Strawbridge*, 2 C.B. 808; 15 L.J. C.P. 172.

(*m*) *Bayley* v. *Fitzmaurice*, 8 E. & B. 679; 27 L.J. Q.B. 143; *Clarke* v. *Fuller*, 16 C.B. N.S. 24; *Nesham* v. *Selby*, L.R. 13 Eq. 191; 41 L.J. Ch. 551.

(*n*) *Bailey* v. *Sweeting*, 9 C.B. N.S. 843; 30 L.J. C.P. 154; *Wilkinson* v. *Evans*, L.R. 1 C.P. 407; 35 L.J. C.P. 224; *Buxton* v. *Rust*, L.R. 7 Ex. 279; 41 L.J. Ex. 173.

(*o*) *Munday* v. *Asprey*, 13 Ch.D. 855; 49 L.J. Ch. 216.

(*p*) *Powers* v. *Fowler*, 4 E. & B. 511.

(*q*) 19 & 20 Vict. c. 97, s. 3.

(*r*) *Holmes* v. *Mitchell*, 7 C.B. N.S. 361; 28 L.J. C.P. 301.

omission (*s*). But, if the writing is not strictly a guarantee—if it is a general order or authority to any person who may choose to act upon it, authorising the supply of goods to a third party, and promising to pay for the goods so supplied—it may be sued upon as an original contract (*t*). A written admission by a purchaser to his agent that he had bought certain goods for him is a sufficient note or memorandum of the bargain between him and the vendor (*u*).

Signature to memorandum.—If a man writes his name in the first person, as, "I, J. S., promise to pay" (*x*), or in the third person, as, "Mr. Stanley" (*y*), this is a sufficient signature. But the mere insertion of the name of the contracting party in the body of a written contract is not of itself a sufficient signature. For, though the signature need not be placed in any particular part of the instrument, yet it must be so introduced as to govern or authenticate every material and operative part of it (*z*). Therefore, where the defendant Moore wrote instructions for a lease to the plaintiff in these words, "The lease renewed; Mrs. Stokes to pay the king's tax, also to pay Moore 24*l.* a year half yearly; Mrs. Stokes to keep the house in good and tenantable repair," &c., it was held that Moore, by writing his own name in the body of the instructions, had not signed an agreement for the renewal of the lease within the intent and meaning of the statute (*a*). If the agreement concludes "as witness our hands," or contains any words showing that the names of the contracting parties were to be subscribed, there is no signing within the statute, unless the names of the parties are duly subscribed at the foot of the instrument (*b*).

A party may under certain circumstances be bound by his signature, although he subscribed in form as a witness (*c*). What, within the legal intent of the statute, will amount to a signing is the same question in equity as at law (*d*). Where an offer was accepted by the defendant by telegram, and the instructions for the message were signed by the defendant, and the telegram received by the plaintiff contained the message with the names of the sender and receiver written by the telegraph clerk on the usual

(*s*) *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1.

(*t*) *M'Kune* v. *Joynson*, 5 C.B. N.S. 218; 28 L.J. C.P. 133.

(*u*) *Gibson* v. *Holland*, L.R. 1 C.P. 1; 35 L.J. C.P. 5.

(*x*) *Taylor* v. *Dobbins*, 1 Str. 399; *Propert* v. *Parker*, 1 Russ. & Myl. 625; *Bleakly* v. *Smith*, 11 Sim. 150.

(*y*) *Lobb* v. *Stanley*, 5 Q.B. 574; 13 L.J. Q.B. 117; *Johnson* v. *Dodgson*, 2 M. & W. 653; 6 L.J. Ex. 185.

(*z*) *Caton* v. *Caton*, L.R. 2 H.L. 127; 36 L.J. Ch. 886; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Kronheim* v. *Johnson*, 7 Ch.D. 60; 47 L.J. Ch. 132.

(*a*) *Stokes* v. *Moore*, 1 Cox, 222, 223.

(*b*) *Hubert* v. *Treherne*, 3 M. & Gr. 743; 11 L.J. C.P. 78.

(*c*) *Welford* v. *Beezely*, 1 Ves. senr. 6; *Gosbell* v. *Archer*, 2 Ad. & E. 508; 5 L.J. K.B. 35.

(*d*) *Morison* v. *Turnour*, 18 Ves. 183.

printed form, it was held that there was a sufficient signature within the statute (*e*). If a letter is signed and sent in an envelope containing a separate unsigned document by the same writer, and headed "supplement," and commencing, "I had quite omitted to tell you," but without any other reference to the letter or the letter to it, it was held that the unsigned document did not satisfy the Statute of Frauds (*f*). If a man writes his name in the vendor's order book, intending it as an order or authority to the vendor to send him certain goods specified therein with the prices, this is a sufficient signature (*g*). So, if he writes his name against an entry or memorandum in a book or ledger, or indorses his name on printed particulars of sale, printed handbills, or printed descriptions, specifying the goods and the price, with intent to denote that he has purchased the contents, this is a sufficient signature; and the name may be written in pencil as well as in ink (*h*). A man may sign also by his initials, or by his mark (*i*), or perhaps by a stamp (*k*), and it is quite immaterial upon what part of the paper the mark or signature is to be found. But the signature must, of course, be made with a view of authenticating the document as a concluded contract, and not with a view merely of altering or settling a draft, or approving of propositions and proposals not finally arranged and decided upon (*l*). It seems that it is not essential that the signature should be placed for no other purpose than to authenticate the contract, as where a chairman of a company signed a minute in the minute-book for the purpose of verifying the accuracy of the entry, but the entry was in terms an admission of the contract (*m*); but where shareholders signed as between themselves articles of association in which there was a clause stating that the plaintiff should be solicitor to the company, the signatures were held to have been made *alio intuitu*, and that the plaintiff could not sue on the contract (*n*).

Signature by agents.—Where the note or memorandum is signed by an agent, it is not necessary that the agent should obtain his authority by any written instrument. Consequently,

(*e*) *Godwin* v. *Francis*, L.R. 5 C.P. 295; 39 L.J. C.P. 121.

(*f*) *Kronheim* v. *Johnson*, 7 Ch.D. 60; 47 L.J. Ch. 132.

(*g*) *Sarl* v. *Bourdillon*, 1 C.B. N.S. 195; 26 L.J. C.P. 78; *ante*, p. 35; *Newell* v. *Radford*, L.R. 3 C.P. 52; 37 L.J. C.P. 1.

(*h*) *Geary* v. *Physic*, 5 B. & C. 234; 4 L.J. (O.S.) K.B. 147.

(*i*) *Hubert* v. *Moreau*, 12 Moore, 216; 5 L.J. (O.S.) C.P. 56; *Phillimore* v. *Barry*, 1 Camp. 513; *Hyde* v. *Johnson*, 2 Bing. N.C. 776, 780; 5 L.J. C.P. 291; *Jacob* v. *Kirk*, 2 Moo. & R. 221.

(*k*) *Bennett* v. *Brumfitt*, L.R. 3 C.P. 28; 37 L.J. C.P. 25.

(*l*) *Coldham* v. *Showler*, 3 C.B. 312; 15 L.J. C.P. 261; *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Doe* v. *Pedgriph*, 4 C. & P. 312.

(*m*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q.B.D. 314; 46 L.J. Q.B. 219.

(*n*) *Eley* v. *Positive Assur. Co.*, 1 Ex.D. 20, 88; 45 L.J. Ex. 451.

the name of the party sought to be charged, printed by a printer in particulars of sale, or in any other printed paper embodying the terms of the contract, may be a signature by "a person lawfully authorised" within the meaning of the statute. If the party has recognised and adopted his printed name or signature—if, for instance, he has sanctioned or permitted the distribution of printed handbills, or printed particulars of sale, in which his name appears—there has been a signature by an agent duly authorised, upon the principle that the subsequent sanction or adoption of the printed name or signature is equivalent to an antecedent authority to the printer to print it (*o*). If an agent has signed a contract without authority, and the principal subsequently adopts the contract or ratifies the transaction, he is bound by the agent's signature (*p*). But the mere introduction of a name into a written or printed paper unrecognised by the party, and not brought home to him as having been written or printed by his authority is, of course, no signature within the meaning of the statute (*q*). A mere clerk or traveller of one partner cannot be treated as an agent to bind the other, unless it be shown that he has received specific and express authority so to do (*r*). One of two or more partners may bind the others by signing the customary trading name of the firm to contracts for the purchase and sale of articles usually dealt in by the firm in the course of its business (*s*). An auctioneer effecting a sale by auction, or an auctioneer's clerk, if specially authorised, taking down the biddings in the presence of the purchaser, is, during the continuance of the sale, but no longer (*t*), the authorised agent of the vendor and purchaser, and is enabled to sign for both or either of the parties, so as to satisfy the Statute of Frauds (*u*); and so is a broker who is employed to sell goods and who signs and delivers bought and sold notes (*x*). Neither of the contracting parties themselves can be the agent of the other for such a purpose (*y*): the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third

(*o*) *Schneider* v. *Norris*, 2 M. & S. 288; *Maclean* v. *Dunn*, 1 Moo. & P. 776; 6 L.J. (O.S.) C.P. 184; *Saunderson* v. *Jackson*, 2 B. & P. 238.

(*p*) *Fitzmaurice* v. *Bayley*, 6 E. & B. 868; 26 L.J. Q.B. 114; *Bigg* v. *Strong*, 4 Jur. N.S. 983; 3 Sm. & G. 592.

(*q*) *Hubert* v. *Treherne*, 3 M. & Gr. 743; 11 L.J. C.P. 78.

(*r*) *Graham* v. *Musson*, 7 Sc. 769; 8 L.J. C.P. 324; *Graham* v. *Fretwell*, 4 Sc. N.R. 25; 11 L.J. C.P. 41; *Blore* v. *Sutton*, 3 Mer. 245; *Durell* v. *Evans*, 1 H. & C. 174; 31 L.J. Ex. 337; *Murphy* v. *Boese*, L.R. 10 Ex. 126; 44 L.J. Ex. 40.

(*s*) *Norton* v. *Seymour*, 3 C.B. 792; 16 L.J. C.P. 100.

(*t*) *Mews* v. *Carr*, 1 H. & N. 488; 26 L.J. Ex. 39; *Bell* v. *Balls*, (1897) 1 Ch. 663; 66 L.J. Ch. 397.

(*u*) *Hinde* v. *Whitehouse*, 7 East, 568; *Emmerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 Taunt. 209; *Bird* v. *Boulter*, 4 B. & Ad. 447; *Sims* v. *Landray*, (1894) 2 Ch. 318; 63 L.J. Ch. 535.

(*x*) *Thompson* v. *Gardiner*, 1 C.P.D. 777.

(*y*) *Wright* v. *Dannah*, 2 Campb. 203; *Sharman* v. *Brandt*, L.R. 6 Q.B. 720; 40 L.J. Q.B. 312.

person; and an auctioneer who signs the defendant's name by his authority cannot afterwards sue the latter upon the contract authenticated by such signature (*z*). If the signature was made by the auctioneer's clerk, the auctioneer may then sue upon the contract (*a*). The agency of an auctioneer, and his authority to bind the bidder by his signature, may be rebutted by showing a contract between the vendor and the bidder inconsistent with such agency (*b*).

Unconscientious use of Statute of Frauds.—Where by the fraud of one of the parties to a contract it has not been reduced into writing, he will not be allowed to set up the statute (*c*).

Confirmation of promises by infants.—By sect. 2 of the Infants' Relief Act, 1874, "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age" (*d*).

Executory promises requiring authentication by deed.—All unilateral or one-sided undertakings and engagements, where there is no mutuality of contract, and nothing is given or agreed to be done, and nothing has been done, as the consideration or inducement for the promise, must be authenticated by deed in order to enable the promisee to maintain an action for the non-performance of them (*ante*, p. 2).

Authentication of leases.—By sect. 3 of the Real Property Act, 1845 (*e*), a lease required by law to be in writing (*f*), of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a

(*z*) *Farebrother* v. *Simmons*, 5 B. & Ald. 333.

(*a*) *Bird* v. *Boulter*, 4 B. & Ad. 443; 1 N. & M. 313.

(*b*) *Bartlett* v. *Purnell*, 4 Ad. & E. 792; 5 L.J. K.B. 169; *Glengall* (*Lord*) v. *Barnard*, 1 Keen, 769; 6 L.J. Ch. 25.

(*c*) *Lincoln* v. *Wright*, 4 De G. & J. 16; 28 L.J. Ch. 705; *Haigh* v. *Kaye*, L.R. 7 Ch. 469; 41 L.J. Ch. 567; *Booth* v. *Turle*, L.R. 16 Eq. 182. See *James* v. *Smith*, (1891) 1 Ch. 384.

(*d*) 37 & 38 Vict. c. 62, s. 2, *post*, p. 380.

(*e*) 8 & 9 Vict. c. 106, s. 3.

(*f*) By the Statute of Frauds (29 Car. 2, c. 3, s. 1), "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put into writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, except (sect. 2) all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised;" and (sect. 3) "no leases, estates, or interest either of freehold, or term of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered unless it be by DEED, or *note in writing* signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall be void at law unless made by deed. It has been held in Ireland that this statute refers only to legal estates, so that an equitable interest, such as an equity of redemption, may be assigned by a note or memorandum in writing without being under seal (*g*). A lease by simple contract for a term exceeding three years in duration, though void as a lease, will operate as an agreement to grant a lease for the term specified (*h*), amd may be specifically enforced (*i*); and a lease or agreement for a lease void as to the duration of the lease may regulate the terms upon which the tenancy subsists in other respects (*k*).

The authority of an agent to make or execute a deed for his principal must be under seal (*l*), except in the case of joint-contractors, one of whom, it has been held, may execute a deed for himself and the others without an authority under seal, provided he execute the deed for himself and the others *in the presence* of the others (*m*).

(*g*) *Stamers* v. *Preston*, 9 Ir. C.L.R. 351, 355.

(*h*) *Bond* v. *Rosling*, 30 L.J. Q.B. 227; 1 B. & S. 371; *Drury* v. *Macnamara*, 5 E. & B. 616; 25 L.J. Q.B. 5; *Tidey* v. *Mollett*, 16 C.B. N.S. 298; 33 L.J. C.P. 235.

(*i*) *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L.J. Ch. 812.

(*k*) *Doe* v. *Bell*, 5 T.R. 471; *Richardson* v. *Gifford*, 1 Ad. & E. 52; 3 L.J. K.B. 122; *Arden* v. *Sullivan*, 14 Q.B. 832; 19 L.J. Q.B. 268; *Tooker* v. *Smith*, 1 H. & N. 732; *Tress* v. *Savage*, 4 E. & B. 43; 23 L.J. Q.B. 339.

(*l*) *Steigiltz* v. *Egginton*, 1 Holt, 141.

(*m*) *Ball* v. *Dunsterville*, 4 T.R. 313.

CHAPTER II.

OF THE INTERPRETATION OF CONTRACTS.

SECTION I.

GENERAL PRINCIPLES OF INTERPRETATION.

Construction of contracts.—Every contract ought to be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant. Every word ought to operate in some shape or other; *nam verba debent intelligi cum effectu ut res magis valeat quam pereat.* One part must be so construed with another that the whole may, if possible, stand; but a clause or particular sentence totally repugnant to the general intent of the contract is void, and must be rejected (*a*). The terms of the contract "are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like acquired a peculiar sense distinct from the popular sense of the same words" (*b*). Technical words of law, however, are to have their legal effect, unless from subsequent inconsistent words it is very clear that the parties used them in a sense different from their legal meaning; and the ordinary grammatical construction is to be followed, unless it is repugnant to the general context of the written instrument (*c*). If the parties have used technical terms, unintelligible to the ordinary reader, but having a distinct meaning amongst mechanics or merchants, extrinsic evidence of such meaning may be given in aid of the interpretation of the deed (*d*). Bad spelling is of no consequence, so long as it appears with certainty what is meant (*e*).

(*a*) *Parkhurst* v. *Smith*, Willes, 332; *Solly* v. *Forbes*, 2 B. & B. 38; 4 Moore, 463; *Eyston* v. *Studd*, Plowd. 465; *Trenchard* v. *Hoskins*, Winch, 93.

(*b*) Lord Ellenborough, *Robertson* v. *French*, 4 East, 137; *Mallan* v. *May*, 13 M. & W. 511; 14 L.J. Ex. 48; *Scott* v. *Bourdillon*, 5 B. & P. 213; *Hart* v. *Standard Marine Ins. Co.*, 22 Q.B.D. 499; 58 L.J. Q.B. 284; *McCowan* v. *Baine*, (1891) A.C. 401.

(*c*) *Lees* v. *Mosley*, 1 You. & C. 607; 5 L.J. Ex. (Eq.) 78; *Elliott* v. *Turner*, 2 C.B. 446; 15 L.J. C.P. 49.

(*d*) *Goblett* v. *Beechy*, 3 Sim. 24; 9 L.J. Ch. 200.

(*e*) *Hulbert* v. *Long*, Cro. Jac. 607; *Osborn's case*, 10 Co. 130, a; 2 Roll. Abr. 147.

But an agreement, the terms of which are unintelligible (*f*), or too vague (*g*), cannot be enforced; where, however, it is confirmed by Act of Parliament, no objection can be taken to any provision in it on the ground of uncertainty (*h*).

Evidence of surrounding circumstances.—To enable the real intention of the parties to be arrived at and a correct application of the language of the contract to the subject-matter thereof to be made, all the surrounding circumstances may be taken into consideration. The law does not deny to the reader the same information that the writer enjoyed; he is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described (*i*). But where there is a written contract, the meaning of which as it stands is clear and unambiguous, former correspondence between the parties cannot be considered for the purpose of arriving at the intention of the parties, nor can words deleted from the document and initialed by the parties as deleted, be used for such purpose (*k*). Where the court has to find a contract in a correspondence, and not in one particular agreement formally signed, the whole of the correspondence which has passed must be taken into consideration (*l*).

Latent ambiguity.—From the admission of such evidence, and from bringing the words of the writing into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the words to the subject-matter of the contract and the objects professed to be described; this is called a LATENT AMBIGUITY, because it is not apparent upon the face of the contract, but arises from the application of the words to the objects to which they refer. "As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim '*ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti*

(*f*) *Guthing* v. *Lynn*, 2 B. & Ad. 232; *Baxter, Ex p., Vince, In re*, (1892) 2 Q.B. 478; 61 L.J. Q.B. 836.

(*g*) *Pearce* v. *Watts*, L.R. 20 Eq. 492; 44 L.J. Ch. 492; *Taylor* v. *Portington*, 7 De G. M. & G. 328.

(*h*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, (1901) 2 Ch. 37; 70 L.J. Ch. 468.

(*i*) *Shore* v. *Wilson*, 9 Cl. & Fin. 555, 569; *Macdonald* v. *Longbottom*, 29 L.J. Q.B. 256; 1 E. & B. 987; *Mumford* v. *Gething*, 29 L.J. C.P. 110; 7 C.B. N.S. 305; *Carr* v. *Montefiore*, 5 B. & S. 408; 33 L.J. Q.B. 256; *Doe* v. *Hubbard*, 20 L.J. Q.B. 67; *Boulter, In re*, 4 Ch.D. 241; 46 L.J. Bank. 11. As to evidence of translators and experts, see *Chatenay* v. *Brazilian Co.*, (1891) 1 Q.B. 79; 60 L.J. Q.B. 295.

(*k*) *Inglis* v. *Buttery*, 3 App.Cas. 552.

(*l*) *Hussey* v. *Horne Payne*, 4 App.Cas. 311; 48 L.J. Ch. 846; *Bristol Bread Co.* v. *Maggs*, 44 Ch.D. 616; 59 L.J. Ch. 472.

tollitur'" (*m*). But the judgment of the court in expounding a deed must be simply declaratory of what is in the deed; it has to ascertain, not what the party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used (*n*). And, "when the words of any written instrument are free from any ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or to the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, and common meaning of the words themselves, and evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible" (*o*).

Patent ambiguity.—Where, by an ambiguity patent on the face of the instrument, the intention of the parties is left in doubt, parol evidence is inadmissible to remove it (*p*). If a blank, for instance, has been left in a deed, or an important clause or word has been omitted by mistake, and it is doubtful what word was intended to have been used, the defect cannot be cured by extrinsic evidence of what was intended to have been inserted (*q*). Evidence merely explanatory of what the party has written is admissible, but not to show what he intended to have written (*r*). But, if the ambiguity arises simply from an imperfect expression of the meaning of the party, and can be resolved by reference to the general context of the instrument, when brought into contact with surrounding circumstances, the court will aid the imperfect expression in favour of the manifest intention, and will draw all such reasonable inferences from the language and general context of the deed as appear to be necessary to give effect to the obvious meaning, and to carry into execution any matter or act clearly contemplated (*s*). If an important word has been omitted by mistake, and it clearly appears from the general context of the instrument, and the light thrown thereon by surrounding circumstances, what the parties really meant, the court, in furtherance of the obvious intent, will construe the deed as if the word had been duly

(*m*) Tindal, C.J., *Miller* v. *Travers*, 1 Moore & Sc. 342, 345; *Doe* v. *Needs*, 2 M. & W. 140; 6 L.J. Ex. 59; *Doe* v. *Hiscocks*, 5 M. & W. 368; 9 L.J. Ex. 27; *Raffles* v. *Wichelhaus*, 33 L.J. Ex. 160; 2 H. & C. 906.

(*n*) *Clayton* v. *Nugent* (*Lord*), 13 L.J. Ex. 365; 13 M. & W. 200.

(*o*) Tindal, C.J., *Shore* v. *Wilson*, 9 Cl. & Fin. 565, 566; *Jones* v. *Newman*, 1 W. Bl. 60.

(*p*) Tindal, C.J., *Saunderson* v. *Piper*, 5 Bing. N.C. 431; 8 L.J. C.P. 227.

(*q*) *Baylis* v. *Church*, 2 Atk. 239; *Hunt* v. *Hart*, 3 Br. C.C. 311.

(*r*) *Miller* v. *Travers*, *supra*; *Clayton* v. *Nugent* (*Lord*), *supra*; and *Shore* v. *Wilson*, *supra*.

(*s*) *Sampson* v. *Easterby*, 9 B. & C. 505; 5 L.J. (O.S.) K.B. 291; *Saltoun* v. *Houston*, 1 Bing. 433; 2 L.J. (O.S.) C.P. 93; *Bache* v. *Proctor*, 1 Doug. 383.

inserted (*t*). Where the name of the obligee of a bond was omitted in the obligatory part of an instrument, and it did not consequently there appear to whom the obligor had become bound, but it afterwards appeared, from the condition, who he was, the bond was held good by reference to the condition, and was construed as if no such clerical error had occurred (*u*). So, where the name of the grantor had been omitted in the operative part of a grant, but it clearly appeared from another part of the deed who he was, the deed was held to be valid, and was carried into full operation (*x*). A deed, therefore, will not, in such cases, be construed to be of no effect; *nam benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat* (*y*). The words "covenant" and "condition," when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean contract or stipulation (*z*).

Figures and words at length.—The meaning of words at length cannot be contradicted or altered by figures. Where the figures and the words of a bill of exchange or promissory note, for example, disagree, the courts will give force to the words at length, in preference to the figures, "because a man is more apt to commit an error with his pen in writing a figure than he is in writing a word" (*a*).

Repugnant and void limitations of liability.—If a man covenants in his own name for the performance of some particular act, and then seeks by proviso to relieve himself from ALL LIABILITY upon the covenant, the proviso will be rejected as being repugnant to the covenant (*b*). If two persons make a grant by deed, and it is provided that the deed shall not charge one of the grantors, the proviso is void; for it restrains all the effect of the grant as against him (*c*). If a company authorises its agent to issue bills of exchange with restricted liability as regards the shareholders, such restriction of liability is repugnant and void (*d*). Where by indenture the defendants covenanted for themselves and their successors churchwardens, &c., with the plaintiff, that they, the said churchwardens, &c., and their successors, would pay to the plaintiff a certain sum of money by instalments, but it was provided that nothing contained in the said indenture should be deemed, or

(*t*) *Coles* v. *Hulme*, 8 B. & C. 568; 7 L.J. (O.S.) K.B. 29; *Phipps* v. *Tanner*, 5 C. & P. 488; *Jarvis* v. *Wilkins*, 7 M. & W. 410; 10 L.J. Ex. 104.

(*u*) *Langdon* v. *Goole*, 3 Lev. 21.

(*x*) *Say and Sele's case*, 10 Mod. 46.

(*y*) Platt on Covenant, ch. 2; Bac. Abr. (Covenant); *Fazakerly* v. *M'Knight*, 6 E. & B. 805; 26 L.J. Q.B. 30.

(*z*) *Hayne* v. *Cummings*, 16 C.B. N.S. 421.

(*a*) *Saunderson* v. *Piper*, 5 Bing. N.C. 431; 8 L.J. C.P. 227.

(*b*) Jenk. Cent. 96, pl. 86.

(*c*) Bro. Abr. CONDITIONS, pl. 238.

(*d*) *State Fire Ins. Co., In re*, 32 L.J. Ch. 300.

construed to be, any personal covenant of, or obligation upon, the defendants, or should in anywise personally affect them, their goods, effects, or estates, but should be binding upon the churchwardens and overseers of the poor of the said parish, and their successors for the time being, it was held that, as the defendants could not covenant so as to bind their successors, the covenant was their own personal covenant, and that the proviso, being in direct contradiction to the covenant, and utterly inconsistent with any personal liability of any kind whatever upon it, must be rejected as repugnant (*e*). But a proviso limiting the liability without destroying it is valid (*f*).

Limitation of liability to particular fund.—When a covenant has been entered into for the payment of money, a proviso by the same deed exonerating the covenantor from all liability upon the covenant is not nugatory, if a particular fund is charged with the payment of the money. In the case of covenants to pay an annuity, if the land of the covenantor is charged with the payment, a proviso exonerating the person and personalty of the grantor is good; and Lord Coke, in commenting upon sect. 220, in Littleton, says, "It appeareth that when in a general grant the law doth give two remedies, the grantor may provide that the grantee shall not use one of them, and so leave the party to the other. But, where the grantee hath but one remedy, there that remedy cannot be barred by any proviso; for such a proviso would be repugnant to the grant." Consequently a proviso restricting the liability, good at the beginning, may become repugnant and void, as, if a man by deed grants a rent for life issuing out of his land, with a proviso that it shall not charge his person, this is a good proviso; yet, if the rent is in arrear, and the grantee dies, his executors shall charge the person of the grantor in an action of debt; for otherwise they would be without remedy; and therefore the proviso is now become repugnant, and, by consequence, void (*g*). Covenants to pay out of a particular fund do not of necessity imply that the payment is not to be made, unless the fund is raised, and do not therefore make the contract conditional and contingent on the realization of the fund. Such a covenant is an absolute covenant to pay the money, unless there is an express limitation of the liability (*h*).

In the case of simple contracts, however, where the party has looked to the anticipated realization of funds by projectors of a

(*e*) *Furnivall* v. *Coombes*, 5 M. & G. 736; 12 L.J. C.P. 265.

(*f*) *Williams* v. *Hathaway*, 6 Ch.D. 544.

(*g*) *Mildmay's case*, 6 Co. 41 b.

(*h*) *Bain* v. *Kirk*, 18 L.J. Q.B. 83; *Pilbrow* v. *Pilbrow's Co.*, 5 C.B. 472; 17 L.J. C.P. 166; *Sunderland Marine Ins. Co.* v. *Kearney*, 20 L.J. Q.B. 417; 16 Q.B. 925.

particular undertaking, and not to the personal liability of the parties with whom he has contracted, his claim is confined to the fund, and he cannot enforce payment from individuals; and, if the project miscarries, and funds are not realised, he has no claim upon anybody or for anything. When it is not said at whose option one of two alternatives is to take place, the rule of law is that the option is in the party who is to do the first act (*i*). Thus a loan for nine or six months gives the borrower the option (*k*). A lease for seven, fourteen, or twenty-one years, without saying at whose option, is at the option of the lessee (*l*).

Words amounting to a covenant.—No precise form of words is necessary to constitute a covenant. Whatever words are used by a party to a deed, if he intends that they shall operate as a covenant he will be held liable (*m*). The words in a contract under seal, "I will be answerable," or "I will be accountable," to A. for 10*l.*, or "I am content to give A. 10*l.* at Michaelmas," amount to a covenant to pay the money (*n*); and words used in the future tense, unconnected with precedent words of agreement, will in themselves be sufficient to constitute an express covenant (*o*). An action of covenant will lie on general words of contract and agreement contained in a deed, although the parties profess not to contract "by way of covenant," as where they "resolved and agreed, and did, by way of declaration and not of covenant, spontaneously and fully agree;" and Lord Eldon said it was nonsense to talk of agreeing and declaring (under seal) without covenanting (*p*). Where a lessee covenanted that he would plough, sow, manure, and cultivate the demised premises, "except the rabbit-warren and sheep-walk," it was held that, as the parties clearly meant by the exception that neither the warren nor the sheep-walk should be ploughed, the exception ought to be construed as a covenant that it should not be done, and that an action of covenant consequently was maintainable for the doing of it (*q*). So, when it was agreed that a lessee should have "*conveniens lignum non succidendo arbores*," it was held that the lessor might have an action of covenant against him on these

(*i*) *Price* v. *Nixon*, 5 Taunt. 338.
(*k*) *Reed* v. *Kilburn Co-operative Soc.*, L.R. 10 Q.B. 264; 44 L.J. Q.B. 126.
(*l*) *Dunn* v. *Spurrier*, 3 B. & P. 399.
(*m*) *Isaacson* v. *Harwood*, L.R. 3 Ch. 225; 37 L.J. Ch. 209.
(*n*) 3 Leon. 119, pl. 169; *Brice* v. *Carre*, 1 Lev. 47; 1 Keb. 155.
(*o*) *Bret* v. *Cumberland*, Cro. Jac. 399.
(*p*) *Ellison* v. *Bignold*, 2 J. & W. 510; *Wood* v. *Copper Miners' Co.*, 7 C.B. 906; 18 L.J. C.P. 293; *Sampson* v. *Easterby*, 9 B. & C. 505, 514; 5 L.J. (O.S.) K.B. 291; *Courtney* v. *Taylor*, 6 M. & G. 851; 12 L.J. C.P. 330; *Williams* v. *Burrell*, 1 C.B. 429; 14 L.J. C.P. 98; *James* v. *Cochrane*, 21 L.J. Ex. 229; 7 Exch. 170; affirmed, 22 L.J. Ex. 201; 8 Exch. 556; *Mason* v. *Cole*, 4 Exch. 379; 18 L.J. Ex. 478; *Farrall* v. *Hilditch*, 5 C.B. N.S. 853; 28 L.J. C.P. 221; *Marryat* v. *Marryat*, 28 Bea. 224; 29 L.J. Ch. 665; *Jackson* v. *N.E. Ry.*, 7 Ch.D. 573; 47 L.J. Ch. 303.
(*q*) *St. Albans* (*Duke*) v. *Ellis*, 16 East, 532.

words for cutting down the trees (*r*). Words of recital in a deed will constitute an agreement between the parties upon which an action of covenant may be maintained, where it appears to be the intention of the parties that they should do so (*s*). Thus, where a termor for ninety-nine years, if three lives should so long continue, recited his interest, and that one life was in being, and assigned his term, it was adjudged that this recital amounted to a covenant that the life continued (*t*). So the recital in a deed of a previous agreement to do a certain act amounts to a covenant in the deed for the performance of it; for the recital operates as a solemn confirmation of the "agreement and intent precedent" (*u*). But a recital does not necessarily imply a covenant; and whether it does so or not in each case depends on what is to be collected as the intention of the parties from the whole instrument (*x*). Thus where a marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled, and the corresponding operative part was a covenant by the husband alone, it was held that the covenant was not controlled by the recital, and was not binding on the wife (*y*). When there is an acceptance of a trusteeship under seal, that does not amount to a covenant to perform the duties of the office (*z*).

Words of proviso and condition may be construed as an express covenant, when such a construction is necessary to give effect to the apparent intention of the parties (*a*). Thus, where a conveyance was made by the plaintiff of an incorporeal right to the defendant, provided that out of the first profits the defendant should pay the plaintiff 500*l.*, it was held that an action of covenant might be maintained on these words of proviso for the non-payment of the money (*b*). Where a lease executed by the lessor and lessee contained a covenant on the part of the lessee to maintain and repair a farmhouse and premises, "the said farmhouse and buildings being previously put into repair" by the lessor, it was held that these words amounted to an absolute covenant on the part of the lessor to put the house into repair, and not merely to a qualification of the covenant of the lessee (*c*). So, where a lease was granted on condition that the lessee should keep and leave the demised premises at the end of the term in as good plight as he found them, or that

(*r*) March 9, pl. 22; Dy. 19, b. pl. (115); *Stevinson's case*, 1 Leon. 324.

(*s*) *Severn & Clarke's case*, 1 Leon. 122; *Aspdin* v. *Austin*, 5 Q.B. 683; 13 L.J. Q.B. 155; *Lay* v. *Mottram*, 19 C.B. N.S. 479.

(*t*) *Holles* v. *Carr*, 3 Swanst. 638, 648; 2 Freem. 3.

(*u*) *Barfoot* v. *Freswell*, 3 Keb. 46*b*.

(*x*) *Ivens* v. *Elwes*, 24 L.J. Ch. 249; 3 Drew. 25.

(*y*) *Young* v. *Smith*, L.R. 1 Eq. 180.

(*z*) *Holland* v. *Holland*, L.R. 4 Ch. 449; 38 L.J. Ch. 398.

(*a*) *Brooks* v. *Drysdale*, 3 C.P.D. 52.

(*b*) *Clapham* v. *Moyl*, 1 Keb. 842, 897.

(*c*) *Connock* v. *Jones*, 3 Exch. 233; 18 L.J. Ex. 204.

he should not exercise thereon a particular trade or business (*d*), it was held that an action of covenant would lie for a breach of this condition. Where, however, the proviso or condition is by way of qualification of the covenant, or defeasance of the deed or of the estate and interest thereby created, and not in the nature of an agreement, as if a lease be granted, provided and on condition that the lessee collect and pay the rents of the other houses of the lessor, an action of covenant is not maintainable. If a lessee for years covenant to repair, "provided always and it is agreed that the lessor shall find great timber, &c.," a covenant is created on the part of the lessor to find the timber by reason of the word "agreed;" but, if the lessee had covenanted to repair provided the lessor found the timber, without the word "agreed," the proviso would not have amounted to a covenant on the part of the lessor, but to a qualification only of the covenant of the lessee (*e*).

Covenants by implication of law.—If a lessee covenants that he will "fold sheep" (*f*), or supply burnt lime from the demised quarries (*g*), it is no answer to an action on the covenants respectively to say that no sheep are kept and no lime burnt. If two persons covenant together that it shall be lawful for the one to hold possession of the other's property for a certain time, the law infers therefrom an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if he detains it beyond that time, it is a breach of covenant (*h*).

Bonds and obligations.—No precise form of words is necessary to create a bond or obligation. Any memorandum in writing under seal, acknowledging a debt, or denoting the intention of the party to bind himself for the payment of a sum of money, will oblige him as effectually as the most formal words he can make use of—such, for example, as "I, A. B., have borrowed 10*l.* of C. D.," or "Memorandum that A. owes B. 10*l.*," or "I have agreed to pay J. S. 19*l.*" Every word which proves a man to be a debtor, if it be under seal, will charge him with the payment of the money (*i*). If no time is limited in a bond for the payment of money acknowledged to be due, such money is due immediately, and payable on demand. If it be for the performance of an act on the 29th of February next following, and the next February has only twenty-eight days, it has been said that the party is not bound

(*d*) *Hodson* v. *Coppard*, 30 L.J. Ch. 20; 29 Beav. 4.

(*e*) 1 Rolle Abr. 518; Bac. Abr. Cov. 340; *Geery* v. *Reason*, Cro. Car. 128; *Simpson* v. *Titterell*, Cro. Eliz. 242; *Wolveridge* v. *Steward*, 3 Moore & Sc. 561; 3 L.J. Ex. 360.

(*f*) *Webb* v. *Plummer*, 2 B. & Ald. 746.

(*g*) *Shrewsbury* (*Earl*) v. *Gould*, *ib.* 487.

(*h*) *Randall* v. *Lynch*, 12 East, 182.

(*i*) *Coke's case*, Dyer, 22, b; *Bedow's case*, 1 Leon. 25; Bac. Abr. p. 804; *Sawyer* v. *Mawgridge*, 11 Mod. 218; 1 Rolle Abr. 146; *Watson* v. *Snead*, Vent. 238.

to do the act until the next leap-year, when February has twenty-nine days (*k*).

Dependent and independent covenants.—There are three kinds of covenants: first, mutual and independent covenants, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; secondly, conditional and dependent covenants, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant; thirdly, covenants which are mutual conditions to be performed at the same time, and, in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act (*l*).

Conditions precedent.—Stipulations in a contract as to something future to be done often constitute conditions precedent to be performed by one party before any liability attaches to the other. Whether particular stipulations are to be conditions precedent or not depends upon the intention of the parties, to be gathered from the language of the particular instrument (*m*). Where a tenant covenanted to repair, the landlord "finding, allowing, and assigning timber sufficient for such reparations to be cut and carried by the lessee," it was held that the finding and assigning the timber by the lessor was a condition precedent to the liability of the lessee to repair (*n*); but, if the landlord is ready and willing, and offers to find and allow the timber, there is a sufficient performance of the condition on his part (*o*). If the covenant has annexed to it a mere licence to take timber for the purpose of repairs, the licence does not amount to a qualification of the covenant, so as to exonerate the tenant from his liability to repair in case there should happen to be no timber on the demised premises fit for repairs (*p*). Whenever it appears to have been the intention of the parties that performance of one stipulation should not be a condition precedent to the performance of another, effect will be

(*k*) 1 Leon. 101, pl. 132.

(*l*) *Kingston* v. *Preston*, cited 2 Doug. 689; *Stavers* v. *Curling*, 3 Sc. 740, 754; 6 L.J. C.P. 41; *Thorpe* v. *Thorpe*, 1 Salk. 171; *Peeters* v. *Opie*, 2 Saund. 350.

(*m*) *Havelock* v. *Geddes*, 10 East, 555; *Seegar* v. *Duthie*, 8 C.B. N.S. 45, 72; 30 L.J. C.P. 65.

(*n*) *Thomas* v. *Cadwallader*, Willes, 496; *Neale* v. *Ratcliffe*, 15 Q.B. 916; 20 L.J. Q.B. 130.

(*o*) *Martyn* v. *Clue*, 18 Q.B. 681; 22 L.J. Q.B. 147.

(*p*) *Bristol* (*Dean*) v. *Jones*, 28 L.J. Q.B. 201; 1 E. & E. 484.

given to such intention (*q*); but, where the intention is to rely on a previous performance, and not on the remedy for non-performance, performance is a condition precedent (*r*). Where a landlord granted all the coal lying and being within and under certain premises, and the grantee covenanted to pay so much for every acre of coal found within or under the said premises, and to pay 40*l.* a year whether the whole of an acre should be gotten or not, it was held that the *finding* of coal was not a condition precedent to the landlord's right to receive the 40*l.* a year (*s*). Where there was a covenant by the lessee to pay rent and to do repairs, and also a covenant by the lessor for quiet enjoyment, "the lessee paying the rent when due and observing the covenants on his part," it was held that the covenant for quiet enjoyment was an independent covenant (*t*).

The word "upon" may mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter of the instrument (*u*).

Where a singer engaged to attend for rehearsal six days before appearance, but neglected to do so, it was held that this was not a breach of a condition precedent, as it did not go to the root of the contract (*x*); but where the plaintiff was, through illness, quite unfit to undertake the earlier performances promised, it was held that the defendant was excused from his part of the contract, as the plaintiff's inability to perform did go to the root of the matter (*y*).

Waiver of conditions precedent.—Where a stipulation in the nature of a condition precedent has been partially performed, it ceases to be available as a condition, and becomes a stipulation by way of agreement, for the breach of which compensation must be sought in damages (*z*).

Independent covenants and promises.—"If there be a day set for the payment of the money, or for the doing of the thing which one promises and agrees to do for another thing, and that day is to happen, or may happen, before the other thing can be performed, an action may be brought for the money before the thing be done; for it appears that the party relied upon his remedy upon the

(*q*) *Christie* v. *Borelly*, 7 C.B. N.S. 561; 29 L.J. C.P. 153; *Dodd* v. *Ponsford*, 6 C.B. N.S. 324.

(*r*) *Roberts* v. *Brett*, 34 L.J. C.P. 241; 11 H.L. Cas. 337.

(*s*) *Jowett* v. *Spencer*, 1 Exch. 647; 17 L.J. Ex. 367.

(*t*) *Edge* v. *Boileau*, 16 Q.B.D. 117; 55 L.J. Q.B. 90.

(*u*) *Reg.* v. *Humphery*, 10 Ad. & E. 335, 369; 5 L.J. Q.B. 202.

(*x*) *Bertini* v. *Gye*, 1 Q.B.D. 183; 45 L.J. Q.B. 209.

(*y*) *Poussard* v. *Spiers*, 1 Q.B.D. 410; 45 L.J. Q.B. 621.

(*z*) *Behn* v. *Burness*, 3 B. & S. 753; 32 L.J. Q.B. 204; *Pust* v. *Dowie*, 5 B. & S. 20, 33; 32 L.J. Q.B. 179.

contract," and not upon a previous or concurrent performance (*a*). If in a contract of hiring and service it is stipulated that the hire shall be paid before the time appointed for the rendering of the service, there the servant may bring an action for the money before the service has been performed (*b*). So, if there are mutual covenants for the sale and purchase of an estate, and a fixed day is appointed for the payment of the purchase-money, and another and later day for the conveyance of the property, the money must be paid on the day appointed, although the purchaser has not got the estate (*c*). Where a purchaser agreed to pay for goods, not on, but after, delivery, it was held that actual delivery was precedent to the right of the vendor to sue for the price, unless the defendant had refused to receive the goods, and by his own act had prevented the performance of the contract by the plaintiff (*d*). So, where a vendor agreed to deliver forthwith fifty tons of iron for the price of 9*l.* per ton, the price to be paid in cash in fourteen days, it was held that the delivery of the iron was a condition precedent to the payment of the price, and, the vendor not having delivered the goods within the fourteen days, that the defendant was discharged from liability (*e*). If a deed purports and professes to grant and convey an interest, the covenants of the grantee immediately relating to that interest, and founded on the grant thereof, are conditional and qualified, so that the liability of the grantee upon them is dependent upon the interest, or some portion thereof, being actually transmitted to him. But this is not the case with respect to the covenants of the grantor of that interest; his covenants are independent and unconditional; and he is consequently liable upon them, whether the interest he professes to convey does or does not pass (*f*).

Covenants founded on a mutuality of obligation and liability must be mutually binding upon the parties to them. If, therefore, one of several parties to a deed *inter partes* founded on mutual covenants neglects to execute the deed, the contract is not binding on the others who have executed it (*g*). And, if a deed of covenant *inter partes*, originally binding upon all, becomes ineffectual and

(*a*) Holt, C.J., *Thorp* v. *Thorp*, 12 Mod. 461; *Parker* v. *Rawlings*, 5 L.J. (O.S.) C.P. 174; 4 Bing. 280; *Judson* v. *Bowden*, 1 Exch. 166; 17 L.J. Ex. 172; *Terry* v. *Duntze*, 2 H. Bl. 389; *Cutler* v. *Bower*, 11 Q.B. 973; 17 L.J. Q.B. 217; *Dicker* v. *Jackson*, 6 C.B. 103, 114; 17 L.J. C.P. 234.

(*b*) *Pool's case*, 1 Wms. Saund. 320, b.

(*c*) *Sibthorp* v. *Brunel*, 3 Exch. 826; *Yates* v. *Gardiner*, 20 L.J. Ex. 327; *Pordage* v. *Cole*, 1 Wms. Saund. 319, b; *Mattock* v. *Kinglake*, 10 Ad. & E. 50; 8 L.J. Q.B. 215; *Spiller* v. *Westlake*, 2 B. & Ad. 157; 9 L.J. (O.S.) K.B. 224; *Walker* v. *Harris*, 1 Anstr. 245.

(*d*) *Ripley* v. *M'Clure*, 4 Exch. 345; 18 L.J. Ex. 419.

(*e*) *Staunton* v. *Wood*, 16 Q.B. 638.

(*f*) *Walter* v. *Norwich* (*Dean*), 1 Brownl. & Gold. 21; Owen, 136; *Jones* v. *King*, 4 M. & S. 188; *Northcott* v. *Underhill*, 1 Raym. 388.

(*g*) *Antram* v. *Chace*, 15 East, 212; *Marsh* v. *Wood*, 9 B. & C. 665; 7 L.J. (O.S.) K.B. 327.

inoperative as to one by matter *ex post facto*, such as bankruptcy, the deed is wholly void (*h*). But, where the covenant is not founded upon some interest to be created by deed, or upon a mutuality of obligation and liability, the general rule of law is that, where a party has a covenant made to him, and he in return is to make a covenant, he may sue on the covenant made to him, even though he himself has not executed the deed (*i*).

Implied stipulations.—If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative (*k*). Where a contract as expressed in writing would not carry out the intention of the parties, the law will imply any term obviously intended by them which is necessary to make the contract effectual (*l*). But where two parties mutually agree for their mutual benefit that one shall be sole agent for the other to sell goods in a particular town, there is no implied condition that the business itself shall be continued (*m*).

Usual covenants.—Prior to the Conveyancing Act, 1881, it was a very frequent stipulation in an agreement for a lease that the lease should contain all "usual covenants," and the courts have had frequently to decide what is or is not a "usual covenant" (*n*). Thus it has been held that covenants to pay rent (*o*), to repair (*p*), for quiet enjoyment (*q*), and to pay rates and taxes when net rent is fixed (*r*), are usual covenants. And, upon the other hand, that covenants not to underlet or assign (*s*), not to carry on a particular trade (*t*), are not "usual." In mining leases it has been held that a proviso for re-entry upon a forfeiture by bankruptcy or assignment (*u*), and a covenant that the lease should

(*h*) *Kearsey* v. *Carstairs*, 2 B. & Ad. 726; 9 L.J. (O.S.) K.B. 323.

(*i*) *Morgan* v. *Pike*, 14 C.B. 473; 23 L.J. C.P. 64.

(*k*) *Stirling* v. *Maitland*, 5 B. & S. 840; 34 L.J. Q.B. 1; *McIntyre* v. *Belcher*, 14 C.B.N.S. 654; 32 L.J. C.P. 254; *Hamlyn* v. *Wood*, (1891) 2 Q.B. 488; 60 L.J. Q.B. 734.

(*l*) *Oriental Steamship Co.* v. *Tylor*, (1893) 2 Q.B. 518; 63 L.J. Q.B. 128; *Holford* v. *Acton Urban Council*, (1898) 1 Ch. 66; 67 L.J. Ch. 636.

(*m*) *Rhodes* v. *Forwood*, 1 App.Cas. 256; 47 L.J. Ex. 396; but see *Turner* v. *Goldsmith*, (1891) 1 Q.B. 544; 60 L.J. Q.B. 247.

(*n*) As to covenants implied by sect. 7 of 44 & 45 Vict. c. 41, see *post*, p. 414.

(*o*) *Taylor* v. *Horde*, 1 Burr. 60.

(*p*) *Kendall* v. *Hill*, 6 Jur. N.S. 968.

(*q*) Davidson's Precedents, vol. 5, pt. 1, p. 51 (3rd ed.).

(*r*) *Bennett* v. *Womack*, 7 B. & C. 627; 6 L.J. (O.S.) K.B. 175.

(*s*) *Hampshire* v. *Wickens*, 7 Ch.D. 555; 47 L.J. Ch. 243; *Buckland* v. *Papillon*, L.R. 2 Ch. 67; 36 L.J. Ch. 81; *Bishop* v. *Taylor*, 60 L.J. Q.B. 556.

(*t*) *Propert* v. *Parker*, 3 Myl. & K. 280; and see *Van* v. *Corpe*, 3 Myl. & K. 269; 6 L.J. Ch. 208; *Doe* d. *Bute* (*Marquis*) v. *Guest*, 15 M. & W. 160.

(*u*) *Hodgkinson* v. *Crowe*, L.R. 10 Ch. 622; 44 L.J. Ch. 680; see *Anderton's Contract*, *In re*, 45 Ch.D. 476; 59 L.J. Ch. 765.

determine when the mines could not be worked to a profit (*v*), are not "usual."

Computation of time.—Whenever a person is allowed a specified number of months for the doing of anything, the month is understood to be a calendar and not a lunar month, unless it appears, from the general context of the contract, that a lunar month was intended (*w*). When time is to be computed from a particular day, or from the day of an act being done, or the happening of a particular event, such day is to be excluded from the computation; for our law rejects fractions of a day, and an act done in the compass of it is not referable to one portion of the day more than another, so that the act is not considered to be passed and done with until the day has passed. When, therefore, goods were sold on the 5th of October to be paid for in two months, it was held that the day on which the contract was made was to be excluded from the computation, and that an action for the price could not be maintained until after the expiration of the 5th of December (*y*).

In considering whether, upon a contract to do an act or enter into an engagement at or for a definite time from a certain date, the time is to be reckoned exclusively or inclusively of the last day, it is impossible to lay down any fixed rule; each case must depend on its own circumstances and subject-matter (*z*). But in general the last day is to be included (*a*).

Interpretation of contracts made in one country and enforced in another.—All contracts made in one country concerning land and houses and immovable property situate in another country must be interpreted according to the law of the country in which the property is situate, the "*lex loci rei sitæ*," and not by the "*lex loci contractûs*," or the law of the country where the contract is made (*b*). A contract or settlement, therefore, made in consideration of marriage, which deals with heritable property situate in Scotland will be construed in England according to the law of Scotland (*c*); and the English courts will enforce the stipulations of an unsealed lease made between Englishmen in England, conveying a right of sporting over land in Scotland, because by Scotch law an instru-

(*v*) *Strelley* v. *Pearson*, 15 Ch.D. 113; 49 L.J. Ch. 406.

(*x*) *Lang* v. *Gale*, 1 M. & S. 111; *Jolly* v. *Young*, 1 Esp. 186; *Cockell* v. *Gray*, 6 Moore, 483, 486; 3 B. & B. 186.

(*y*) *Webb* v. *Fairmaner*, 3 M. & W. 473; 7 L.J. Ex. 140; *Young* v. *Higgon*, 6 M. & W. 49; 9 L.J. M.C. 29; *Mercantile Marine Insurance Co.* v. *Tithering-ton*, 34 L.J. Q.B. 11; 5 B. & S. 765. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 10, *post*, p. 503.

(*z*) *Pugh* v. *Leeds* (*Duke*), Cowp. 714. As to bills of exchange, see 45 & 46 Vict. c. 61, ss. 14 and 92, *post*, p. 1135.

(*a*) *Ackland* v. *Lutley*, 9 Ad. & E. 879; 8 L.J. Q.B. 164; *Webb* v. *Fairmaner*, *supra*; *Watson* v. *Pears*, 2 Campb. 294; *Lester* v. *Garland*, 15 Ves. 248; *Isaacs* v. *Royal Insurance Co.*, L.R. 5 Ex. 296; 39 L.J. Ex. 189; *Bellhouse* v. *Mellor*, 4 H. & N. 116; 28 L.J. Ex. 141.

(*b*) Story's Confl. of Laws, ss. 424, 428.

(*c*) *Duncan* v. *Cannan*, 23 L.J. Ch. 265; 18 Beav. 128.

ment under seal is not necessary for the conveyance of a right to an incorporeal hereditament (*d*). But a contract of marriage made in Scotland in which trusts were declared in English form as to English real property, and in Scotch form as to Scotch personalty, was construed as to the English property by English law (*e*). But contracts in general receive their interpretation either from the law of the country in which the contract is made, the "*lex loci contractûs*," or the law of the country in which the contract is to be performed (*f*). The law of the place where the contract is made is *primâ facie* that which the parties intended should apply, and therefore that law ought to prevail in the absence of circumstances indicating a different intention (*g*). If no place of performance is specified on the face of the contract, the *lex loci contractûs* will determine the rights that are acquired on the one side, and the liabilities incurred on the other. If the contract is valid by the law of the country where it is made, it is valid everywhere, unless it is *contra bonos mores*, or is a contract for the doing of a thing which is directly prohibited and forbidden in, or contrary to the public policy of, the country where the contract is sought to be enforced (*h*); for remedies must be pursued by the means which the law points out in the place where the remedy is sought to be obtained (*i*). "So much of the law of the country where the contract is made," observes Tindal, C. J., "as affects the rights and merits of the contract, all that relates '*ad litis decisionem*,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*,' is taken from the *lex fori* of that country where the action is brought" (*k*). Where a policy of life insurance granted by an English company was assigned by a person domiciled in Cape Colony to his wife, it was held that the assignment was governed by the law of Cape Colony (*l*).

The rule governing the interpretation of a contract made in one

(*d*) *Adams* v. *Clutterbuck*, 10 Q.B.D. 403; 52 L.J. Q.B. 607.

(*e*) *Chamberlain* v. *Napier*, 15 Ch.D. 614; 49 L.J. Ch. 628.

(*f*) *Robinson* v. *Bland*, 1 W. Bl. 256, 259; *Gibbs* v. *Fremont*, 9 Exch. 25; 22 L.J. Ex. 302.

(*g*) *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115; 35 L.J. Q.B. 74; *Jacobs* v. *Credit Lyonnais*, 12 Q.B.D. 589; 53 L.J. Q.B. 156; *Missouri Steamship Co., In re*, 42 Ch.D. 321; 58 L.J. Ch. 721; *Royal Exch. Assur. Corp.* v. *Sjorforsackrings Aktiebolaget Veega*, (1902) 2 K.B. 384; 71 L.J. K.B. 739.

(*h*) *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L.J. Ch. 417; *Grell* v. *Levy*, 16 C.B. N.S. 79; *Branley* v. *S.E. Ry.*, 12 C.B. N.S. 72; 31 L.J. C.P. 286.

(*i*) *Robinson* v. *Bland*, 2 Burr. 1085; 1 W. Bl. 234, 257; *Forbes* v. *Cochrane*, 2 B. & C. 471; 2 L.J. (O.S.) K.B. 67; *Guepratte* v. *Young*, 4 De G. & Sm. 217; *Cood* v. *Cood*, 33 L.J. Ch. 278; 33 Beav. 314; *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L.J. Ch. 417.

(*k*) *Huber* v. *Steiner*, 2 Sc. 304; *Leroux* v. *Brown*, 12 C.B. 803; 22 L.J. C.P. 1; *De La Vega* v. *Vianna*, 1 B. & Ad. 284; 8 L.J. (O.S.) K.B. 388; *Macfarlane* v. *Norris*, 2 B. & S. 783; 31 L.J. Q.B. 245; *Williams* v. *Wheeler*, 8 C.B. N.S. 299; *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L.J. Q.B. 81.

(*l*) *Lee* v. *Abdy*, 17 Q.B.D. 309.

country, to be performed wholly or partly in another, is, that the law of the country where the contract is made governs as to the nature of the obligation and the interpretation of it, if the parties to the contract are either subjects of the power there ruling, or as temporary residents owe that power a temporary allegiance (*m*). But a contract between an Englishman domiciled and resident in England, and an Englishman resident in a foreign country, but not having acquired a foreign domicile, must be governed by the rules of English law (*n*). Where a contract is entered into between persons residing in different countries, where different systems of law prevail, it is a question in each case with reference to what system of law the parties contracted, and what was their intention as to the law which should determine their rights under the contract. A clear intention, therefore, appearing on the face of a contract to be performed abroad that disputes arising under it should be settled according to the *lex loci contractûs* will override the ordinary rule that such disputes should be settled by the *lex loci solutionis* (*o*). And, when the government of a state contracts a loan in another country, the contract is governed by the law of the borrowing state, and not by that of the country where the contract is made (*p*).

When a contract is made in a foreign country and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and, fourthly, evidence of any peculiar rules of construction which may exist in that law; and must then itself interpret the document on ordinary principles of construction (*q*). Where mutual debts are contracted in a foreign country, the law of that country as to set-off will apply (*r*).

Foreign bonds, bills, and notes—Conflict of laws.—If a bond or obligation for the payment of a sum of money be made in France, and no place of payment is designated on the face of the contract, the extent of obligation and liability incurred on the one side, and the right acquired on the other, will be regulated by the law of France (*s*); but, if the money is to be paid in England, the legal effect of the contract will be determined by

(*m*) *Peninsular & Oriental St. Nav. Co.* v. *Shand*, 3 Moo. P.C. N.S. 272; *Jacobs* v. *Credit Lyonnais*, 12 Q.B.D. 589; 53 L.J. Q.B. 156.

(*n*) *Cood* v. *Cood*, 33 Beav. 314; 33 L.J. Ch. 278.

(*o*) *Hamlyn* v. *Talisker Distillery*, (1894) A.C. 202; *S. African Breweries* v. *King*, (1900) 1 Ch. 273; 69 L.J. Ch. 171; *Spurrier* v. *La Cloche*, (1902) A.C. 446; 71 L.J. P.C. 101.

(*p*) *Smith* v. *Weguelin*, L.R. 8 Eq. 198; 38 L.J. Ch. 465.

(*q*) *Di Sora* v. *Phillips*, 10 H.L. Cas. 624; 33 L.J. Ch. 129; *Chatenay* v. *Brazilian Co.*, (1891) 1 Q.B. 79; 60 L.J. Q.B. 295.

(*r*) *Macfarlane* v. *Norris*, 2 B. & S. 783; 31 L.J. Q.B. 245; *sed quære.*

(*s*) *Melan* v. *de Fitzjames* (*Duke*), 1 B. & P. 142.

the English law, the "*lex loci solutionis*." On a foreign bill the liability of the acceptor, and the rate of interest payable, where no rate is expressed on the face of the bill, will be determined by the law of the country where the bill is payable; but the obligation of the drawer, who binds himself to pay in case the acceptor does not, will be governed by the law of the place where the bill was drawn, and not by the law of the place where it was to be paid by the drawee. In the case of a bill drawn in France and accepted in England, if the drawer is sued upon the bill, the contract will be governed by the law of France, where the bill was drawn; if the acceptor is sued, it will be governed by the law of England, where the acceptor's contract to pay was made (*t*). A bill drawn in France *primâ facie* bears interest as a debt in France would do, if nothing else appear; but, if that bill be endorsed in Belgium, the indorser is a new drawer; and it may be a question whether this indorsement is a drawing of a new bill in Belgium, or only a new drawing of the French bill. In the former case it would carry the Belgian, in the latter the French, rate of interest (*u*). The indorsement of a bill in blank does not, according to the French law, pass the property in the bill absolutely, but only subject to all the exceptions which would be available against the indorser himself; but such an indorsee is entitled to sue on the bill in his own name in France, and therefore can do the same in this country (*x*). If the bill is drawn and accepted and payable in England, an indorsement in blank in France by a French subject residing there will give to the holder a right to sue the acceptor in this country (*y*).

Bills of exchange were drawn in France by a domiciled Frenchman, in the French language, in English form, on an English company who accepted the bills. The drawer indorsed them and sent them to an Englishman in England. Such indorsements were informal and invalid (as well as the drawing of the bills), according to French law. It was held that the acceptor was liable (*z*).

By the Bills of Exchange Act, 1882, sect. 72, where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity

(*t*) *Cammell* v. *Sewell*, 29 L.J. Ex. 350; 5 H. & N. 728.

(*u*) *Allen* v. *Kemble*, 6 Moore, P.C. 322; *Gibbs* v. *Fremont*, 9 Exch. 31; 22 L.J. Ex. 302.

(*x*) *Bradlaugh* v. *De Rin*, L.R. 5 C.P. 473; 39 L.J. C.P. 254; overruling *Trimbey* v. *Vignier*, 1 Bing. N. C. 151 3 L.J. C.P. 246.

(*y*) *Lebel* v. *Tucker*, L.R. 3 Q.B. 77; 37 L.J. Q.B. 46. See *Lee* v. *Abdy*, 17 Q.B.D. 309; *Alcock* v. *Smith*, (1892) 1 Ch. 238; 61 L.J. Ch. 167.

(*z*) *Smallpage's case*, 30 Ch.D. 598; 55 L.J. Ch. 116.

as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà protest*, is determined by the law of the place where such contract was made. Provided that (a) where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; (b) where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2.) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà protest* of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.

(3.) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

Foreign purchases—Affreightments.—The fulfilment of a contract for the sale of goods, so far as it relates to the transfer and delivery of the goods to the purchaser, according to quantity, weight, or measure, will be regulated by the law of the country where the delivery is to be made (*a*). If a contract is made in England to load a full cargo on board a vessel at a foreign port, the meaning of the words "full cargo" will be regulated by the law of the

(*a*) 3 Burge on Colon. Law, p. 771; *Rosseter* v. *Cahlmann*, 8 Exch. 361; 22 L.J. Ex. 128; *Meyer* v. *Dresser*, 33 L.J. C.P. 289; 16 C.B. N.S. 646; *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115; 35 L.J. Q.B. 74; *Mildred* v. *Maspons*, 8 App.Cas. 874; 53 L.J. Q.B. 33.

foreign port, and not by the law of England. If an order is sent from England for the purchase of goods in Russia, to be delivered on board an English ship in a Russian port, the rights and liabilities growing out of the contract will be governed by the law of Russia; and, if, after the delivery of the goods on board ship, the unpaid vendor has a right, by the law of Russia, to re-possess himself of the goods, on having reason to suspect that the purchaser contemplates bankruptcy, or intends to make the vendor lose the purchase-money, this right will be recognized in our courts of common law (*b*).

The validity of a bottomry-bond taken up in a foreign port upon a foreign ship, freight, and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law, and not by the *lex loci contractûs*, or the law of the country to which the vessel belongs (*c*).

What determines the locus contractûs.—When contracts are entered into between parties residing in different countries through the medium of letters, the place where the final assent has been given by one party to an offer made by another is the place where the contract is considered to have been made (*d*). "If I send my agent to Scotland, and he in my name makes a contract there, it is the same as if I were myself on the spot; and the contract must be considered as a contract entered into in Scotland" (*e*). In the case of contracts in writing, the place where the covenantor or promisor executes or signs the contract is the place where it is made, although the contract is inchoate and incomplete, and does not obtain legal validity until something else has been done with his authority at some different place (*f*).

SECTION II.

OF THE ADMISSIBILITY OF ORAL EVIDENCE IN WRITTEN CONTRACTS.

Inadmissibility of oral evidence to add to, alter, or contradict, a written contract.—It is a fundamental rule of the common law that oral evidence shall not be given to add to, subtract from, or alter or vary, any description of written contract: "*quoties in verbis nulla*

(*b*) *Inglis* v. *Usherwood*, 1 East, 515; *The Gaetano and Maria*, 7 P.D. 137; 51 L.J. P. 67; *The August*, (1891) P. 328; 60 L.J. P. 57.

(*c*) *Duranty* v. *Hart*, 2 Moo. P.C. N.S. 289.

(*d*) 2 Burge on Colon. Law, 753.

(*e*) *Albion Fire Insurance Co.* v. *Mills*, 3 Wils. & S. 218, 233 (Sc.).

(*f*) *Snaith* v. *Mingay*, 1 M. & S. 92.

est ambiguitas nulla expositio contra verba fienda est." This general rule or principle of law has been established on the ground that writing stands higher in the scale of evidence than oral testimony, and that the stronger evidence ought not to be controlled or altered by the weaker (*g*). It has been held that oral evidence is inadmissible to show that a grant of an annuity, not made subject to redemption on the face of the deed, was nevertheless intended by the parties to be redeemable (*h*); also that the verbal declaration of an auctioneer, made at the time of sale, cannot be given in evidence in opposition to the printed conditions of sale, unless the declaration has been fraudulently made (*i*). If, in a contract of charter-party, a person states himself to be the owner of a vessel, and then proceeds to let or charter the vessel for a certain term, he cannot contradict by oral testimony his own averment in writing and show that he acted only as the agent of the owner (*k*). If a written contract of purchase and sale describes the nature and character of the things sold, oral evidence is inadmissible to add to or alter the written description (*l*); if it fixes the time for the completion of the purchase, or the time for the delivery of the goods, a contemporary agreement to substitute another day must be expressed in writing (*m*); and if the time for payment is named, oral evidence is inadmissible to show that the payment was to be prolonged, or that it was to depend on a contingency, or be made out of a particular fund. So, on a written contract for a weekly hiring, oral evidence is inadmissible to show that a yearly hiring was intended (*n*). And on a written contract to make a marketable title to certain freeholds, oral evidence is inadmissible to show that the purchaser knew that it would be impossible for the vendor to make a marketable title (*o*). And, on a contract to manufacture and deliver goods at a specified time for a specified price, oral evidence is inadmissible to show that a portion of the price agreed to be paid for the goods was in consideration of the undertaking to deliver them at the times specified, and that the market price was much less than that agreed to be paid (*p*). Oral evidence is inadmissible to make a promissory note, absolute upon the face of it, conditional or payable upon a contingency (*q*), or to

(*g*) *Davis* v. *Symonds*, 1 Cox, 404.
(*h*) *Haynes* v. *Hare*, 1 H. Bl. 662.
(*i*) *Gunnis* v. *Erhart*, 1 H. Bl. 289; *Shelton* v. *Livius*, 2 Cr. & J. 411; 1 L.J. Ex. 139; *Higginson* v. *Clowes*, 15 Ves. 522; *Eden* v. *Blake*, 13 M. & W. 618; 14 L.J. Ex. 194.
(*k*) *Humble* v. *Hunter*, 17 L.J. Q.B. 350; 12 Q.B. 310.
(*l*) *Smith* v. *Jeffryes*, 15 L.J. Ex. 325; 15 M. & W. 561; *Harnor* v. *Groves*, 15 C.B. 667; 24 L.J. C.P. 53.
(*m*) *Stead* v. *Dawber*, 10 Ad. & E. 57; 9 L.J. Q.B. 101; *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L.J. Ex. 126; *Stowell* v. *Robinson*, 3 Bing. N.C. 928; 6 L.J. C.P. 326.
(*n*) *Evans* v. *Roe*, L.R. 7 C.P. 138.
(*o*) *Cato* v. *Thompson*, 9 Q.B.D. 616.
(*p*) *Brady* v. *Oastler*, 3 H. & C. 112; 33 L.J. Ex. 300.
(*q*) *Rawson* v. *Walker*, 1 Stark. 361; *Moseley* v. *Hanford*, 10 B. & C. 729; 8 L.J. (O.S.) K.B. 261; *Foster* v. *Jolly*, 1

make a contract which, by the terms of it, is to commence *in præsenti*, to commence *in futuro* (*r*); or to show that it was agreed, when a bill or note was given or indorsed, that the instrument should be renewed, and that payment should not be demanded at the time when it became due (*s*); but, where bought and sold notes differed, oral evidence was admitted to prove an arrangement between the broker and the purchaser, by which the apparent variance was explained and shown to be immaterial (*t*). Evidence, however, of a contemporaneous oral agreement to renew a bill of exchange is inadmissible in an action upon the bill (*u*).

A warranty, made orally on the completion of a written contract of sale, cannot be introduced as part of the contract, if the contract itself is silent as to the fact of such warranty (*v*); but a loose and incomplete memorandum of sale will not exclude oral evidence of a warranty (*x*). If a written demise be silent as to the payment of the ground rent (*y*), or land tax (*z*), oral evidence is inadmissible to show that the tenant agreed to pay it. If a written contract of purchase and sale imports that the delivery of the goods and the payment of the price are to be concurrent acts, oral evidence is inadmissible to show that credit was bargained for and intended to have been given (*a*). But a writing containing only part of the contract, and not being evidence of a concluded agreement, does not shut out oral evidence of the time of payment. Where the defendant by letter ordered the plaintiff to send goods to a wharf, oral evidence was admitted to show that the order was given on the faith of a promise made by word of mouth by the plaintiff to the defendant, that the defendant should have six months' credit for the payment of the goods (*b*). Where an agreement for a lease has been drawn up in writing, oral evidence cannot be given to show that more premises were intended to be included in the agreement than those actually mentioned in it, or that a greater rent was to be paid than that actually expressed, or that the rent was to be paid quarterly, when by the agreement it is to be paid yearly, or that the rent was to commence at a later

C. M. & R. 703; 4 L.J. Ex. 65; *Free* v. *Hawkins*, 1 Moore, 535; 8 Taunt. 92; *Adams* v. *Wordley*, 1 M. & W. 374; 5 L.J. Ex. 158; *Abrey* v. *Crux*, L.R. 5 C.P. 37; 39 L.J. C.P. 9.

(*r*) *Williams* v. *Jones*, 5 B. & C. 108.

(*s*) *Hoare* v. *Graham*, 3 Campb. 56; *Brown* v. *Langley*, 5 Sc. N.R. 249; 12 L.J. C.P. 62.

(*t*) *Kempson* v. *Boyle*, 3 H. & C. 763; 34 L.J. Ex. 191.

(*u*) *New London Credit Syndicate* v. *Neale*, (1898) 2 Q.B. 487; 67 L.J. Q.B. 825.

(*v*) *Powell* v. *Edmunds*, 12 East, 6; *Harnor* v. *Groves*, 15 C.B. 667; 24 L.J. C.P. 53.

(*x*) *Allen* v. *Pink*, 4 M. & W. 140; 7 L.J. Ex. 206.

(*y*) *Preston* v. *Merceau*, 2 W. Bl. 1249.

(*z*) *Rich* v. *Jackson*, 4 Br. C.C. 515.

(*a*) *Ford* v. *Yates*, 2 Sc. N.R. 645; 10 L.J. C.P. 117; see also 56 & 57 Vict. c. 71, s. 28.

(*b*) *Lockett* v. *Nicklin*, 19 L.J. Ex. 403; 2 Exch. 93; *Stones* v. *Dowler*, 29 L.J. Ex. 122; *Angel* v. *Duke*, L.R. 10 Q.B. 174; 44 L.J. Q.B. 78.

day than that named in the agreement; for, whenever the contract is reduced into writing, nothing that is not found impressed upon it can be considered as forming part of the contract (*c*). But the contract may be evidenced and established, through the medium of several writings, as well as by one document (*d*); and the import of a written paper, purporting to contain the terms of a contract, may be controlled, altered, or extended, by a contemporaneous agreement in writing (*e*), provided it be shown that both papers refer to the same subject-matter, persons, and things. Where there is a proposal only in writing, oral evidence may be given to show that that proposal has been accepted (*f*), but not of what passed at the time of making the proposal for the purpose of varying the contract (*g*). And where there was a discrepancy between a lease and its counterpart, the counterpart was looked at to ascertain where the mistake lay (*h*).

But, although, by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, subtract from, or in any manner to vary or qualify the express terms of the written contract (*i*), yet an agreement upon a distinct matter may be shown to have been made by word of mouth, and may be enforced (*k*); and, after an agreement has been reduced into writing, it is competent to the parties, at any subsequent time before breach of it, by a new contract not in writing, either altogether to waive or annul the former agreement, or in any manner to add to, subtract from, or vary the terms of it, and thus to make a new contract, which may be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon it, provided the new contract thus sought to be established in the place of the original written contract be not a contract of such a nature as is required to be authenticated by writing; for, when that is the case, the new substituted contract cannot be proved partly by writing and partly by oral testi-

(*c*) *Meres* v. *Ansell*, 3 Wils. 275; *Henson* v. *Coope*, 3 Sc. N.R. 48; 2 L.J. (O.S.) K.B. 102; *Dickson* v. *Zizinia*, 20 L.J. C.P. 73; 10 C.B. 602.

(*d*) See *ante*, p. 34.

(*e*) *Brown* v. *Langley*, 12 L.J. C.P. 62; 5 Sc. N.R. 249.

(*f*) *Wake* v. *Harrop*, 1 H. & C. 202; 31 L.J. Ex. 451.

(*g*) *Hotson* v. *Browne*, 9 C.B. N.S. 442; 30 L.J. C.P. 106.

(*h*) *Burchell* v. *Clark*, 2 C.P.D. 88; 46 L.J. C.P. 115.

(*i*) *Pateriche* v. *Powlet*, 2 Atk. 383; *Woollam* v. *Hearn*, 7 Ves. 218.

(*k*) *Lindley* v. *Lacey*, 34 L.J. C.P. 7; 17 C.B. N.S. 578; *Morgan* v. *Griffith*, L.R. 6 Ex. 70; 40 L.J. Ex. 46; *Erskine* v. *Adeane*, L.R. 8 Ch. 756; 42 L.J. Ch. 855; *De Lassalle* v. *Guildford*, (1901) 2 K.B. 215; 70 L.J. K.B. 533.

mony (*l*), and will not be good for any purpose; but the original contract will remain in force (*m*).

Parol evidence is, however, admissible where it goes to show, not a new contract, but simply a voluntary forbearance by the plaintiff at the request of the defendant; for in such a case the Statute of Frauds does not apply (*n*); and it is immaterial whether the request for forbearance was made before or after the contract was broken (*o*).

Proof of contracts partly by writing and partly by oral testimony.—Oral testimony in aid of insufficient written evidence of a contract is admissible, when the contract is not required by law to be in writing. If a written document, for example, amounts to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be supported by, oral testimony (*p*). Thus, in the case of a contract for work and services, if the names of the contracting parties are not mentioned, or the price to be paid for the work is not specified, or the quantity not named, and the writing consequently does not amount to a contract, oral proof of the additional circumstances necessary to constitute a contract is admissible; such evidence does not alter or add to an existing contract, as no contract exists independently of it (*q*). An invoice made out after a sale of goods has been effected is not conclusive evidence that the parties named in it as the contracting parties are really the contracting parties; but oral evidence is admissible to show that a party named therein as a vendor was not in reality the vendor (*r*). Where the plaintiff signed a consignment note, which stated that certain goods were delivered by him to a railway company to be carried to N., but the charge for carriage was not mentioned, and oral evidence was given that the company's agreement with the plaintiff before the note was signed was to carry to K., but that the plaintiff did not read the note, and that the sum to be charged, and which was paid, was for the carriage to K., it was held that the evidence was admissible on the ground that the note was not a complete contract (*s*). A

(*l*) *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 65; 2 L.J. K.B. 127; *Stead* v. *Dawber*, 10 Ad. & E. 65; 9 L.J. Q.B. 101; *Crowley* v. *Vitty*, 21 L.J. Ex. 135; 7 Exch. 319; *Sanderson* v. *Graves*, L.R. 10 Ex. 234; 44 L.J. Ex. 210.

(*m*) *Noble* v. *Ward*, 36 L.J. Ex. 91; L.R. 2 Ex. 135; *Plevins* v. *Downing*, 1 C.P.D. 220; 45 L.J. C.P. 695.

(*n*) *Ogle* v. *Vane* (*Lord*), L.R. 3 Q.B. 272; 37 L.J. Q.B. 77.

(*o*) *Hickman* v. *Haynes*, L.R. 10 C.P. 598; 44 L.J. C.P. 358.

(*p*) *Eden* v. *Blake*, 13 M. & W. 614, 618; 14 L.J. Ex. 194; *Bolckow* v. *Seymour*, 17 C.B. N.S. 107; *Stones* v. *Dowler*, 29 L.J. Ex. 122.

(*q*) *Knapp* v. *Harden*, 1 Gale, 47; *Ingram* v. *Lee*, 2 Campb. 521.

(*r*) *Holding* v. *Elliott*, 5 H. & N. 117; 29 L.J. Ex. 134.

(*s*) *Malpas* v. *L. & S. W. Ry.*, L.R. 1 C.P. 336; 35 L.J. C.P. 166, explaining *Jeffery* v. *Walton*, 1 Stark. 267.

document purporting to be a contract, signed by the parties, is not necessarily so; and it is competent for either of the parties to show by parol evidence that it was not their intention in signing it that it should operate as a contract, and that the real contract between them was not in writing (*t*). Generally, oral evidence is admissible for the purpose of showing that the real contract between the parties is not in writing, and that a subsequent written contract does not contain, and was not intended to contain, the whole agreement between them (*u*); but where a written proposal, signed by the defendant, was adopted in terms by the plaintiff, though not in writing, it was held that evidence of what passed at the time of making the proposal was not admissible for the purpose of varying the construction of the writing (*x*). Oral evidence is always admissible for the purpose of identifying the subject-matter of the contract, as, for instance, to show that a contract referring to a bill as of the 24th of October was intended to apply to one dated the 25th (*y*); or to explain what was meant by the words "your wool" in a contract for the purchase of wool so described (*z*), or the words "your employ" in a contract of service (*a*), or the words "the lease" in an agreement to procure a lease (*b*). All facts are admissible which tend to show the sense the words bear in reference to the surrounding circumstances concerning which the words were used, but such facts as only tend to show that the writer intended to use words bearing a particular sense must be rejected (*c*).

In equity a defendant may prove a parol variation or addition to a written contract where he is resisting specific performance of the contract; and a plaintiff may also make use of a parol variation, when there has been such a part performance of the parol portion of the agreement, as would enable the court to decree a specific performance in the case of an original and independent agreement, or where the omission has occurred by fraud, or, in cases not within the Statute of Frauds, by clear mistake (*d*).

Annexation of agricultural and mercantile customs.—Customary incidents universally attaching to the subject-matter of the contract in the place where the contract was made are impliedly annexed to the written terms of the contract, unless the custom is expressly

(*t*) *Rogers* v. *Hadley*, 2 H. & C. 227; 32 L.J. Ex. 241.

(*u*) *Harris* v. *Rickett*, 4 H. & N. 1; 28 L.J. Ex. 197.

(*x*) *Hotson* v. *Browne*, 9 C.B. N.S. 442; 30 L.J. C.P. 106; *ante*, p. 62.

(*y*) *Way* v. *Hearn*, 13 C.B. N.S. 292; 32 L.J. C.P. 34.

(*z*) *Macdonald* v. *Longbottom*, 1 E. & E. 977, 987; 29 L.J. Q.B. 256.

(*a*) *Mumford* v. *Gething*, 7 C.B. N.S. 305; 29 L.J. C.P. 105.

(*b*) *Horsey* v. *Graham*, L.R. 5 C.P. 9; 39 L.J. C.P. 58.

(*c*) *Bank of New Zealand* v. *Simpson*, (1900) A.C. 182; 69 L.J. P.C. 22.

(*d*) *Woollam* v. *Hearn*, 2 W. & T. L. Cas. 513 (ed. 7); *Laver* v. *Fielder*, 32 Beav. 1.

excluded (*e*). Parol evidence of custom, consequently, is always admissible to explain the real meaning of the parties (*f*), but not to prevail over and nullify the express provisions of the contract (*g*). The evidence of usage must, however, be distinct, in order to affect the meaning of the terms of the contract (*h*), and not be inconsistent therewith (*i*). The known usage of a particular trade, and the established course of every mercantile dealing, are considered to be tacitly annexed to the terms of every mercantile contract made in the ordinary course of business in which the usage prevails (*k*), if there be no words therein expressly controlling the ordinary operation of the usage; and parol evidence thereof may consequently be given (*l*). The principle on which the evidence is admitted is, that the parties have set down in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication all those general incidents which a uniform usage would annex, and according to which they must be considered to contract, unless they expressly exclude them (*m*). Whether the terms of the contract are such as to exclude evidence of the custom is a question for the judge and not for the jury (*n*). A local usage of a particular place, or of a particular class of persons, is not binding upon persons living at a distance, and who are proved to have been wholly unacquainted with such usage (*o*). And a custom in a particular market that a broker to buy is a principal to sell, is not binding upon a person ignorant of the existence of such custom, for it changes the intrinsic character of the contract (*p*). And so is a rule that a broker can only recognise the person employing him, although he knows him to be only an agent (*q*). If the terms of the contract are clear,

(*e*) Many agricultural customs have been embodied in the Agricultural Holdings Acts, 46 & 47 Vict. c. 61, and 63 & 64 Vict. c. 50; and for divers customs of different counties, see Woodfall's Landlord and Tenant, 721 (ed. 11).

(*f*) *Hutton* v. *Warren*, 1 M. & W. 475, 476; 5 L.J. Ex. 234; *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith's L. C. 528 (ed. 10).

(*g*) *Clarke* v. *Roystone*, 13 M. & W. 752; 14 L.J. Ex. 143; *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 429; 1 L.J. Ex. 101; *Roxburghe* v. *Robertson*, 2 Bligh, 156; *Roberts* v. *Barker*, 1 C. & M. 808; 2 L.J. Ex. 268; *Phillipps* v. *Briard*, 1 H. & N. 21; 25 L.J. Ex. 233; *Cuthbert* v. *Cumming*, 24 L.J. Ex. 200; 11 Exch. 405.

(*h*) *Bowes* v. *Shand*, 2 App.Cas. 455; 46 L.J. Q.B. 561.

(*i*) *Hayton* v. *Irwin*, 5 C.P.D. 130.

(*k*) *Allan* v. *Sundius*, 1 H. & C. 123; 31 L.J. Ex. 307.

(*l*) *Syers* v. *Jonas*, 2 Exch. 111; *Grant* v. *Maddox*, 15 M. & W. 737; 16 L.J. Ex. 227; *Bourne* v. *Gatliff*, 3 Sc. N.R. 1, 40; 11 Cl. & F. 45.

(*m*) *Humfrey* v. *Dale*, E. B. & E. 1004; 27 L.J. Q.B. 390; *Lucas* v. *Bristow*, E. B. & E. 907; 27 L.J. Q.B. 364; *Reg.* v. *Stoke-upon-Trent*, 13 L.J. M.C. 41; 5 Q.B. 303; *Brown* v. *Byrne*, 3 E. & B. 715; 23 L.J. Q.B. 313; *Field* v. *Lelean*, 6 H. & N. 617; 30 L.J. Ex. 168; *Myers* v. *Sarl*, 30 L.J. Q.B. 9; 3 E. & E. 306; *Fleet* v. *Murton*, L.R. 7 Q.B. 126; 41 L.J. Q.B. 49.

(*n*) *Parker* v. *Ibbetson*, 4 C.B. N.S. 355; 27 L.J. C.P. 236.

(*o*) *Bartlett* v. *Pentland*, 10 B. & C. 770; 8 L.J. (O.S.) K.B. 164; *Kirchner* v. *Venus*, 12 Moore, P.C. 399; *Sweeting* v. *Pearce*, 30 L.J. C.P. 109; 9 C.B. N.S. 534.

(*p*) *Robinson* v. *Mollett*, L.R. 7 H.L. 802; 44 L.J. C.P. 362.

(*q*) *Pearson* v. *Scott*, 9 Ch.D. 198; 47 L.J. Ch. 705.

they must prevail in the absence of very clear and consistent evidence that, by custom, something different is meant (*r*). But, if a merchant residing in London employs an agent in Liverpool to make a contract there, the contract so made will be clothed with all the incidents of a Liverpool contract in respect of custom of trade (*s*). Where the written contract does not exclude the custom, oral evidence is not admissible for the purpose of showing that the parties did not intend it to apply (*t*). Oral evidence is admissible to show that, by the custom of a particular trade, persons describing themselves in the contract as "agents to merchants" are personally liable, if they do not disclose their principals within a reasonable time (*u*).

Customary meaning of particular words.—If, by the known usage of trade or by custom, a word has acquired, in respect of the subject-matter of the contract, a peculiar meaning different from the ordinary meaning, evidence is admissible to show that the parties used the word in its customary trade acceptation, and not in the ordinary sense. Thus, the word *thousand* in certain trades comprehends a larger number of units than it does in its ordinary acceptation. In a lease of a rabbit warren, parol evidence was admitted to show that by the custom of the country where the lease was made, in taking an account of the rabbits on a rabbit warren, the numbers were computed at one hundred dozen to a thousand; and the word "thousand" in a lease as applied to rabbits was consequently construed to mean twelve hundred (*x*). So, where an insurance was effected "to any port in the Baltic," evidence was admitted to show that the Gulf of Finland is considered by universal custom and consent amongst merchants and in mercantile contracts to be within the Baltic, though the two seas are treated as distinct by geographers (*y*). And in a lease of a coal mine evidence was admitted to show that the word "*level*" in mining districts had a meaning different from the ordinary meaning, and that the word was used by the parties to the contract in the sense in which it is employed by miners (*z*). But the custom and usage must be general and universal, and not the course of dealing of a particular firm or house of trade (*a*).

(*r*) *Bowes* v. *Shand*, 2 App.Cas. 455; 46 L.J. Q.B. 561; *Hayton* v. *Irwin*, 5 C.P.D. 130.

(*s*) *Graves* v. *Legg*, 2 H. & N. 213; 26 L.J. Ex. 316.

(*t*) *Fawkes* v. *Lamb*, 31 L.J. Q.B. 98; but see *Burges* v. *Wickham*, 33 L.J. Q.B. 17; 3 B. & S. 669.

(*u*) *Hutchinson* v. *Tatham*, L.R. 8 C.P. 482; 42 L.J. C.P. 260; *Pike* v. *Ongley*, 18 Q.B.D. 708; 56 L.J. Q.B. 373.

(*x*) *Smith* v. *Wilson*, 3 B. & Ad. 728; 1 L.J. K.B. 194.

(*y*) *Uhde* v. *Walters*, 3 Campb. 16; *Brough* v. *Whitmore*, 4 T.R. 210; *Anderson* v. *Pitcher*, 2 B. & P. 168; *Birrell* v. *Dryer*, 9 App.Cas. 345.

(*z*) *Clayton* v. *Gregson*, 5 Ad. & E. 302.

(*a*) *Gabay* v. *Lloyd*, 3 B. & C. 797; 3 L.J. (O.S.) K.B. 116; *Sweeting* v. *Pearce*, 9 C.B. N.S. 534; 30 L.J. C.P. 109; *post*, p. 304; *Scott* v. *Irving*, 1 B. & Ad. 605; 9 L.J. (O.S.) K.B. 89; *post*, p. 1044.

Terms of art—Trade acceptations.—The meaning of all words and terms of art and specifications of quantity, quality, weight, and measure, are regulated by local custom, unless the terms have been selected, and a definite meaning given to them, by the legislature (*b*). But, to vary the meaning of plain words, the existence of the custom must be "clear, cogent, and irresistible" (*c*). If peculiar expressions are used in a contract, which have in a particular place or trade a known meaning attached to them, it is for the jury to say what the meaning of those expressions is, but for the court to decide what is the meaning of the contract (*d*).

Oral evidence of conditional assent.—If two parties sign a memorandum of a contract upon the strength of a clear oral agreement that the writing is not to be binding until the happening of a given event, and the event never happens, there is no contract (*e*). Where a party claims as the indorsee of a bill of exchange, it may be shown that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee for a particular purpose, and on the understanding that it should not operate as an indorsement until the condition was fulfilled (*f*). And, if an oral agreement and an agreement in writing have been made, whether contemporaneously or not, upon two distinct independent matters, and the one does not conflict with or alter the other, both may stand; and the oral bargain may be enforced as well as the contract in writing (*g*). When the contract is evidenced by letters and writings, it is for the court to interpret them and determine whether they do or do not amount to a concluded contract; and, if the judge leaves it to a jury to say what is the effect and meaning of written correspondence, there is a misdirection (*h*).

Estoppel by deed.—The rule of law which stops a party from disputing what he has affirmed by deed (*ante*, p. 17) does not extend to strangers to the contract (*i*). A party to a deed, moreover, is not estopped in an action by another party not founded on the deed, and wholly collateral to it, from disputing the truth of

(*b*) *Taylor* v. *Briggs*, 2 C. & P. 525; *Hutchison* v. *Bowker*, 5 M. & W. 535; 9 L.J. Ex. 24; *Spicer* v. *Cooper*, 1 Q.B. 424; 10 L.J. Q.B. 241.

(*c*) *Lewis* v. *Marshall*, 13 L.J. C.P. 193; 8 Sc. N.S. 477.

(*d*) *Hutchison* v. *Bowker, supra; Neilson* v. *Harford*, 8 M. & W. 823; 11 L.J. Ex. 20; *Trueman* v. *Loder*, 11 Ad. & E. 599; 9 L.J. Q.B. 165; *Sotilichos* v. *Kemp*, 18 L.J. Ex. 36; 3 Exch. 105.

(*e*) *Pym* v. *Campbell*, 6 E. & B. 370; 25 L.J. Q.B. 277; *Rogers* v. *Hadley*, 2 H. & C. 227; 32 L.J. Ex. 241; *ante*, p. 64; *Lindley* v. *Lacey*, 34 L.J. C.P. 9; 17 C.B. N.S. 578; *Wallis* v. *Littell*, 11 C.B. N.S. 369; 31 L.J. C.P. 100; *Davis* v. *Jones*, 17 C.B. 634; 25 L.J. C.P. 91; *Pattle* v. *Hornibrook*, (1896) 1 Ch. 25; 66 L.J. Ch. 144.

(*f*) *Bell* v. *Ingestre* (*Lord*), 12 Q.B. 317; 19 L.J. Q.B. 71; *Bannerman* v. *White*, 31 L.J. C.P. 28; 10 C.B. N.S. 844.

(*g*) *Lindley* v. *Lacey*, 34 L.J. C.P. 7; 17 C.B. N.S. 578; *White* v. *Parkin*, 12 East, 578; *Harris* v. *Rickett*, 4 H. & N. 1; 28 L.J. Ex. 197; *Green* v. *Saddington*, 7 E. & B. 503.

(*h*) *Cheveley* v. *Fuller*, 13 C.B. 122.

(*i*) *Rex* v. *Scammonden*, 3 T.R. 474.

certain facts recited in such deed (*k*). When a recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the whole instrument (*l*). As between the parties themselves, any averment of a fact made by one of the parties in the nature of a representation or warranty to the other may be contradicted by that other (*m*). But the party who makes the averment is not permitted to dispute the fact recited (*n*). If a lease, however, recites that the lessor is possessed of real or personal property, the lessee who executes and accepts such lease is estopped, during the continuance of his occupation, from denying the title and possession of his lessor at the time such lease was executed (*o*).

A "grant" of an estate which would amount in equity to a representation, does not amount in law to a representation of a right to grant, that is, to an estoppel. There must be a strict recital to the effect that the party has the right or title in order by estoppel to bind him or persons claiming through him (*p*).

Estoppels in pais arise "where a party by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, and alter his own previous position." A party who has so acted is said to be estopped before the country, and precluded from falsifying his own representation (*q*). If, in the transaction which is itself in dispute, one person has negligently led another into the belief of a certain state of facts, and such negligence has been the proximate and real cause of leading that other to act upon such belief, the former is estopped from showing that the state of facts referred to did not actually exist (*r*). Neglect or omission to do an act is equally within the rule, but in order to create an estoppel it must be shown that the party setting it up has been induced by such negligence

(*k*) *Carpenter* v. *Buller*, 8 M. & W. 209; 10 L.J. Ex. 393; *Trinidad Asphalt Co.* v. *Coryat*, (1896) A.C. 587; 65 L.J. P.C. 100.

(*l*) *Stroughill* v. *Buck*, 14 Q.B. 787; 19 L.J. Q.B. 209; *Wiles* v. *Woodward*, 5 Ex. 557; 20 L.J. Ex. 264.

(*m*) *Hayne* v. *Maltby*, 3 T.R. 441; Vin. Abr. Estoppel, M. 455.

(*n*) *Oldham* v. *Langmead*, cited 3 T.R. 439; *Humble* v. *Hunter*, 17 L.J. Q.B. 350; 12 Q.B. 310.

(*o*) *Beckett* v. *Bradley*, 8 Sc. N.R. 843; 14 L.J. C.P. 3.

(*p*) *General Finance Co.* v. *Liberator Society*, 10 Ch.D. 15.

(*q*) *Pickard* v. *Sears*, 6 Ad. & E. 474; *M'Cance* v. *L. & N. W. Ry.*, 34 L.J. Ex. 39; 3 H. & C. 343; *Freeman* v. *Cooke*, 2 Exch. 654; 18 L.J. Ex. 114; *Johnson* v. *Credit Lyonnais*, 3 C.P.D. 32, 40; 47 L.J. C.P. 241; *Carr* v. *L. & N. W. Ry.*, L.R. 10 C.P. 316; 44 L.J. C.P. 109; *Citizen's Bank of Louisiana* v. *First National Bank of New Orleans*, L.R. 6 H.L. 352; 43 L.J. Ch. 269; *Williams* v. *Stern*, 5 Q.B.D. 409; 49 L.J. C.P. 663; *Coventry* v. *G. E. Ry.*, 11 Q.B.D. 776; 52 L.J. Q.B. 694; *Whitechurch* v. *Cavanagh*, (1902) A.C. 117; 71 L.J. K.B. 400.

(*r*) *Carr* v. *L. & N. W. Ry.*, *supra*; *Coventry* v. *G. E. Ry.*, *supra*; *Seton* v. *Lafone*, 19 Q.B.D. 68; 56 L.J. Q.B. 415.

or omission to alter his position (*s*). If one party dealing with another puts forth a sealed instrument as his deed, or if he represents it to be a binding obligation which he has himself executed, he cannot be heard in any court of law or equity to say, as against a party who has dealt with him on the faith of the correctness of the representation, that the instrument is not his deed, or that he never executed it, or that it is not a binding obligation (*t*). If on the evidence it appears that two persons upon the negotiation of a mercantile security have assumed by common consent a certain fact, such as that a particular person is the drawer of a bill, or if by express agreement between them a bill is drawn and indorsed by procuration in the name of a fictitious or dead person, and the position of one of the parties has been altered on the faith of the arrangement, the other cannot afterwards be permitted to say that the bill was not drawn or indorsed as it purports to be (*u*). But where the defendant left his blank acceptance in his table drawer, and the bill was stolen, and his name filled in as drawer of the bill, it was held he was not estopped (*x*).

Mistaken or untrue averments in written contracts not under seal.—Although the express admissions of a party inserted in a contract are strong evidence against him, yet he is at liberty, in certain cases, when the contract is not under seal, to prove that such admissions were mistaken or untrue, and is not estopped by them, unless another person has been induced by them to alter his condition, when the party is estopped, as we have seen, from disputing their truth with respect to that person and that transaction (*y*); and this rule or principle of law is applicable to mistakes in respect of legal liability, as well as in respect of matter-of-fact (*z*). But a person is not estopped by a mere contract to do something which does not involve a representation of some fact (*a*). If a bill of exchange or promissory note purports on the face of it to be made for value received, it is competent to the parties to show that no value was received (*b*); and, if a receipt for the payment of money has been given, oral evidence is admissible to contradict such receipt, and

(*s*) *Freeman* v. *Cooke, supra; M'Kenzie* v. *British Linen Co.*, 6 App.Cas. 82; *Cooke* v. *Eshelby*, 12 App.Cas. 271; 56 L.J. Ch. 850. See *Ogilvy* v. *West Australian Mortgage Corporation*, (1896) A.C. 257; 65 L.J. P.C. 46.

(*t*) *Straffon, Ex parte*, 22 L.J. Ch. 194, 202; 1 De G. M. & G. 576.

(*u*) *Ashpital* v. *Bryan*, 32 L.J. Q.B. 95; 3 B. & S. 474. See as to fictitious endorsement, *Vagliano* v. *Bank of England*, (1891) A.C. 107; 60 L.J. Q.B. 145, *post*, p. 1110.

(*x*) *Baxendale* v. *Bennett*, 3 Q.B.D. 525; 47 L.J. Q.B. 624. See *per* Lindley, L.J., *Cooper, In re*, 20 Ch.D. 611; 51 L.J. Ch. 862.

(*y*) *Heane* v. *Rogers*, 9 B. & C. 586; 7 L.J. (O.S.) K.B. 283.

(*z*) *Newton* v. *Liddiard*, 18 L.J. Q.B. 56; 12 Q.B. 925.

(*a*) *Farmeloe* v. *Bain*, 1 C.P.D. 445; 45 L.J. C.P. 264.

(*b*) *Foster* v. *Jolly*, 1 C. M. & R. 708; 4 L.J. Ex. 65; *Ridout* v. *Bristow*, 1 C. & J. 231; 9 L.J. (O.S.) Ex. 48. See 45 & 46 Vict. c. 61, s. 30, *post*, p. 1119.

rebut its legal operation as a discharge from liability (*c*). So, where a passenger who was injured by a railway accident, accepted 400*l.*, and gave the company a receipt expressed to be in full discharge of his claims, it was held that the statement in the receipt could be rebutted by evidence that he did not receive the money in full satisfaction of all demands (*d*).

(*c*) *Lampon* v. *Corke*, 5 B. & Ald. 611; *Skaife* v. *Jackson*, 3 B. & C. 423; 3 L.J. (O.S.) K.B. 43; *Farrar* v. *Hutchinson*, 9 Ad. & E. 643; 8 L.J. Q.B. 107; *Wallace* v. *Kelsall*, 7 M. & W. 273, 274; 10 L.J. Ex. 12; *Graves* v. *Key*, 3 B. & Ad. 313; *Bowes* v. *Foster*, 2 H. & N. 779; 27 L.J. Ex. 262.

(*d*) *Lee* v. *Lancashire and Yorkshire Ry.*, L.R. 6 Ch. 527.

CHAPTER III.

OF THE AVOIDANCE OF CONTRACTS.

SECTION I.

VOID CONTRACTS.

Distinction between void and voidable contracts.—A contract which is void has no legal effect, and binds neither party—a contract which one of the parties may set aside under certain conditions is voidable only; but, unless set aside, is binding on both parties.

Immoral contracts.—Whenever a contract has been entered into for the performance of an immoral act, or an act which is contrary to the provisions of an Act of Parliament, or to the public policy of the common law, the courts will not lend their assistance for the enforcement of the contract (*a*); and a deed will be set aside where the consideration is immoral (*b*). If the illegality of the contract appears upon the face of it, it is at once fatal to an action thereon; and, if it does not so appear, the fact of its existence may be established through the medium of oral testimony; but "illegality is never presumed: on the contrary, everything must be presumed to have been legally done till the contrary be proved" (*c*). Bonds, agreements, and guarantees to indemnify persons against the consequences of their illegal acts are absolutely void, whether the parties giving the bond or indemnity did or did not know of the illegality of the transaction (*d*). Such are contracts to indemnify a man against the consequences of publishing a libel (*e*); or to indemnify a sheriff or other ministerial officer of the law against the pecuniary consequences resulting to himself from his permitting a prisoner to go at large, or committing any other breach

(*a*) *Holman* v. *Johnson*, 1 Cowp. 343; *Fivaz* v. *Nicholls*, 2 C.B. 501; 15 L.J. C.P. 125.

(*b*) *Willyams* v. *Bullmore*, 32 Beav. 574; 33 L.J. Ch. 461.

(*c*) *Bennett* v. *Clough*, 1 B. & Ald. 463.

(*d*) *Duvergier* v. *Fellows*, 10 B. & C. 826; 8 L.J. (O.S.) K.B. 270.

(*e*) *Shackell* v. *Rosier*, 2 Bing. N.C. 634; 5 L.J. C.P. 193.

of duty (*f*); or a promise to pay a man a sum of money "in consideration that he will beat another out of such a close" (*g*); or to save him harmless in consideration that he will imprison another (*h*); but an agreement to surrender a third party into the custody of the sheriff is not necessarily illegal (*i*). Where the defendant agreed that he would not expose the adultery of the plaintiff, if the plaintiff would not sue on a bond, it was held that the agreement was void (*k*). Where the defendant contracted to let rooms to the plaintiff, but afterwards, on discovering that they were intended to be used for the delivery of lectures of a blasphemous character, refused to allow the use of them, it was held that the purpose was illegal, and that the contract could not be enforced by law (*l*).

Contracts tending to promote fornication and prostitution are void as being *contra bonos mores*, such as bonds, covenants, promissory notes, or securities for the payment of money, given to a woman in order to induce her to commit fornication or to live in a state of concubinage or prostitution (*m*), or to secure a maintenance to a married woman in order that she may be induced to leave her husband and carry on an illicit intercourse with another man (*n*); but, if a man covenants to pay an annuity to a woman in consideration of past cohabitation, or gives her a bond to secure to her the payment of money for her support or the support of her children, the contract is valid (*o*), even although he continues the cohabitation (*p*). The contract, however, must be made by deed, past cohabitation and seduction being an insufficient consideration for the support of a simple contract or promise (*q*). A contract by the mother of a bastard child to release the putative father, in consideration of a present money payment, from all further payments in respect of the child, is not void in law; but neither is it a bar to the jurisdiction of the magistrate to make an order of affiliation on the father, such order being, under the statute, for the benefit of the child, and not of the mother exclusively (*r*). If a landlord knowingly permits a female lodger to carry on the trade of prostitution under his roof, the courts will give him no

(*f*) *Featherston* v. *Hutchinson*, Cro. Eliz. 199; *Morris* v. *Chapman*, Jones, 24.
(*g*) *Allen* v. *Rescous*, 2 Lev. 174.
(*h*) *Fletcher* v. *Harcot*, Hut. 55.
(*i*) *Lewis* v. *Davison*, 4 M. & W. 657; 8 L.J. Ex. 78.
(*k*) *Brown* v. *Brine*, 1 Ex.D. 5; 45 L.J. Ex. 129.
(*l*) *Cowan* v. *Milbourn*, L.R. 2 Ex. 230; 36 L.J. Ex. 124.
(*m*) *Robinson* v. *Coz*, 9 Mod. 263; *Walker* v. *Perkins*, 3 Burr. 1568; *Friend* v. *Harrison*, 2 C. & P. 584.
(*n*) *Evans* v. *Carrington*, 30 L.J. Ch. 370; 2 De G. F. & J. 489.
(*o*) *Gibson* v. *Dickie*, 3 M. & S. 463; *Turner* v. *Vaughan*, 2 Wils. 339; *Nye* v. *Moseley*, 6 B. & C. 133; 4 L.J. (O.S.) K.B. 179; *Annandale* v. *Harris*, 2 P. Wms. 432; *Priest* v. *Parrot*, 2 Ves. senr. 160; *Knye* v. *Moore*, 2 S. & S. 260; 3 L.J. (O.S.) Ch. 136.
(*p*) *Vallance, In re*, 26 Ch.D. 353.
(*q*) *Beaumont* v. *Reeve*, 8 Q.B. 483; 15 L.J. Q.B. 141; *Matthews* v. *L—e*, 1 Madd. 558.
(*r*) *Follit* v. *Koetzow*, 2 E. & E. 730; 29 L.J. M.C. 128.

assistance for the recovery of his rent (*s*). One who makes a contract for sale or hire, with the knowledge that the other contracting party intends to apply the subject-matter of the contract to an immoral or illegal use, cannot recover upon the contract; and it is not necessary that he should expect to be paid out of the proceeds of the immoral or illegal act (*t*). Thus, where coachbuilders, knowing a woman to be a prostitute, supplied her with a brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men, it was held that they could not recover the price, although there was no evidence that they looked expressly to the proceeds of her prostitution for payment (*u*). But "a prostitute must have a lodging as well as other people"; and if she merely uses the lodgings to live in and plies her trade elsewhere, there is no answer to the landlord's claim for his rent (*v*). Where an action was brought for the charges of washing a variety of expensive dresses and numerous gentlemen's nightcaps, and it appeared that the dresses were used by the defendant for the purpose of enabling her to decoy gentlemen to her bed, and the nightcaps for those gentlemen to sleep in when she got them there, and the plaintiff was aware of the uses to which the dresses and nightcaps were applied, it was held that the plaintiff was nevertheless entitled to recover for the washing (*x*). A shopkeeper cannot recover the price of immoral or obscene prints and libels sold by him (*y*). A printer cannot bring an action against a publisher for the price agreed to be paid for printing an indecent, libellous, and immoral history setting forth the amours and intrigues of a prostitute; every servant and workman, "to the lowest," knowingly engaged in putting forth such a work to the public is prevented from suing for compensation (*z*).

Contracts against public policy.—A covenant by a father that he will abstain from seeing or exercising any control over his children is void as being contrary to the policy of the law (*a*), unless the father has, by gross misconduct, manifested himself unfit to associate with them (*b*). But a bond given by the father of illegitimate children to the mother to secure her an annuity on con-

(*s*) *Jennings* v. *Throgmorton*, R. & M. 251; *Smith* v. *White*, L.R. 1 Eq. 626; 35 L.J. Ch. 454.

(*t*) *Cannan* v. *Bryce*, 3 B. & Ald. 179; *M'Kinnell* v. *Robinson*, 3 M. & W. 434; 7 L.J. Ex. 149.

(*u*) *Pearce* v. *Brooks*, L.R. 1 Ex. 213; 35 L.J. Ex. 134.

(*v*) *Crisp* v. *Churchill*, cited 1 B. & P. 340.

(*x*) *Lloyd* v. *Johnson*, 1 B. & P. 340.

(*y*) *Fores* v. *Johnes*, 4 Esp. 97.

(*z*) *Poplett* v. *Stockdale*, 2 C. & P. 200.

(*a*) *Vansittart* v. *Vansittart*, 4 K. & J. 62; 27 L.J. Ch. 222; 2 De G. & J. 249; 27 L.J. Ch. 289; *Hamilton* v. *Hector*, L.R. 6 Ch. 701; 40 L.J. Ch. 692. As to the mother of an illegitimate child, see *Barnardo* v. *McHugh*, (1891) A.C. 388; 61 L.J. Q.B. 721; *Humphrys* v. *Polak*, (1901) 2 K.B. 385; 70 L.J. K.B. 752.

(*b*) *Swift* v. *Swift*, 34 L.J. Ch. 209, 394; 34 Beav. 266. As to agreements in separation deeds, see 36 Vict. c. 12, s. 2; Addison on Torts, 597 (ed. 7).

dition of her giving up the care and custody of the children is legal and may be enforced (*c*). A promise by a client to his solicitor to make him a present beyond the scale of ordinary legal remuneration is void as being contrary to the public policy of the law (*d*); and so are all contracts between solicitors and clients for the purchase of property from the client (*e*); and all contracts prejudicial to the interests of the public, such as a contract tending to prevent free competition (*f*), to influence improperly the performance of public duties, or having for its object the purchase or acquisition by money of a dignity or title of honour in the gift of the crown (*g*). If money is lent to an elector as an inducement to him to give his vote, it cannot be recovered back; nor can any security given for its repayment be enforced. A contract with a member of the legislature to induce him to vote in a particular way, placing his private interest in opposition to his public duty, is void; but a member of the legislature may make terms for the sale of his lands, and for compensation for any injury he may sustain from the carrying out of an undertaking seeking parliamentary sanction (*h*). A contract to abandon rights under the Employers' Liability Act, 1880, is not void (*i*).

Contracts providing for the future separation of husband and wife are contrary to public policy, and therefore void (*k*). But a contract between the husband and a trustee on behalf of the wife, providing for the terms of a present separation, will be enforced (*l*).

Contracts in restraint of marriage are void, as being opposed to public policy (*m*); but a restriction against marriage with one specified person is not illegal (*n*).

Maintenance.—Agreements to furnish money to be risked on the event of a lawsuit, or to aid and assist in the prosecution of lawsuits, in which the party making the agreement is in nowise interested, and with which he has no just or reasonable ground for interference, are void, as tending to keep alive strife and contention (*o*). But if the party has any interest in the thing in dispute,

(*c*) *Plaskett's Estate, In re*, 30 L.J. Ch. 606.

(*d*) *O'Brien* v. *Lewis*, 4 Giff. 221; 32 L.J. Ch. 569; *Tyrrel* v. *Bk. of London*, 10 H.L.C. 26; 31 L.J. Ch. 396; *Pince* v. *Beattie*, 32 L.J. Ch. 734. As to validity of agreements between solicitors and their clients, see 33 & 34 Vict. c. 28, *post*, p. 827.

(*e*) *Post*, p. 119.

(*f*) *Hilton* v. *Eckersley*, 6 E. & B. 47, 64; 25 L.J. Q.B. 199.

(*g*) *Egerton* v. *Brownlow* (*Earl*), 4 H.L.C. 235; 23 L.J. Ch. 348.

(*h*) *Howden* (*Lord*) v. *Simpson*, 1 Rail. Cas. 347.

(*i*) *Griffiths* v. *Dudley* (*Earl*), 9 Q.B.D. 357; 51 L.J. Q.B. 543. As to contracting out of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), see ss. 3 and 9 of that Act.

(*k*) *Merryweather* v. *Jones*, 4 Giff. 509.

(*l*) *Gibbs* v. *Harding*, L.R. 5 Ch. 336; 39 L.J. Ch. 374.

(*m*) *Post*, p. 1175.

(*n*) *Topham* v. *Portland* (*Duke*), 32 L.J. Ch. 81; 1 De G. J. & S. 517.

(*o*) 32 Hen. 8, c. 9; Plowd. 88; 2 Instit. 564; *Pierson* v. *Hughes*, Freem. 71, 81; *Earle* v. *Hopwood*, 30 L.J. C.P. 217; 9 C.B. N.S. 566; *Bradlaugh* v. *Newdigate*, 11 Q.B.D. 1; 52 L.J. Q.B. 454; *Harris* v. *Brisco*, 17 Q.B.D. 504; 55 L.J. Q.B. 423.

or has a fair and reasonable ground for thinking that he has rights in common with other parties, he may lawfully enter into an agreement with them for the prosecution or defence of those rights (*p*). A father may assist his son, a husband his wife, or a master his servant without being guilty of maintenance; but such a relationship as that of a cousin is not sufficient to make such an agreement lawful (*q*). Charitable motives are a good defence to the action, however indiscreet the charity may be (*r*). It is laid down in our old law books that, for avoiding maintenance, rights of action cannot be assigned or granted over by one man to another. Thus, "if a man owe me money on an obligation or the like, I cannot grant this debt to another; but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor" (*s*). But the ancient rule had been so explained away at common law, that it remained only as an objection to the form of the action; and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, protected the assignment of a *chose in action* as much as the law would that of a chose in possession (*t*). Rights of action, debts, and claims to money due on contracts, may therefore now be purchased without making the purchaser guilty of maintenance. If, however, the purchaser gives an indemnity against all the costs that have been, or may be, incurred by the vendor in the prosecution of the suit, the contract will then amount to maintenance (*u*), and will consequently be void (*x*).

Champerty.—When the party officiously and unwarrantably agreeing to furnish money, or to aid in the maintenance of the action or suit, is to share in the advantages thereof, he is said to be guilty of *champerty* (*campi partitio*), and the agreement is void (*y*). But if the interference does not amount to maintenance, there is no champerty, although the party tendering the assistance is to receive the money recovered in the action (*z*). An agreement by a solicitor not to charge his client's costs, in consideration of his

(*p*) 4 Bl. Com. 134, 135; 2 Roll. Abr. 115; *Findon* v. *Parker*, 11 M. & W. 682; 12 L.J. Ex. 444; *Alabaster* v. *Harness*, (1895) 1 Q.B. 339; 64 L.J. Q.B. 76.

(*q*) *Hutley* v. *Hutley*, L.R. 8 Q.B. 112; 42 L.J. Q.B. 52.

(*r*) *Harris* v. *Brisco*, 17 Q.B.D. 504; 55 L.J. Q.B. 423.

(*s*) Vin. Abr. Assignment (B.) (D.); Bro. Abr. Chose in action; Co. Litt. 265 a.

(*t*) Co. Litt. 232 b, n. 1; *Tyson* v. *Jackson*, 30 Beav. 384; *Hare* v. *L. & N. W. Ry.*, Johns. 722. See Judicature Act, 1873, s. 25 (6).

(*u*) *Bradlaugh* v. *Newdigate*, 11 Q.B.D. 1; 52 L.J. Q.B. 454.

(*x*) *Harrington* v. *Long*, 2 Myl. & K. 590; *Jones* v. *Thomas*, 2 Y. & C. 498.

(*y*) *Stanley* v. *Jones*, 7 Bing. 369; 9 L.J. (O.S.) C.P. 51; *Reynell* v. *Sprye*, 21 L.J. Ch. 633; 1 De G. M. & G. 660; *Sprye* v. *Porter*, 7 E. & B. 58, 80; 26 L.J. Q.B. 64. See *James* v. *Kerr*, 40 Ch.D. 449; 58 L.J. Ch. 355.

(*z*) *Williams* v. *Protheroe*, 3 Y. & J. 129; 2 M. & P. 779.

being allowed to retain for his own use a share of the sums recovered by him for them, amounts to champerty and is illegal and void (*a*); but if the work is done, and the client receives the benefit of it, the solicitor will be entitled to his costs as between solicitor and client (*b*). An agreement (to be carried into effect in this country), which, if made in this country, would be void on the ground of champerty, is not the less void because made in a foreign country where such a contract would be legal (*b*). The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud partakes of the nature of champerty, and will not be enforced (*c*).

A contract by a person to communicate information on the terms of getting a share of the property that may thereby be obtained by the person to whom the information is given is not void for champerty. But if the contract is that the person giving the information shall himself recover the property for the persons who are entitled to it, then, even although no hostile action may be necessary, it is against the policy of the law and the contract is void (*d*).

The statutes against champerty were directed mainly against speculations in lawsuits, and were intended to repress the gambling propensity which formerly prevailed of buying up doubtful titles. It was never intended to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it (*e*).

Agreements between solicitors and their clients respecting payment for services are now regulated by the Solicitors Act, 1870. No action is to be brought upon such agreements, but they may be enforced by motion (*f*), and rule or order, or set aside (*g*). Nothing in the Act is to render valid an agreement for payment only in the event of success (*h*), or one which is void under the bankruptcy laws (*i*).

Contracts obstructing or interfering with the administration of public justice are also void, as being contrary to the public policy of the law. All contracts prohibiting parties from bringing an action, and all agreements purporting to oust the courts of their jurisdiction altogether are void (*k*). But an agreement to refer

(*a*) *Masters, In re*, 4 Dowl. P.C. 21; *Yeatman, Ex parte*, *ib.* 304; *Hilton* v. *Woods*, L.R. 4 Eq. 432; 36 L.J. Ch. 941; *Pince* v. *Beattie*, 32 L.J. Ch. 734; *Earle* v. *Hopwood*, 9 C.B. N.S. 566; 30 L.J. C.P. 217: 32 Hen. 8, c. 9; see also *Coondoo* v. *Mookerjee*, 2 App.Cas. 186.

(*b*) *Grell* v. *Levy*, 16 C.B. N.S. 73.

(*c*) *De Hoghton* v. *Money*, L.R. 2 Ch. 164; *Hill* v. *Boyle*, L.R. 4 Eq. 260.

(*d*) *Rees* v. *De Bernardy*, (1896) 2 Ch. 437; 65 L.J. Ch. 656.

(*e*) *Anderson* v. *Radcliffe*, E. B. & E. 817; 29 L.J. Q.B. 12; *Scott* v. *Miller*, 28 L.J. Ch. 584; Johns. 220, 328.

(*f*) 33 & 34 Vict. c. 28, s. 8.

(*g*) Sect. 9.

(*h*) Sect. 11. See Solicitors Act, 1870, *In re*; 1 Ch.D. 573; 45 L.J. Ch. 47.

(*i*) Sect. 12.

(*k*) *Horton* v. *Sayer*, 4 H. & N. 643; 29 L.J. Ex. 28; *Lee* v. *Page*, 30 L.J. Ch. 857; *Edwards* v. *Aberayron Ins. Society*, 1 Q.B.D. 563; *Hope* v. *International*

existing or future differences to arbitration may be enforced (*l*), whether the difference is one of fact or of law (*m*); and agreements for determining only the amount to be recovered by arbitration are valid (*n*); and the determination by arbitration of the amount of damages to be recovered, or the time of payment, may lawfully be made a condition precedent to the right to maintain an action (*o*). It is difficult to reconcile two propositions so nearly in direct opposition as that no contract of the parties shall oust the jurisdiction of the courts, and that, on any difference arising between two parties, it shall be referred to arbitration; but the fair result of the authorities is that, if the contract is in such terms that a reference to a third person is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition has been complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference will not oust the jurisdiction of the courts or deprive the party of his action (*p*). It is not contrary to public policy for the parties to agree that the question of fraud on the part of an architect whose certificate and valuation has been agreed to be binding as between them shall not be raised by either of them (*q*). All agreements to pay money to induce a party to suppress evidence, or to give evidence in favour of one side only, or not to appear as a witness in a civil suit or a criminal prosecution, are void (*r*), and will be set aside (*s*); and so are agreements to compound a felony, or to forego a prosecution for a public misdemeanour (*t*), or to hush up a charge of embezzlement (*u*), or to compromise a suit for divorce in consideration of money to be paid to the petitioner by the co-respon-

Society, 4 Ch.D. 327, 334; 46 L.J. Ch. 200; *Lound* v. *Grimwade*, 39 Ch.D. 605; 57 L.J. Ch. 725.

(*l*) 52 & 53 Vict. c. 49; *Roper* v. *Lendon*, 1 E. & E. 825; 28 L.J. Q.B. 262.

(*m*) *Randegger* v. *Holmes*, L.R. 1 C.P. 679.

(*n*) *Horton* v. *Sayer*, *supra*; *Lee* v. *Page*, 30 L.J. Ch. 857.

(*o*) *Scott* v. *Avery*, 5 H.L. Cas. 811; 25 L.J. Ex. 308; *Brown* v. *Overbury*, 11 Exch. 715; 25 L.J. Ex. 169; *Scott* v. *Liverpool Corporation*, 28 L.J. Ch. 230; *Tredwen* v. *Holman*, 1 H. & C. 72; 31 L.J. Ex. 398; *Braunstein* v. *Accidental Death Ins. Co.*, 1 B. & S. 782; 31 L.J. Q.B. 17; *Edwards* v. *Aberayron Ins. Society*, *supra*; *Dawson* v. *Fitzgerald*, 1 Ex.D. 257; 45 L.J. Ex. 893; *Babbage* v. *Coulburn*, 9 Q.B.D. 235; 52 L.J. Q.B. 50; *Viney* v. *Bignold*, 20 Q.B.D. 172; 57 L.J. Q.B. 82; *Spurrier* v. *La Cloche*, (1902) A.C. 447; 71 L.J. P.C. 101.

(*p*) *Elliott* v. *Royal Exchange Assurance Co.*, L.R. 2 Ex. 237, 242; 36 L.J. Ex. 129.

(*q*) *Tullis* v. *Jackson*, (1892) 3 Ch. 441; 61 L.J. Ch. 655.

(*r*) *Collins* v. *Blantern*, 2 Wils. 347.

(*s*) *Williams* v. *Bayley*, L.R. 1 H.L. 200; 35 L.J. Ch. 717.

(*t*) *Keir* v. *Leeman*, 6 Q.B. 308; 13 L.J. Q.B. 359; 9 Q.B. 371; 15 L.J. Q.B. 360; *Windhill L. B.* v. *Vint*, 45 Ch.D. 351; 59 L.J. Ch. 608; *Edgcombe* v. *Rodd*, 5 East, 294. See *Flower* v. *Sadler*, 10 Q.B.D. 572.

(*u*) *Critchley*, *Ex parte*, 15 L.J. Q.B. 124; *Williams* v. *Bayley*, *supra*.

dent (*x*), or to pay money in consideration that a party will use his private interest and influence with the crown to obtain the pardon of a criminal (*y*), or to pay money in consideration of the abandonment of a petition presented to the House of Commons against the return of a member on the ground of bribery (*z*); and all agreements interfering with the proper administration of the bankruptcy laws, and the examination and discharge of bankrupts, or tending to deceive the trustees or officers of the court, or to induce them not to do their duty (*a*). And not only is the agreement itself void, but any bill of exchange, promissory note, or other security given in pursuance of any such agreement, is tainted with illegality and cannot be enforced, unless it is a negotiable security in the hands of a *bonâ fide* holder for value, without notice of the illegality (*b*). But an agreement to compound civil rights, or to forego or settle an action that has been commenced (*c*), or to compromise one of those misdemeanours where the person injured has the choice between a civil and a criminal remedy (*d*), or to discharge a party from imprisonment under civil process, or his goods from a distress or execution (*e*), is valid and may be enforced. All contracts, bonds, indemnities, guarantees, and undertakings tending to induce sheriffs, gaolers, town-clerks, and public officers to violate or neglect their duty, or made to protect them from the consequences of their misconduct, are absolutely null and void (*f*). But an engagement or undertaking to indemnify a sheriff in the execution of a lawful act, or in the exercise of the duties of his office, is valid and may be enforced, such as an indemnity bond to induce him to execute or not to execute a *fi. fa.* upon goods and chattels the ownership of which is disputed (*g*).

Contracts in contravention of the policy of an Act of Parliament (*h*), *or of the Bankruptcy Acts*, are illegal and void, such as contracts and securities for the payment of money to a particular creditor to induce him to withdraw his opposition to a bankrupt's discharge (*i*),

(*x*) *Gipps* v. *Hume*, 2 J. & H. 517; 31 L.J. Ch. 37.

(*y*) *Norman* v. *Cole*, 3 Esp. 253.

(*z*) *Coppock* v. *Bower*, 4 M. & W. 367; 8 L.J. Ex. 9.

(*a*) *Nerot* v. *Wallace*, 3 T.R. 23; *Coles* v. *Strick*, 15 Q.B. 9; *Humphreys* v. *Welling*, 31 L.J. Ex. 33; 1 H. & C. 7.

(*b*) *Clubb* v. *Hutson*, 18 C.B. N.S. 414; *Williams* v. *Bayley*, L.R. 1 H.L. 200; 35 L.J. Ch. 717. See *Flower* v. *Sadler*, 10 Q.B.D. 572; *Jones* v. *Merioneth Bldg. Soc.*, (1892) 1 Ch. 173; 61 L.J. Ch. 138; and 45 & 46 Vict. c. 61, s. 27, *post*, p. 1121.

(*c*) *Harding* v. *Cooper*, 1 Stark. 467; *Drage* v. *Ibberson*, 2 Esp. 643.

(*d*) *Fisher* v. *Apollinaris Co.*, L.R. 10 Ch. 297; 44 L.J. Ch. 500; but see per Stirling, J., *Windhill L. B.* v. *Vint*, 45 Ch.D. 351; 59 L.J. Ch. 608.

(*e*) *Brett* v. *Close*, 16 East, 300; *Sugars* v. *Brinkworth*, 4 Campb. 46; *Pilkington* v. *Green*, 2 B. & P. 151.

(*f*) *Blithman* v. *Martin*, 2 Bulstr. 213; *Wright* v. *Verney* (*Lord*), 3 Doug. 240; *Morris* v. *Chapman*, T. Jones, 24; *Hughes* v. *Statham*, 4 B. & C. 187; 3 L.J. (O.S.) K.B. 179.

(*g*) Atkinson on Sheriffs, p. 192 (ed. 5).

(*h*) *Macgregor* v. *Dover and Deal Ry.*, 18 Q.B. 618; 22 L.J. Q.B. 69.

(*i*) *Jackson* v. *Davison*, 4 B. & Ald. 695; *Rogers* v. *Kingston*, 2 Bing. 441; 3 L.J. (O.S.) C.P. 77; *Murray* v. *Reeves*, 8 B. & C. 425; 6 L.J. (O.S.) K.B. 348;

or to abandon proceedings in bankruptcy (*k*), or to secure to a particular creditor a superior claim or preference in respect of the future property of the bankrupt (*l*), or a greater share of the dividends of a bankrupt's estate (*m*), or some additional advantage which prevents the property being distributed under the bankruptcy laws (*n*), or to omit a debt from a bankrupt's schedule in order that the creditor may, after the bankruptcy, claim the amount from the bankrupt (*o*); and so also are all agreements tending to induce the officers of the court or trustees not to do their duty (*p*). Any *cessio bonorum* made by an insolvent on the eve of bankruptcy for the benefit of some creditors to the exclusion of others, or any scheme or arrangement made for the distribution of the assets by such person otherwise than according to the provisions of the bankruptcy law, is a fraud upon the creditors who are excluded or disappointed, or who may be delayed thereby, and is consequently void (*q*). A contract for the building of a ship provided that, in the event of bankruptcy of the builder, the purchaser might cause the ship to be completed by anyone else, and employ such materials of the builder's as were on his premises and fit for the purpose, and it was held that this contract was void as against the trustees in bankruptcy (*r*). A covenant or agreement to pay all the creditors their debts in full, in consideration that they will not proceed further under the bankruptcy, is of course perfectly legal; and so is a guarantee to a petitioning creditor securing to him a dividend of a certain amount on his debt, as an inducement to him to incur the expense and trouble of suing for an adjudication. But if the bankruptcy is a concerted bankruptcy, and there is anything fraudulent in the proceeding, the contract will be illegal and void (*s*). By sect. 48 of the Bankruptcy Act, 1883 (*t*), every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own money, in favour of any creditor (*u*), or any person in trust for any creditor, with a view of

Hall v. *Dyson*, 17 Q.B. 785; 21 L.J. Q.B. 224; *Hills* v. *Mitson*, 8 Exch. 758; 22 L.J. Ex. 273.

(*k*) *Davis* v. *Holding*, 1 M. & W. 164; 5 L.J. Ex. 102.

(*l*) *Alsager* v. *Spalding*, 4 Bing. N.C. 407; 7 L.J. C.P. 225; *Rose* v. *Main*, 1 Bing. N.C. 357; 4 L.J. C.P. 18.

(*m*) *Staines* v. *Wainwright*, 6 Bing. N.C. 179; 9 L.J. C.P. 107.

(*n*) *Mackay, Ex parte, Jeavons, In re*, L.R. 8 Ch. 643; 42 L.J. Bank. 68; *Williams, Ex parte*, 7 Ch.D. 138; 47 L.J. Bank. 26.

(*o*) If the creditor is a party to the omission of the debt, he cannot afterwards recover the amount: *Tabram* v. *Freeman*, 2 C. & M. 451; 3 L.J. Ex. 135.

(*p*) *Nerot* v. *Wallace*, 3 T.R. 26; *M'Neill* v. *Cahill*, 2 Bligh, 229.

(*q*) *Saffery, Ex parte*, 4 Ch.D. 555; 46 L.J. Bank. 34.

(*r*) *Barter, Ex parte*, 26 Ch.D. 510; 53 L.J. Ch. 802.

(*s*) *Kaye* v. *Bolton*, 6 T.R. 134; *Fry* v. *Malcolm*, 5 Taunt. 117.

(*t*) 46 & 47 Vict. c. 52.

(*u*) As to meaning of term "creditor," see *Paine, In re*, (1897) 1 Q.B. 122; 66 L.J. Q.B. 71.

giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy; but the section is not to affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt. A secret agreement by a shareholder in a company which is being compulsorily wound up that he will endeavour to postpone the making of a call, or will support the claim of a creditor, is illegal (*x*).

Contracts for the evasion of the licensing and excise Acts are void. The Customs Laws are now consolidated in the 39 & 40 Vict. c. 36, amended by 41 Vict. c. 15 (*y*). An agreement that articles of apprenticeship shall be antedated, to make it appear that an apprentice has been articled for the full term required by the statute, is void; and so is a bond given to secure payment of the premium in respect of such apprenticeship (*z*). Leases of premises to be used in contravention of the excise laws or licensing Acts, or the provisions of a building Act, or a health of towns Act, or any local public Act of Parliament (*a*), are void, if the lessors knew that the premises were to be used for the forbidden purpose. Whenever a licence is required for the exercise of a trade on grounds of public policy, any agreement made with the view of enabling a party to trade without the licence is void (*b*).

Parish indemnities.—A security given to overseers to indemnify the parish against charges to which it may be subject by the birth of an illegitimate child therein is not illegal (*c*); nor is a covenant with a lessor of premises in a parish to indemnify the churchwardens and overseers of the poor of the parish, and the inhabitants thereof, from all charges resulting from the covenantor's taking apprentices or servants who should thereby gain a settlement within, or become chargeable to the parish (*d*).

Sale of letters of recommendation and public offices of trust.—All contracts and agreements to pay money to ministers of state for an appointment to a public office of trust, or for the grant of favours from the crown (*e*), or for an appointment in the dockyard, the crown being kept in ignorance of the bargain, are absolutely void, as being contrary to public policy. But if the office is an acknow-

(*x*) *Elliott* v. *Richardson*, L.R. 5 C.P. 744; 39 L.J. C.P. 140.

(*y*) See *post*, p. 102, as to Excise.

(*z*) *Poole* v. *Wiggins*, 3 Bing. N.C. 230; 6 L.J. C.P. 2.

(*a*) *Gaslight and Coke Co.* v. *Turner*, 6 Bing. N.C. 324; 9 L.J. Ex. 336.

(*b*) *Ritchie* v. *Smith*, 6 C.B. 474; 18 L.J. C.P. 9.

(*c*) *Cole* v. *Gower*, 6 East, 110.

(*d*) *Walsh* v. *Fussell*, 6 Bing. 163; 7 L.J. (O.S.) C.P. 261.

(*e*) *Hanington* v. *Du Chatel*, 1 Bro. C.C. 124; *Morris* v. *M'Culloch*, Ambl. 435.

ledged saleable office, and the transaction is carried on under public authority, and with the consent of the crown, and of the parties who have the office in their gift, as was formerly the case with sales of commissions in the army, the transaction is lawful, and the contract growing out of it may be enforced. The fellow of a college may assign and mortgage the income of his fellowship, although the assignment may be a violation of his duty to the college (*f*); and it was also held that the clerk to the deputy registrar in the Prerogative Court of Canterbury might likewise charge or alien the income and profits of his office (*g*). Exchanges of public offices, and substitutions of one person in the place of another, are lawful, when they are made with the sanction of the public authorities and the parties who have the disposal of such offices; but secret agreements for exchanges of such offices are void (*h*).

Contracts in fraud of masters and employers.—All contracts and agreements to recommend parties for employment in offices of trust in consideration of the payment of money, or to pay money in consideration of such recommendation, entered into without the knowledge of the employer or person who has the office at his disposal, are a fraud upon the latter, and are void (*i*). If a party entrusted with the duty of selecting fit persons for certain offices obtains contracts or securities for the payment of money by the applicants after their appointment, without the knowledge of the employer, he is guilty of a gross abuse of the confidence reposed in him, and such agreements cannot stand. But, if the employer is apprised of the whole transaction, it cannot then be considered a fraud on him, although, if the office be a public office, the contract may be void on grounds of public policy (*post*, p. 85). An agreement to pay money in consideration of a recommendation to the appointment to the command of a vessel, entered into without the knowledge of the shipowners, is void (*k*); but, if the shipowners are cognizant of the agreement at the time they make the appointment, there is then no fraud in the matter (*l*). If a person is employed to puff a particular tradesman, he cannot bring an action against the latter for his commission, if the employment was kept secret from the customers, and they were led to suppose that the recommendation was founded upon the known character of the party recommended, and not upon a pecuniary consideration (*m*).

(*f*) *Feistel* v. *King's Coll., Cambridge*, 16 L.J. Ch. 339; 10 Beav. 491.
(*g*) *Aston* v. *Gwinnell*, 3 Y. & J. 136.
(*h*) *Parsons* v. *Thompson*, 1 H. Bl. 322.
(*i*) *Waldo* v. *Martin*, 4 B. & C. 319; 6 D. & R. 364.
(*k*) *Blachford* v. *Preston*, 8 T.R. 89; *Card* v. *Hope*, 2 B. & C. 672; 2 L.J. (O.S.) K.B. 96.
(*l*) *Richardson* v. *Mellish*, 2 Bing. 229, 242; 3 L.J. (O.S.) C.P. 265.
(*m*) *Wybird* v. *Stanton*, 4 Esp. 179.

Fraud on creditors.—If a debtor induces his creditors to compound their claims and execute a deed of composition for their several debts by concealing from them the true state of his affairs, the deed will be void, and the creditors remitted to their original rights (*n*). Whenever creditors enter into a deed of composition with their debtor, whereby they agree to release the latter from his liabilities on payment of a certain rateable proportion of their several claims, any private underhand agreement for securing to any one of the creditors executing the deed any advantage not enjoyed by them all in common is fraudulent and void. Equality is the only principle that can be applied; and, if one creditor, unknown to the other creditors (*o*)—not unknown to one or two, but to the general body—enters into an arrangement by which he gets for himself from the debtor, or from any one on behalf of the debtor, any collateral advantage whatever, that arrangement cannot stand (*p*). But a payment in excess of the composition made afterwards under pressure and not in pursuance of a previous arrangement will not avoid the composition (*q*). And, although a promissory note so given has been dishonoured, and an action brought upon it and judgment recovered, yet a guarantee given for the amount of such judgment is tainted with the original fraud, and cannot be enforced, notwithstanding that the illegality might have been, but was not, pleaded to the action (*r*). If money is paid to one creditor, unknown to the other creditors, it may be recovered back (*s*). And, although he is to receive no more money than the others, yet, if the composition is to be paid by instalments, and he secretly bargains for, and obtains, better security for the payment of his own instalments than is possessed by the other creditors, the security so obtained is void (*t*). And, if he has secretly received either goods or money to induce him to compound his claim and join in the execution of the composition deed, he will not be allowed to sue upon the deed for the instalments due to him, or upon any bond or bill of exchange given him to secure the payment of such instalments (*u*). A bargain by which a creditor, in consideration of his being a surety for the payment to the others of a composition, agreed with the debtor, without the

(*n*) *Vine* v. *Mitchell*, 1 Moo. & R. 337; *Wenham* v. *Fowle*, 3 Dowl. P.C. 43.

(*o*) *Cockshott* v. *Bennett*, 2 T.R. 763.

(*p*) *Jackman* v. *Mitchell*, 13 Ves. 581; *Jackson* v. *Lomas*, 4 T.R. 166; *Wells* v. *Girling*, 4 Moore, 87; 1 B. & B. 447; *Geere* v. *Mare*, 2 H. & C. 339; 33 L.J. Ex. 50; *Mare* v. *Warner*, 3 Giff. 100; *Mare* v. *Earle*, 3 Giff. 108; *McKewan* v. *Sanderson*, L.R. 15 Eq. 229.

(*q*) *Carey* v. *Barrett*, 4 C.P.D. 379.

(*r*) *Clay* v. *Ray*, 17 C.B. N.S. 188; *Geere* v. *Mare*, 2 H. & C. 339; 33 L.J. Ex. 50.

(*s*) *Alsager* v. *Spalding*, 4 Bing. N.C. 407; 7 L.J. C.P. 225; *Atkinson* v. *Denby*, 7 H. & N. 934; 31 L.J. Ex. 362; *Lenzberg's Policy*, *In re*, 7 Ch.D. 650; 47 L.J. Ch. 178.

(*t*) *Leicester* v. *Rose*, 4 East, 381.

(*u*) *Knight* v. *Hunt*, 5 Bing. 432; 7 L.J. (O.S.) C.P. 165.

knowledge of the other creditors, for the payment of his own debt in full, was set aside at the instance of the debtor (*x*). If the creditor keeps back a portion of the debts due to him, and does not correctly state the amount of his claim in the composition deed, his conduct is fraudulent, and he will not be allowed to sue the debtor for the debts omitted (*y*). If he makes a promise, upon the faith of which the composition proceeds, he will not be permitted to violate his engagement, as his doing so would amount to a fraud upon the other creditors (*z*).

All the creditors are presumed to compound their claims upon the debtor on the understanding that they are all to receive equal proportions of their several debts; and they all accept the same security for what they are individually to receive. They are, therefore, not fairly dealt by, if any of them bargains for, or receives, better terms than another (*a*). But a creditor who holds bills of exchange drawn by the debtor upon, and accepted by, third parties as a security for part of his debt, is entitled to avail himself of the benefit of such securities; and, if he claims the whole of his debt under the composition deed in the first instance, and then receives the amount due upon the bills, he is entitled to his composition upon the residue of his demand (*b*). The omission to state the amount of the debt in the deed will not avoid the contract as regards the creditor whose debt has been so omitted to be stated; but the amount of the debt may be proved by extrinsic testimony (*c*).

Contracts made illegal by statutes.—Everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden; and a contract to do such thing is absolutely void (*d*). Where the contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not; but in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was an intention to break the law; and then it becomes important to ascertain whether the parties knew what the law was (*e*). Where a statute imposes a penalty upon corporate officers or others who are concerned or interested in the subject-matter of a contract to

(*x*) *Wood* v. *Barker*, L.R. 1 Eq. 139; 35 L.J. Ch. 276.
(*y*) *Britten* v. *Hughes*, 5 Bing. 460; 7 L.J. (O.S.) C.P. 188.
(*z*) *Clark* v. *Upton*, 3 Man. & Ry. 89.
(*a*) *Lewis* v. *Jones*, 4 B. & C. 511; 3 L.J. (O.S.) K.B. 270; *Coleman* v. *Waller*, 3 Y. & J. 217.
(*b*) *Thomas* v. *Courtnay*, 1 B. & Ald. 5.
(*c*) *Harrhy* v. *Wall*, 1 B. & Ald. 103; *Reay* v. *White*, 1 C. & M. 748; 2 L.J. Ex. 229.
(*d*) *Chambers* v. *Manchester & Milford Ry.*, 5 B. & S. 588; 33 L.J. Q.B. 268; *Cork & Youghal Ry., In re*, L.R. 4 Ch. 748; 39 L.J. Ch. 277.
(*e*) *Waugh* v. *Morris*, L.R. 8 Q.B. 202, 208; 42 L.J. Q.B. 57.

prevent them from entering into contracts, it is not necessary, in order to render such contracts void, that they should be declared to be void by the very words of the statute, but the whole statute must be looked at in order to see whether or not the legislature intended that such contracts should be void, or merely to inflict a penalty (*f*).

Illegal partnerships.—By sect. 34 of the Partnership Act, 1890, a partnership is dissolved by any event which makes it unlawful to carry it on.

Illegal contract as to ground game.—By sect. 3 of the Ground Game Act, 1880 (*g*), every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier under that Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, is void. This section is only directed to preventing landlords and tenants from combining to defeat the objects of the Act; it does not, therefore, prevent the tenant of a farm, over which he has the sole right of killing ground game, otherwise than in pursuance of the statute, from entering into a valid agreement with a third person to let such right to him (*h*). A reservation in a lease of land of the exclusive right of sporting to the lessor is not wholly void as being in contravention of the section, but only so far as it purports to divest the right of the occupier to kill and take ground game (*i*). An agreement purporting to bind the landlord of a farm, in the event of the tenant in occupation leaving the ground game unshot, to compensate the tenant for damage done by such game to his crops, is void under the section, both as being an agreement purporting to divest or alienate the right of the occupier as declared by the Act, and as giving to the occupier an advantage in consideration of his forbearing to exercise such right (*k*).

Illegal contract as to compensation under the Agricultural Holdings Act.—A contract by a tenant depriving himself of his right to claim compensation under the Agricultural Holdings Act is, so far as it deprives him of such right, void, both at law and in equity (*l*).

Illegal contract as to stamp duty.—By sect. 20 of the Customs Act, 1888 (*m*), every condition of sale, passed with the view of pre-

(*f*) *Melliss* v. *Shirley Local Board*, 16 Q.B.D. 446; 55 L.J. M.C. 143.

(*g*) 43 & 44 Vict. c. 47, s. 3.

(*h*) *Morgan* v. *Jackson*, (1895) 1 Q.B. 885; 64 L.J. Q.B. 462.

(*i*) *Stanton* v. *Brown*, (1900) 1 Q.B. 671; 69 L.J. Q.B. 301.

(*k*) *Sherrard* v. *Gascoigne*, (1900) 2 Q.B. 279; 69 L.J. Q.B. 720.

(*l*) 46 & 47 Vict. c. 61, s. 55. Contracts between the owner and occupier of land for the payment of tithe rent-charge by the occupier are void: 54 Vict. c. 8, s. 1.

(*m*) 51 Vict. c. 8, s. 20.

cluding objection on the ground of insufficiency of stamp, and every contract or undertaking for assuming the liability on account of the absence or insufficiency of stamp upon any instrument executed after the passing of that Act, or indemnifying against such absence or insufficiency, is void. Sect. 17 of the same Act, which imposes a penalty on a broker who fails to send a contract note to his principal does not render the contract between broker and principal illegal so as to preclude the broker from recovering commission or brokerage (*n*).

Illegal sale of offices.—By 5 & 6 Ed. 6, c. 16, ss. 2, 3, and 49 Geo. 3, c. 126, it is enacted that all contracts for money or profit, relating to appointments, touching the administration of justice, or the collection of the revenue, or to any office in the gift of the crown, and any commission, civil, naval, or military, and any place or employment in any public department or office of Government shall be void (*o*). All assignments, trusts, and money bargains, therefore, respecting cadetships, places, and public offices are illegal and void (*p*). The offices of sub-distributor of stamps and collector of taxes are within the statute, both of them being connected with the receipt of the revenue (*q*); but the office of clerk to the deputy registrar in the Prerogative Court of Canterbury was held not to be an office within the Act (*r*), nor the office of clerk to assessed tax commissioners, or of clerk to commissioners of sewers (*s*), nor the fellowship of a college (*t*). The appointment of a deputy to fulfil the duties of a public office at a fixed salary, the deputy paying over the fees of the office to the principal, is of course perfectly legal, where the business of the office can be lawfully transacted by the deputy; but, if the deputy takes the fees of the office, and pays a fixed sum annually to the principal for the post, the deputation of the office and the contract to pay the money are void (*u*). A clergyman having the cure of souls is not a public officer, and may assign his salary (*x*).

Sale of pensions.—An assignment by a retired military officer of his pension for valuable consideration was void under 47 Geo. 3,

(*n*) *Learoyd* v. *Bracken*, (1894) 1 Q.B. 114; 63 L.J. Q.B. 96.

(*o*) The sale of commissions is now illegal; see 34 & 35 Vict. c. 86 (preamble).

(*p*) *Graeme* v. *Wroughton*, 24 L.J. Ex. 265; 10 Exch. 146; *Lee* v. *Coleshill*, Cro. Eliz. 529; *Stackpole* v. *Earle*, 2 Wils. 133; *Garforth* v. *Fearon*, 1 H. Bl. 328; *Palmer* v. *Bate*, 2 B. & B. 673; *Parker* v. *Brown*, Cro. Jac. 612; *Reg.* v. *Charretie*, 13 Q.B. 447; 18 L.J. M.C. 151.

(*q*) *Hopkins* v. *Prescott*, 16 L.J. C.P. 259; 4 C.B. 578,

(*r*) *Austin* v. *Gwinnell*, 3 Y. & J. 136.

(*s*) *Sterry* v. *Clifton*, 9 C.B. 110; 19 L.J. C.P. 237.

(*t*) *Feistel* v. *King's College, Cambridge*, 16 L.J. Ch. 339; 10 Beav. 491.

(*u*) *Godolphin* v. *Tudor*, 2 Salk. 468; *Gulliford* v. *De Cardonell*, *ib.* 466; 1 Bro. P.C. 135; *Greville* v. *Atkins*, 9 B. & C. 462; 4 M. & R. 372.

(*x*) *Mirams, In re*, (1891) 1 Q.B. 594; 60 L.J. Q.B. 397. See, however, as to beneficed clergymen, simoniacal contracts, p. 86.

c. 25 (*y*), which is now repealed (*z*). But an assignment of a pension granted by the late East India Company was held valid (*a*); and so was an assignment of a pension payable to a former officer of the East India Company out of the revenue of India (*b*).

Simoniacal contracts.—By 31 Eliz. c. 6, s. 5, it is enacted that if any person, body politic or corporate, shall for money, reward, &c., or for any promise or contract for money, &c., present to any benefice with cure of souls, prebend, or any ecclesiastical living or dignity, the presentation, and every admission or investiture thereupon made, shall be utterly void. A penalty is imposed upon the parties to such a transaction, and upon every person who receives money or reward, or accepts a promise thereof, to admit or induct any person into any benefice or ecclesiastical dignity. Penalties are also imposed upon persons who resign or exchange benefices with cure of souls for money, reward, or benefit. And by 12 Anne, st. 2, c. 12, it is enacted that if any person, for money, reward, &c., or by reason of any promise of money, &c., directly or indirectly procures or accepts the next avoidance or presentation to any benefice, &c., and shall be presented thereupon, such presentation shall be void, and the agreement shall be deemed to be a simoniacal contract (*c*).

The statutes against simony do not prohibit the sale of an advowson or the right of presentation to a living or benefice which is filled at the time of the sale; but the object of them is to restrain a patron who possesses the right of presenting at a vacancy from being influenced in the choice of his presentee by a bribe or benefit to himself. An agreement, however, for the sale of an advowson, containing a stipulation that the vendor should pay interest until the benefice became vacant, the incumbent being a son of the vendor, but not being a party to the contract, was held not to be simoniacal (*d*). If an advowson is sold or transferred during a vacancy of the benefice, the presentation upon that vacancy does not pass by the grant. It is a fruit fallen or *chose in action* vested in the patron, which cannot legally be sold or transferred by him (*e*); and, if it is provided in any part of the contract that the right of presentation which has then accrued shall be exercised by the late patron in favour of a nominee of

(*y*) *Lloyd* v. *Cheetham*, 3 Giff. 171; 30 L.J. Ch. 340.

(*z*) See 44 & 45 Vict. c. 58, 5th sch.

(*a*) *Heald* v. *Hay*, 3 Giff. 467; 31 L.J. Ch. 311.

(*b*) *Carew* v. *Cooper*, 4 Giff. 619; 33 L.J. Ch. 289.

(*c*) See 32 & 33 Vict. c. 94, ss. 12 and 13, as to contracts under the provisions of the Church Buildings Acts and New Parishes Acts relative to rights of presentation.

(*d*) *Sweet* v. *Meredith*, 3 Giff. 610; 32 L.J. Ch. 147.

(*e*) *Leak* v. *Babington*, Cro. Eliz. 811.

the purchaser or of any particular individual, the whole contract is simoniacal and void. If the incumbent of a living is sick and dying, and the next presentation is purchased with intent to present a particular person as soon as the expected vacancy occurs, the purchase is simoniacal and void. But not if it is made without the privity of, and without a view to the nomination of, the clerk afterwards appointed (*f*). The patron of a vacant donative benefice, who was a curate, granted the advowson by deed poll to a trustee to present any nominee of the patron's, and he then nominated himself, and the trustee by deed poll granted him the office of rector; it was held that the contract was not simoniacal (*g*). An agreement upon an exchange of livings that neither party should pay for dilapidations was held not to be simoniacal, and not contrary to the policy of the Ecclesiastical Dilapidations Act (*h*).

Resigning and charging benefices.—A bond given by an incumbent for the resignation of his benefice on notice or request generally, or in favour of a particular person named in the bond, as soon as the latter should become qualified for admission or induction to such benefice, has been held void, as "coming as near simony as possible" (*i*). An Act of Parliament, however, has been passed (9 Geo. 4, c. 94), legalising bonds of this description. By 13 Eliz. c. 20 (*k*), it is enacted that all charging of benefices with any pension or profit to be taken out of the same, other than rents to be reserved upon leases as therein mentioned, shall be utterly void. Under this statute it has been held that a demise of the glebe by the incumbent of a benefice, to secure an annuity, is void (*l*); also an agreement by a clergyman to appropriate the future profits of his living to the payment of his debts, reserving thereout a competent stipend to a curate to serve the church (*m*); also a warrant of attorney which appears on the face of it to be an authority for the sequestration of a living and the appropriation of the profits in discharge of a debt due from the incumbent (*n*). But a warrant of attorney to enter up judgment against the incumbent, given with a defeasance in the usual form, and not charging the benefice in express terms, is not void (*o*), although it

(*f*) *Sheldon* v. *Brett*, Winch. 63; *Fox* v. *Chester* (*Bishop*), 6 Bing. 1; 1 Dow & Cl. 416.

(*g*) *Lowe* v. *Chester* (*Bishop*), 10 Q.B.D. 407.

(*h*) *Wright* v. *Davies*, 1 C.P.D. 638; 46 L.J. C.P. 41; 34 & 35 Vict. c. 43.

(*i*) *Fletcher* v. *Sondes* (*Lord*), 3 Bing. 501. On the subject of resignation deeds, see *Reichell* v. *Oxford* (*Bishop*), 14 App.Cas. 259; 59 L.J. Ch. 66.

(*k*) Repealed by 43 Geo. 3, c. 84, and revived 57 Geo. 3, c. 99.

(*l*) *Shaw* v. *Pritchard*, 10 B. & C. 241; 8 L.J. (O.S.) K.B. 133.

(*m*) *Alchin* v. *Hopkins*, 1 Bing. N.C. 99; 3 L.J. C.P. 272.

(*n*) *Newland* v. *Watkin*, 9 Bing. 113; 1 L.J. C.P. 177; *Saltmarshe* v. *Hewett*, 1 Ad. & E. 812; 3 L.J. K.B. 188.

(*o*) *Moore* v. *Ramsden*, 7 Ad. & E. 907; 7 L.J. Q.B. 54.

may refer on the face of it to a void deed charging the benefice, and may appear to be given as a collateral security for the same debt (*p*). A mortgage of pew rents made by the vicar of a district church is void under this Act (*q*).

Contracts in general restraint of industry and trade, preventing parties from gaining a livelihood in any particular vocation, were at one time absolutely void, as being contrary to public policy (*r*). But it has now been held that a covenant in restraint of trade, which is not wider than is reasonably required for the protection of the covenantee, will not be held void on any ground of public policy unless some specific ground for so holding it void can be clearly established (*s*). The question in each case would therefore seem to be whether the restraint imposed is reasonable in reference to the interests of the parties concerned (*t*); and if an agreement restraining a person from carrying on business is injurious to the public interests of the country, such an agreement is invalid to the extent to which it is injurious, but not further, if it is so framed that it can be divided (*u*). If it cannot be divided and is wider than is reasonable and necessary for the protection of the party interested, it is void (*x*). The onus of proving that the restraint is unnecessary and unreasonable where it is only in partial restraint of trade—*e.g.*, for a limited period—rests on the person who has knowingly entered into such an agreement (*y*). There is no case in which an agreement in restraint of trade, free from objection in other respects, has been held void simply because its duration was unlimited (*z*). An unlimited restraint will be valid if from the circumstances it appears to be reasonable and not contrary to the public interest. It seems that the distinction between the legal considerations which would invalidate general and partial restraints on trading may now be considered as abolished (*a*). An agreement made by a trader with a purchaser of his commodi-

(*p*) *Colebrook* v. *Layton*, 4 B. & Ad. 578; 2 L.J. K.B. 95; *Bendry* v. *Price*, 7 Dowl. P.C. 753; *Bishop* v. *Hatch*, *ib.* 763.

(*q*) *Arrowsmith*, *Ex parte*, 8 Ch.D. 96; 47 L.J. Bankr. 46.

(*r*) *Thompson* v. *Harvey*, 1 Show. 2; *Davies* v. *Davies*, 36 Ch.D. 359; 56 L.J. Ch. 962; *Gunmakers' Co.* v. *Fell*, Willes, 389; *Tailors of Lichfield's case*, 11 Co. 53, a; *Hinde* v. *Gray*, 1 Man. & G. 195; 9 L.J. C.P. 253; 2 Hen. 5, fol. 5, pl. 26; *Claygate* v. *Batchelor*, Owen, 143; *Ward* v. *Byrne*, 5 M. & W. 548; 9 L.J. Ex. 14; *Allsopp* v. *Wheatcroft*, L.R. 15 Eq. 59; 42 L.J. Ch. 12.

(*s*) *Underwood* v. *Barker*, (1899) 1 Ch. 300; 68 L.J. Ch. 201.

(*t*) *Nordenfelt* v. *Maxim Nordenfelt Co.*, (1894) A.C. 535; 63 L.J. Ch. 908.

(*u*) *Baines* v. *Geary*, 35 Ch.D. 154; 56 L.J. Ch. 935; *Nordenfelt's case*, (1893) 1 Ch. 630; 62 L.J. Ch. 273.

(*x*) *Perls* v. *Saalfeld*, (1892) 2 Ch. 149; 61 L.J. Ch. 409.

(*y*) *Haynes* v. *Doman*, (1899) 2 Ch. 13; 68 L.J. Ch. 419.

(*z*) *Per* Lindley, M.R., *Haynes* v. *Doman*, *supra*.

(*a*) *Rousillon* v. *Rousillon*, 14 Ch.D. 351; 49 L.J. Ch. 338; *Davies* v. *Davies*, 36 Ch.D. 359; 56 L.J. Ch. 962; *Mills* v. *Dunham*, (1891) 1 Ch. 576; 60 L.J. Ch. 362; *Badische Anilin Fabrik* v. *Schott*, (1892) 3 Ch. 447; 61 L.J. Ch. 698; *Nordenfelt* v. *Maxim Nordenfelt Co.*, (1894) A.C. 535; 63 L.J. Ch. 908.

ties not to sell them below certain fixed prices is valid and not against public policy (*b*). Contracts whereby certain master manufacturers mutually bind themselves to close their works at the will of a majority (*c*), or not to employ any workman who has left the service of another master manufacturer without the consent of his employer (*d*), are contracts in restraint of trade, and therefore void. And so are contracts by which men bind themselves not to work except under certain conditions, and to support one another, in the event of being thrown out of employment, in carrying out the views of the majority (*e*).

Trades Unions.—By sect. 3 of the Trade Union Act, 1871 (*f*), the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. But by sect. 4, nothing in that Act is to enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of—1st, any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed; 2nd, any agreement for the payment by any person of any subscription or penalty to a trade union; 3rd, any agreement for the application of the funds of a trade union, to provide benefits to members, or to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules and resolutions of such trade union, or to discharge any fine imposed upon any person by sentence of a court of justice; 4th, any agreement made between one trade union and another; 5th, any bond to secure the performance of any of the above-mentioned agreements. But nothing in that section is to be deemed to constitute any of the above-mentioned agreements unlawful. An action brought to enforce an agreement between members of a trade union "to provide benefits to members" was held not maintainable (*g*), but an injunction to restrain members from acting contrary to such an agreement was allowed (*h*). Where the general objects of a society are legal, the fact that some of its rules are illegal and in

(*b*) *Elliman* v. *Carrington*, (1901) 2 Ch. 275; 70 L.J. Ch. 577.

(*c*) *Hilton* v. *Eckersley*, 6 E. & B. 47; 25 L.J. Q.B. 199.

(*d*) *Mineral Water Bottle Trade Protection Society* v. *Booth*, 36 Ch.D. 465.

(*e*) *Hornby* v. *Close*, L.R. 2 Q.B. 153; 36 L.J. M.C. 43.

(*f*) 34 & 35 Vict. c. 31, amended by 39 & 40 Vict. c. 22. As to suing trades unions, see *Taff Vale Ry.* v. *Amalgamated Railway Servants' Society*, (1901) A.C. 426; 70 L.J. K.B. 905.

(*g*) *Rigby* v. *Connol*, 14 Ch.D. 482; 49 L.J. Ch. 328; *Chamberlain's Wharf* v. *Smith*, (1900) 2 Ch. 605; 69 L.J. Ch. 783.

(*h*) *Wolfe* v. *Matthews*, 21 Ch.D. 194; 51 L.J. Ch. 833.

restraint of trade does not prevent a member from recovering a sum of money payable to him under a rule which is not illegal (*i*).

Contracts restraining the exercise of a trade or profession in particular localities are valid, when there is a reasonable ground for the restriction, as in the case of the sale of the good-will of a trade carried on in a particular locality, where the vendor covenants or agrees not to carry on the same business on the same spot in opposition to the purchaser (*k*); or the taking or continuing in his engagement (*l*) of an apprentice or servant, clerk or traveller, upon the terms that he shall not, during or after the termination of his engagement, solicit custom from the master's customers (*m*), or set up the same trade, craft, or profession in opposition to his employer in his immediate neighbourhood, or in the district over which the master's business extends (*n*); or the formation or dissolution of a partnership, or the retirement of one of the members of a firm, upon the terms, and subject to an agreement, that he will not at any time be a competitor with the remaining partners, or any new partners or assignees, in the district where the business is carried on (*o*). So rules made for the *bonâ fide* purpose of protecting the funds of a society whose general objects are legal from claims which may fairly be avoided, are not illegal because they are incidentally to some extent in restraint of trade, if they are only reasonable and necessary for the purpose for which they were made (*p*). Where the contract is reasonable, the courts will prevent any infringement of it, although a pecuniary penalty in the case of a breach may have been stipulated for in the agreement (*q*). A trader "may sell a secret of business, and restrain himself generally from using that secret" (*r*); and railway companies and other parties engaged in trade may lawfully agree that one company shall not compete or interfere with the other upon a

(*i*) *Swaine* v. *Wilson*, 24 Q.B.D. 252; 59 L.J. Q.B. 76; *Strick* v. *Swansea Tinplate Co.*, 36 Ch.D. 558; 57 L.J. M.C. 438.

(*k*) *Prugnell* v. *Gosse*, Aleyn, 67; *Broad* v. *Jollyffe*, Cro. Jac. 596; *Jollie & Broad's case*, 2 Rolle R. 201; *Mitchell* v. *Reynolds*, 1 P. Wms. 181; *Archer* v. *Marsh*, 6 Ad. & E. 959; 6 L.J. K.B. 244; *Jones* v. *Lees*, 1 H. & N. 189; 25 L.J. Ex. 241.

(*l*) *Gravely* v. *Barnard*, L.R. 18 Eq. 518; 43 L.J. Ch. 659.

(*m*) *Rannie* v. *Irvine*, 7 Man. & G. 969; 14 L.J. C.P. 10; *Huntocke* v. *Blacklowe*, 2 Wms. Saund. 156; *Homer* v. *Ashford*, 11 Moore, 101; 4 L.J. (O.S.) C.P. 62; *Hartley* v. *Cummings*, 17 L.J. C.P. 84; 5 C.B. 247; *Dubowsky* v. *Goldstein*, (1896) 1 Q.B. 478; 65 L.J. Q.B. 397.

(*n*) *Chesman* v. *Nainby*, 2 Ld. Raym. 1456; 2 Str. 739; *Nicholls* v. *Stretton*, 7 Beav. 42; 10 Q.B. 346; *Baines* v. *Geary*, 35 Ch.D. 154; 56 L.J. Ch. 935; *Sainter* v. *Ferguson*, 7 C.B. 716; 18 L.J. C.P. 217; *Denby* v. *Henderson*, 11 Exch. 194; 24 L.J. Ex. 324; *Benwell* v. *Inns*, 26 L.J. Ch. 663; 24 Beav. 307.

(*o*) *Gale* v. *Reed*, 8 East, 80; *Leighton* v. *Wales*, 3 M. & W. 545; 7 L.J. Ex. 145.

(*p*) *Swaine* v. *Wilson*, 24 Q.B.D. 252; 59 L.J. Q.B. 76.

(*q*) *Fox* v. *Scard*, 33 Beav. 327; *Howard* v. *Woodward*, 34 L.J. Ch. 47; *National Prov. Bank of England* v. *Marshall*, 40 Ch.D. 112; 58 L.J. Ch. 229; but see *Carnes* v. *Nesbitt*, 7 H. & N. 778; 31 L.J. Ex. 273.

(*r*) V.-C. Leach, *Byson* v. *Whitehead*, 1 Sim. & S. 77; *Leather Cloth Co.* v. *Lorsont*, L.R. 9 Eq. 345; 39 L.J. Ch. 86.

particular line of railway (*s*). An agreement made by several persons to parcel out the stevedoring business of a particular port amongst themselves, and so to prevent competition among themselves, and keep up prices, was held to be good (*t*); and so was a combination between shipowners to keep up freights and exclude rival shipowners by underbidding them and carrying at lower rates than they could afford to do (*u*). But the restraint must be confined within reasonable limits; for, where it is larger and wider than is necessary for the protection of the party with whom the contract is made, it is illegal, and the contract is void (*x*). It has been held that the limit of a provincial town, and ten or twenty miles round it, is not too large for such a profession as a surgeon, apothecary, and man-midwife (*y*); five miles from Northampton Square, in the county of Middlesex, in the case of a milkman and cowkeeper (*z*); one mile in the case of a fruiterer (*a*); and that the wide ambit of the metropolis is not too large for such a profession as that of a dentist; nor even "London and 150 miles from thence," for the profession of a solicitor (*b*), or a canvassing publisher (*c*); nor Birmingham and 200 miles from thence, in the case of a horsehair manufacturer (*d*); nor "within a hundred miles of the General Post Office at Cardiff," in the case of the business of selling malt liquors (*e*). But a restraint extending over so large a district seems to be at variance with the ancient policy of the common law in respect of "restraint of trade," and to overrule some earlier decisions holding that a restraint extending over so wide an area is void, on the ground that the employer shuts out the assistant from a larger field of exertion than can by possibility be beneficially occupied by himself (*f*). "Six hundred miles from any particular spot in this kingdom is out of all reason, and absolutely void" (*g*). In one case it has been held that the reasonableness of the restriction, and its consequent validity, depend upon the extent and not the populousness of the district. In another, that both the super-

(*s*) *Shrews. & Birm. Ry.* v. *L. & N. W. Ry.*, 21 L.J. Q.B. 89; 17 Q.B. 652.

(*t*) *Collins* v. *Locke*, 4 App.Cas. 674; 48 L.J. P.C. 68.

(*u*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, (1892) A.C. 25; 61 L.J. Q.B. 295.

(*x*) *Hitchcock* v. *Coker*, 6 Ad. & E. 454; 6 L.J. Ex. 266.

(*y*) *Davis* v. *Mason*, 5 T.R. 118; *Atkyns* v. *Kinnier*, 4 Exch. 776; 19 L.J. Ex. 134; *Carnes* v. *Nesbitt*, *ante*, p. 90.

(*z*) *Proctor* v. *Sargent*, 2 Man. & G. 20; 10 L.J. C.P. 34.

(*a*) *Pemberton* v. *Vaughan*, 16 L.J. Q.B. 161; 10 Q.B. 87.

(*b*) *Bunn* v. *Guy*, 4 East, 190.

(*c*) *Tallis* v. *Tallis*, 22 L.J. Q.B. 185; 1 E. & B. 391; *Horner* v. *Graves*, 7 Bing. 735; 9 L.J. (O.S.) C.P. 192.

(*d*) *Harms* v. *Parsons*, 32 Beav. 328; 32 L.J. Ch. 247.

(*e*) *Rogers* v. *Maddocks*, (1892) 3 Ch. 346; 62 L.J. Ch. 219.

(*f*) *Mallan* v. *May*, 11 M. & W. 668; 14 L.J. Ex. 48.

(*g*) *Price* v. *Green*, 16 M. & W. 346; 16 L.J. Ex. 108.

ficial area and the amount of the population are to be taken into consideration (*h*).

When the restraint is limited in point of space, the limit is to be measured by a straight line drawn upon the horizontal plane from point to point (*i*). If the restraint is reasonable as to space, the circumstance that it is indefinite in point of time will not affect its validity (*k*). The cause or consideration for the restraint must be disclosed upon the face of the contract, as the courts will not, it seems, permit the ground for it, however partial or slight the restraint may be, to be supplied by evidence outside the contract. If the restraint merely appears without anything to show it to be reasonable and proper, the contract is invalid, whether it be under seal, or whether it be a simple contract only. The court, and not the jury, is to judge of the circumstances and the reasonableness of the restraint, and determine whether the contract is valid or not (*l*). Parol evidence of the consideration is admissible in regard to contracts in restraint of trade just as it is in regard to all other simple contracts (*m*).

If one man binds himself to serve another for a particular period, and not to carry on the business of his employers within ten miles of their place of business, the restriction will be confined to the period of service (*n*), unless the entire services of the servant are by the contract to be devoted to the employer, and the restriction is manifestly intended to come into operation when he leaves the service and is his own master (*o*). A person who has covenanted not to trade within certain reasonable limits is bound by his covenant, although the covenantee may have ceased both by himself and by his agents, licensees, or assigns to carry on the trade (*p*). He is responsible if he serves customers within the prohibited limits, although he has no residence, shop, or place of business within them (*q*). And where the defendant became an assistant to two surgeons and entered into a bond not at any time to carry on the profession of a surgeon in the particular town or within ten miles of it, and the partnership between the two surgeons was afterwards dissolved and one of them engaged the defendant as his assistant, it was held that the other surgeon could

(*h*) As to the divisibility of such covenants, see *post*, p. 109.

(*i*) *Lake* v. *Butler*, 5 E. & B. 92; 24 L.J. Q.B. 273; *Duignan* v. *Walker*, 28 L.J. Ch. 867; Johns. 446; *Mouflet* v. *Cole*, L.R. 8 Ex. 32; 42 L.J. Ex. 8.

(*k*) *Catt* v. *Tourle*, L.R. 4 Ch. 654; 38 L.J. Ch. 665.

(*l*) *Homer* v. *Ashford*, 11 Moore, 103; 4 L.J. (O.S.) C.P. 62; *Hutton* v. *Parker*, 7 Dowl. P.C. 739; *Mallan* v. *May*, 11 M. & W. 665; 14 L.J. Ex. 48.

(*m*) *Cooper* v. *Southgate*, 63 L.J. Q.B. 670.

(*n*) *King* v. *Hansell*, 5 H. & N. 106.

(*o*) *Mumford* v. *Gething*, 29 L.J. C.P. 105; 7 C.B. N.S. 305.

(*p*) *Elves* v. *Crofts*, 10 C.B. 241; 19 L.J. C.P. 389.

(*q*) *Turner* v. *Evans*, 2 E. & B. 512; 22 L.J. Q.B. 412; *Brampton* v. *Beddoes*, 13 C.B. N.S. 538.

obtain an injunction to restrain the defendant from acting as such (*r*). Where there was a covenant not to be concerned in carrying on, either directly or indirectly, or to sell any goods in any way connected with, a trade, it was held to be broken by selling goods as a journeyman in the employment of another carrying on that trade (*s*). There is not any implied covenant or promise on the part of a vendor or assignor of the good-will of a business not to set up the same trade in opposition to the purchaser in the neighbourhood of the spot where the business is carried on; and the courts will not grant an injunction to prevent the vendor from so doing (*t*); but the vendor is not entitled to canvass the customers of the old firm either to deal with him or not to deal with the purchaser, and he may be restrained by injunction from so doing (*u*). The same principle is applicable where a person has been taken into partnership on the terms that on the expiration of the partnership the good-will shall belong solely to the other partner (*x*). It seems, however, that an injunction will not be granted to restrain the vendor or assignor from dealing with the old customers if they come to him without solicitation (*y*). When the business of a firm has been carried on under an adopted name, a person who sells the good-will of the business cannot set up the same business under the same name and style, although he cannot be prevented from using his own name (*z*). An agreement between several persons carrying on a particular trade in various parts of England, not to interfere with each other in different towns and districts, or become competitors, or undersell one another, in particular localities, is not contrary to public policy, and is, consequently, valid (*a*). And, lastly, it must be observed, that the exercise of the trade or profession in the prohibited district must be shown to have been made in opposition to and against the will of the covenantee; if it is done at his request, to aid and assist him, there is not any breach of the covenant (*b*). A covenant by a retiring partner to retire, "so far as the law allows, from the business, and not to trade, act, or deal in any way," so as to affect the continuing partners, was held to be too vague to be enforced by the court; it was further held that the latter part of the

(*r*) *Palmer* v. *Mallet*, 36 Ch.D. 411; 57 L.J. Ch. 226.

(*s*) *Jones* v. *Heavens*, 4 Ch.D. 636.

(*t*) *Cruttwell* v. *Lye*, 17 Ves. 346; *Walker* v. *Mottram*, 19 Ch.D. 355; 51 L.J. Ch. 189.

(*u*) *Trego* v. *Hunt*, (1896) A.C. 7; 65 L.J. Ch. 1; overruling *Pearson* v. *Pearson*, 27 Ch.D. 145; 54 L.J. Ch. 32; and discussing all the cases on the subject, *Gillingham* v. *Beddow*, (1900) 2 Ch. 242; 69 L.J. Ch. 527.

(*x*) *Trego* v. *Hunt*, *supra*.

(*y*) *Leggott* v. *Barrett*, 15 Ch.D. 306.

(*z*) *Churton* v. *Douglas*, 28 L.J. Ch. 841; Johns. 174.

(*a*) *Wickens* v. *Evans*, 3 Y. & J. 330; *Collins* v. *Locke*, 4 App.Cas. 674; 48 L.J. P.C. 68, *ante*, p. 91.

(*b*) *Rawlinson* v. *Clarke*, 14 M. & W. 191.

covenant was personal to the continuing partners and could not be sued upon by their assignees (*c*).

Contracts creating monopolies, also, are void, as being contrary to public policy (*d*), "which favours free trade, and is against monopoly and ingrossing" (*e*). Contracts between brewers and publicans, restraining the publican from buying beer from any other brewer than the one named in the contract, may be thought to be contrary to the common law, as creating a monopoly; but, although these contracts have been censured, they have never been held to be invalid. Before, however, the brewer can recover damages for a breach of the contract by the publican, he must show clearly that the beer supplied by him was good marketable beer, wholesome, and fit to drink, and that the price was reasonable (*f*). A grant from the crown of the sole use, for a reasonable period, of any art invented or first brought into the realm by the grantee, is not void as being contrary to the policy of the common law (*g*).

Contracts with foreign enemies.—All contracts for trading purposes made between British subjects and the subjects of a sovereign who is at war with this country are void, and cannot be enforced in our courts of law on the return of peace (*h*), unless the contracts have been made pursuant to a licence to trade granted by the crown (*i*). The effect of a licence authorising an alien enemy to trade with this country is to legalise the commerce comprehended in the licence, and all usual contracts entered into for carrying on such licensed trade. The alien licensee consequently may sue and be sued in respect of such contracts, just the same as if he were a natural-born subject (*k*). A contract between two subjects of a neutral state to export contraband of war to a belligerent is lawful, and may be enforced in the courts of the neutral state (*l*).

Stock-jobbing.—The statutes 7 Geo. 2, c. 8, and 10 Geo. 2, c. 8, passed to prevent the practice of stock-jobbing, have been repealed

(*c*) *Davies* v. *Davies*, 36 Ch.D. 359; 56 L.J. Ch. 962.

(*d*) 21 Jac. 1, c. 3.

(*e*) *East Ind. Co.* v. *Sandys*, Skin. 169; *Darcy* v. *Allen*, Moore, 671; *The case of Monopolies*, 11 Co. 86 b; Com. Dig. Trade, D. 4.

(*f*) *Holcombe* v. *Hewson*, 2 Camp. 391; *Jones* v. *Edney*, 3 *ib.* 285; *Thornton* v. *Sherratt*, 8 Taunt. 530; *Luker* v. *Dennis*, 7 Ch.D. 227; 47 L.J. Ch. 174.

(*g*) *The case of Monopolies*, 11 Co. 86 b; Com. Dig. Trade, D. 4; 21 Jac. 1, c. 3, s. 6; *Duvergier* v. *Fellows*, 10 B. & C. 829; 8 L.J. (O.S.) K.B. 270.

(*h*) *Potts* v. *Bell*, 8 T.R. 548; *Ogden* v. *Peele*, 8 D. & R. 1; *Bell* v. *Reid*, 1 M. & S. 731; *Furtado* v. *Rodgers*, 3 B. & P. 191.

(*i*) *Flindt* v. *Scott*, 15 East, 525; 5 Taunt. 674; *Lemcke* v. *Vaughan*, 8 Moore, 646; 2 L.J. (O.S.) C.P. 44. As to insurance against seizure which took place immediately before commencement of a war, see *Driefontein Gold Mines* v. *Janson*, (1901) 2 K.B. 419; 70 L.J. K.B. 881; aff. H. L., 71 L.J. K.B. 857.

(*k*) *Usparicha* v. *Noble*, 13 East, 340; *Fenton* v. *Pearson*, 15 East, 426; *Morgan* v. *Oswald*, 3 Taunt. 568.

(*l*) *Chavasse, Ex parte, Grazebrook, In re*, 34 L.J. Bk. 17; *The Helen*, 35 L.J. Adm. 2; L.R. 1 Adm. 1.

by 23 Vict. c. 28, on the ground that they impose unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities. But an agreement between two or more to purchase shares in a company in order to induce persons, who might thereafter purchase shares in the company, to believe, contrary to the fact, that there was a *bonâ fide* market for its shares, is an illegal transaction, and no action can be maintained in respect of such agreement or purchase of shares (*m*).

Gaming contracts and wagers.—By sect. 18 of the Gaming Act, 1845 (*n*), it is enacted that all contracts or agreements by way of gaming or wagering shall be void; and that no action or suit shall be brought or maintained for recovering money or any valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made (*o*); but it is provided that the prohibition of gaming or wagering contracts therein contained shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise. Where two persons entered into partnership for the purpose of betting on horse races, and the business resulted in a loss, which was paid by one party, who claimed contribution from the other in respect of it, it was held that the money he had paid had been paid in respect of contracts which were null and void under the section (*p*). By the Gaming Act, 1892 (*q*), any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the foregoing Act, or to pay any sum by way of commission, fee, reward, or otherwise, in respect of such a contract, or of any services in relation to or connection with it, shall be null and void, and no action will lie to recover any such sum. The Act does not deprive a principal, employing an agent to make bets for him, of his right to recover from such agent any sums received by the agent on account of such bets (*r*); nor does it apply to a deposit of money with a stakeholder, so as to prevent the depositor from maintaining an action against the stakeholder for the recovery of a deposit which he has demanded back from the stakeholder before it was

(*m*) *Scott* v. *Brown*, (1892) 2 Q.B. 724; 61 L.J. Q.B. 738.

(*n*) 8 & 9 Vict. c. 109, s. 18.

(*o*) See *Universal Stock Exchange* v. *Strachan* (No. 1), (1896) A.C. 166; 65 L.J. Q.B. 428; *Same* v. *Same* (No. 2), (1895) 2 Q.B. 697; 65 L.J. Q.B. 178.

(*p*) *Saffery* v. *Mayer*, (1901) 1 K.B. 11; 70 L.J. K.B. 145.

(*q*) 55 Vict. c. 9. This Act abrogates the decision in *Read* v. *Anderson*, 13 Q.B.D. 779; 53 L.J. Q.B. 532; see *Tatam* v. *Reeve*, (1892) 1 Q.B. 44; 62 L.J. Q.B. 30, *post*, p. 98.

(*r*) *De Mattos* v. *Benjamin*, 63 L.J. Q.B. 248.

paid over by him (*s*). An agreement between two persons, each of whom is possessed of a horse, to ride a race, the winner to have both horses, is an agreement by way of wagering, and not an agreement to contribute towards a prize to be awarded to the winner of a lawful game, and is therefore null and void (*t*). Where there was an agreement to walk a match for 200*l.* a side, and the money was deposited with a stakeholder, it was held to be a wager within the statute, but that although the winner, as such, could not sue the loser or stakeholder, yet the loser as depositor might recover back his share (*u*). An action will not lie to recover money lent to a successful combatant in a prize-fight to be deposited as his share of the stake (*x*). So also where it was agreed between the plaintiff and the defendant that the plaintiff should have 2*l.* on a horse at 25 to 1, and the horse won, and the plaintiff claimed 50*l.* from the defendant, this was held to be within the statute (*y*). But where the defendant had given a cheque to the plaintiff in respect of such winnings, it was held that the plaintiff could recover on the cheque (*z*). Where two persons agree that one shall engage to ride a horse so many miles in so many hours, this is not within the proviso to the Act of 1845 (*a*). A colourable contract for the purchase and sale of railway shares or of goods, where neither party intends to deliver or accept the shares or the goods, but merely to pay differences according to the rise or fall of the market, is gaming and wagering; and it is for a jury to determine whether the parties really meant to purchase and sell, or whether the transaction was a mere bet upon the future price of the commodity (*b*). But there is no ground for contending that a contract for the sale of shares or of goods, to be delivered at a future day, is a gaming or wagering contract merely because the vendor neither has the shares or goods in his possession nor has entered into any contract to buy them, nor has any expectation of becoming possessed of them by the time appointed for transferring or delivering them otherwise than by purchasing them in the market (*c*). A bond given to persons to whom the obligor had lost bets on horse races which he was unable to pay, in order to prevent them from taking the steps which under the conventional code established among betting men they were

(*s*) *Burge* v. *Ashley*, (1900) 1 Q.B. 744; 69 L.J. Q.B. 538; following *O'Sullivan* v. *Thomas*, 64 L.J. Q.B. 398; (1895) 1 Q.B. 698.

(*t*) *Coombes* v. *Dibble*, L.R. 1 Ex. 248; 35 L.J. Ex. 167.

(*u*) *Diggle* v. *Higgs*, 2 Ex.D. 422; 46 L.J. Ex. 721; *Trimble* v. *Hill*, 5 App. Cas. 342; 49 L.J. P.C. 49.

(*x*) *Carney* v. *Plimmer*, (1897) 1 Q.B. 634; 66 L.J. Q.B. 415.

(*y*) *Higginson* v. *Simpson*, 2 C.P.D. 76; 46 L.J. C.P. 192.

(*z*) *Beeston* v. *Beeston*, 1 Ex.D. 13; 45 L.J. Ex. 230.

(*a*) *Batson* v. *Newman*, 1 C.P.D. 571.

(*b*) *Grizewood* v. *Blane*, 11 C.B. 538; *Rourke* v. *Short*, 25 L.J. Q.B. 196.

(*c*) *Hibblewhite* v. *M'Morine*, 5 M. & W. 466; 8 L.J. Ex. 271; *Phillips, Ex parte*, 6 Jur. N.S. 1273; 30 L.J. Bk. 1; as to the meaning of the words "time bargain," see *Thacker* v. *Hardy*, *infra*.

entitled to take, and which would have been followed by consequences involving the obligor in considerable pecuniary loss, is valid (*d*). And where a broker was employed to speculate upon the Stock Exchange upon the terms that only the "differences" in prices were to be paid to the employer, it was held that the broker could sue for indemnity against the liabilities incurred by him in buying and selling on behalf of his principal and for his commission (*e*); for although gaming and wagering contracts cannot be enforced, yet they are not illegal so as to taint legal contracts entered into in furtherance of gaming. But where both parties to contracts for the sale and purchase of stocks intend that no stocks shall be delivered and that "differences" only shall be accounted for, the mere fact that the contracts provide that either party may require completion of the purchase does not prevent them from being contracts by way of gaming, and therefore void. In such transactions securities deposited by one party with the other to secure the payment of "differences" do not come within sect. 18 of the Act of 1845, and are recoverable by action (*f*). Where the vendors of a medical preparation advertised that they would pay a reward to any person contracting a specified disease after having used their preparation, it was held that the advertisement was not an offer to contract by way of wagering within the Act of 1845 (*g*).

Oral evidence may be given, and the parties themselves be examined, to show that a contract purporting on the face of it to be a contract of sale was a mere gaming contract, void *ab initio*, although the contract is in writing or under seal (*h*). It would seem that the statutes against gaming do not prevent a person who has employed another upon commission to make bets for him from recovering from such person the winnings which he has received on his behalf (*i*); nor do they prevent a person who has deposited money in the hands of a stakeholder to abide an event from repudiating the contract, and recovering back his deposit, before the event has happened (*k*); but they do prevent a third party from suing for the recovery of money paid at the request of the defendant to the winner of a bet; and it is immaterial whether the plaintiff knew that the money he had paid was in respect of a

(*d*) *Bubb* v. *Yelverton*, L.R. 9 Eq. 471; 39 L.J. Ch. 428.

(*e*) *Thacker* v. *Hardy*, 4 Q.B.D. 685; 48 L.J. Q.B. 289; *Forget* v. *Ostigny*, (1895) A.C. 318; 64 L.J. P.C. 62.

(*f*) *Universal Stock Exchange* v. *Strachan* (No. 1), (1896) A.C. 166; 65 L.J. Q.B. 428; *Grieve, In re, Trustee, Ex parte*, (1899) 1 Q.B. 794; 68 L.J. Q.B. 509; *Cronmire, In re, Waud, Ex parte*, (1898) 2 Q.B. 383; 67 L.J. Q.B. 620.

(*g*) *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256; 62 L.J. Q.B. 257.

(*h*) *Collins* v. *Blantern*, 1 Smith's L. Cas. 355 (ed. 10); *Enderby* v. *Gilpin*, 5 Moore, 588.

(*i*) *Bridger* v. *Savage*, 15 Q.B.D. 363; 54 L.J. Q.B. 464; see 55 Vict. c. 9, *ante*, p. 95, and *per* Wright, J., in *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398.

(*k*) *O'Sullivan* v. *Thomas*, *supra*; *Burge* v. *Ashley*, (1900) 1 Q.B. 744; 69 L.J. Q.B. 538.

bet (*l*). Where a person employs an agent to bet on commission, and the agent fails to make the bets, his principal cannot maintain any action for damages for the breach of contract (*m*).

Lotteries.—Various statutes have from time to time been passed for the suppression of lotteries, and contracts with respect to them have been declared to be illegal (*n*).

Betting-house keepers.—By sect. 1 of the Betting Act, 1853 (*o*), betting-houses are prohibited; and it is provided (sect. 5) that money or valuables received as a deposit on any bet may be recovered back, with full costs of suit (*p*). But nothing contained in the Act is to extend (sect. 6) to any person receiving or holding money or valuables by way of stakes or deposit to be paid to the winner of any lawful race, sport, or game, or to the owner of any horse engaged in any race.

Lawful games.—Playing at lawful games, such as horse-races, steeple-chases, and foot-races, or the game of dominoes, does not amount to gaming unless bets are made, and money lost and won; but, if the amount of a bet is deposited in the hands of a stakeholder, to be awarded to the winner of the bet, the money cannot be recovered by the winner (*q*); for all bets, though made upon a lawful game, are invalidated by the statute (*r*).

Notes, bills, and mortgages given to secure money won at, or lent for, play, are not absolutely void, but are deemed and taken to have been made for an illegal consideration only; so that they are void only as between the original parties (*s*) and those persons who take them without consideration, or with notice of the illegality of the consideration, or after they have become overdue (*t*).

Money knowingly lent for gaming, or to be employed by the borrower in playing at cards, or dice, or any game of chance or skill in a common gaming-house, or in playing at the games of hazard, the ace of hearts, pharaoh, or basset, cannot be recovered from the borrower, as the lender is himself a party to the violation of the statutes prohibiting such games. But money lent to play at

(*l*) *Tatam* v. *Reeve*, (1892) 1 Q.B. 44; 62 L.J. Q.B. 30.

(*m*) *Cohen* v. *Kittell*, 22 Q.B.D. 680; 58 L.J. Q.B. 241.

(*n*) 10 Will. 3, c. 23; 9 Anne, c. 6, s. 56; 9 Geo. 1, c. 19; 12 Geo. 2, c. 28; 42 Geo. 3, c. 119; as to what may be a lottery, see *Sykes* v. *Beadon*, 11 Ch.D. 170, 190; 48 L.J. Ch. 186; and *Macnee* v. *Persian Corporation*, 44 Ch.D. 306; 59 L.J. Ch. 695; as to missing words competitions, see *Barclay* v. *Pearson*, (1893) 2 Ch. 154; 62 L.J. Ch. 636; as to coupon competitions, see *Stoddart* v. *Sagar*, (1895) 2 Q.B. 474; 64 L.J. M.C. 234.

(*o*) 16 & 17 Vict. c. 119.

(*p*) *Doggett* v. *Catterns*, 19 C.B. N.S. 765; 34 L.J. C.P. 159.

(*q*) *Varney* v. *Hickman*, 5 C.B. 271; 17 L.J. C.P. 102; *Moon* v. *Durden*, 2 Exch. 22. See *ante*, p. 96.

(*r*) *Parsons* v. *Alexander*, 24 L.J. Q.B. 277; see *post*, p. 111; and *post*, Implied Contracts, p. 412.

(*s*) *Cooke* v. *Stratford*, 13 M. & W. 379; 14 L.J. Ex. 66; 9 Anne, c. 14; 8 & 9 Vict. c. 109, s. 18.

(*t*) *Edmunds* v. *Groves*, 2 M. & W. 642; 6 L.J. Ex. 203; *Hay* v. *Ayling*, 16 Q.B. 431; 20 L.J. Q.B. 171; see 45 & 46 Vict. c. 61, s. 27, *post*, p. 1121.

whist, or cribbage, or any game not prohibited by Act of Parliament, may be sued for and recovered from the borrower, provided the loan is not part and parcel of a wagering or gaming contract (*u*). If, however, a licensed publican lends money to a guest to enable the latter to play at a game prohibited by law, or to lay bets or wagers on games of chance, the money so lent cannot be recovered (*x*).

Sale by illegal weights and measures.—By the Weights and Measures Acts of 1878 and 1892, provision is made for the establishment of uniform weights and measures, and penalties are imposed for using unjust weights and measures (*y*); and any contract made by any such weights or measures is declared void (*z*). It is, moreover, enacted that all contracts for work to be done or for goods, merchandise, or other things, to be sold, delivered, done, or agreed for, by weight or measure, where no special agreement shall be made to the contrary, shall be deemed to be made according to the standard weights and measures. The statute does not prevent contracts from being made by any multiple or aliquot part of the pound weight, or by metric system, or decimal sub-division. Where, therefore, a contract was made for the sale of iron by what is called "long weight," a well-known term used in the north to designate the long hundred of 120 lbs. as distinguished from the southern hundred of 112 lbs., it was held that the contract was valid, as "the ton long weight" was a multiple of the standard pound (*a*). And where, on a sale by hobbet, it appeared that the hobbet was a local term designating a given number of pounds weight, it was held that this was a sale by the pound weight, the hobbet being a known multiple of a pound (*b*). These statutes do not avoid contracts made in England for the sale of goods to be measured or weighed abroad (*c*).

Coinage.—By sect. 6 of the Coinage Act, 1870 (*d*), every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according

(*u*) *M'Kinnell* v. *Robinson*, 3 M. & W. 434; 7 L.J. Ex. 149.

(*x*) *Foot* v. *Baker*, 6 Sc. N.R. 309; 5 Man. & G. 335.

(*y*) 41 & 42 Vict. c. 49, s. 19. The Acts do not apply to weights and measures belonging to the Crown: *R.* v. *Kent* (*Justices*), 24 Q.B.D. 181; 59 L.J. M.C. 51. As to what amounts to weight or measure used for trade, see *Harris* v. *London County Council*, (1895) 1 Q.B. 240; 64 L.J. M.C. 81; *Crick* v. *Theobald*, 64 L.J. M.C. 216.

(*z*) 41 & 42 Vict. c. 49, s. 25; 52 & 53 Vict. c. 21, s. 3.

(*a*) *Jones* v. *Giles*, 10 Exch. 119; 24 L.J. Ex. 259.

(*b*) *Hughes* v. *Humphreys*, 3 E. & B. 958; 23 L.J. Q.B. 356.

(*c*) *Rosseter* v. *Cahlmann*, 8 Exch. 361; 22 L.J. Ex. 128.

(*d*) 33 & 34 Vict. c. 10, s. 6.

to the coins which are current and legal tender in pursuance of that Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state.

Illegal sale of coals.—By the Weights and Measures Act, 1889, Pt. II. s. 20 (*e*), it is enacted that all coals shall be sold by weight, and not by measure, except under certain conditions; and a penalty is imposed on all persons who sell coal otherwise. If any of the requirements of the former statutes were not complied with, the vendor was unable to sue for the price (*f*).

Illegal sale of game.—Sects. 17, 25 and 27 of the Game Act, 1831 (*g*), regulate the sale of game by game-keepers and persons who have taken out game certificates, and a penalty is imposed upon all persons who sell game without a licence to deal in game, or without having a game certificate, and upon all unlicensed persons who buy game from unlicensed dealers.

Illegal sale of spirituous liquors.—By sect. 12 of the Sale of Spirits Act, 1750 (*h*), no person shall be entitled to sue for the price of spirituous liquors, unless the debt shall have been *bonâ fide* contracted for at one time to the amount of 20*s.* or upwards, nor shall any particular item or article in any account or demand for distilled spirituous liquors be allowed and maintained, where liquors delivered at one time and mentioned in such article or item shall not amount to 20*s.* at the least (*i*). But by the Sale of Spirits Act, 1862 (*k*), the Act of 1750, so far as it relates to spirituous liquors sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof in quantities not less at any one time than a reputed quart, is repealed. Spirits mixed with water are spirituous liquors within the meaning of the Act (*l*). If payments are made on account of a tavern bill containing items for spirits, together with other general items, and the tavern-keeper appropriates the payments in satisfaction and discharge of his claim for the spirits, his right of action for the rest of his demand is not affected by the statute (*m*). By sect. 182 of the County Courts Act, 1888 (*n*), no action is thenceforth to be brought or be maintainable in any court to

(*e*) 52 & 53 Vict. c. 21.

(*f*) *Little* v. *Poole*, 9 B. & C. 200; 7 L.J. (O.S.) K.B. 158; *Cundell* v. *Dawson*, 17 L.J. C.P. 311; 4 C.B. 376; *Tyson* v. *Thomas*, M'Clel. & Y. 119.

(*g*) 1 & 2 Will. 4, c. 32; and see 23 & 24 Vict. c. 90; 43 & 44 Vict. c. 47, s. 4.

(*h*) 24 Geo. 2, c. 40, s. 12.

(*i*) *Burnyeat* v. *Hutchinson*, 5 B. & Ald. 241; *Hughes* v. *Done*, 1 Q.B. 302; 10 L.J. Q.B. 65; *Lansdale* v. *Clarke*, 1 Exch. 78; 16 L.J. Ex. 246.

(*k*) 25 & 26 Vict. c. 38.

(*l*) *Scott* v. *Gillmore*, 3 Taunt. 226; see further as to what are spirits and spirituous liquors, *Att.-Gen.* v. *Bailey*, 1 Exch. 281; 17 L.J. Ex. 9; *Bailey* v. *Harris*, 18 L.J. Q.B. 115; 12 Q.B. 905.

(*m*) *Philpott* v. *Jones*, 2 Ad. & E. 41; 4 L.J. K.B. 65; *Owens* v. *Denton*, 1 C. M. & R. 712; 4 L.J. K.B. 68.

(*n*) 51 & 52 Vict. c. 43.

recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider or perry which was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given, for, on, or towards the obtaining of any such ale, &c. The sale of spirits is also regulated by the Spirits Act, 1880, see sects. 146—149.

Illegal sale of poison and adulterated food.—The sale of arsenic is regulated by the Arsenic Act, 1851, and that of other poisons by the Pharmacy Act, 1867, and the Pharmacy Act, 1869 (*o*). The selling of poisoned grain, meal, or seed is prohibited by the 26 & 27 Vict. c. 113, and the sale of adulterated food and drugs, by the Sale of Food and Drugs Acts, 1875 to 1899 (*p*).

Illegal sale of explosive substances.—The sale of explosive substances is regulated by the 38 & 39 Vict. c. 17; see also 39 & 40 Vict. c. 36, and 42 & 43 Vict. c. 21. As to petroleum, see 34 & 35 Vict. c. 105; 42 & 43 Vict. c. 47; 44 & 45 Vict. c. 67.

Chain-cables and anchors.—By the Merchant Shipping Act, 1894 (*q*), the rights of marine-store dealers to buy and sell chain-cables and anchors are dealt with. And by the Anchors and Chain Cables Act, 1899 (*r*), it is made unlawful for any makers of, or dealers in, anchors or chain-cables to sell or contract to sell any chain-cable or anchor exceeding in weight 168 pounds, for the use of any British ship, unless it has been first proved in accordance with the Act. Every contract for the sale of such a chain-cable or anchor is, if there is no stipulation to the contrary, to be deemed to imply a warranty that it has been so proved (*s*).

Smuggling.—If goods are sold abroad for the purpose of being smuggled into this country, and the vendor knowingly packs the goods in a particular way to aid and assist the act of smuggling, or in any way shares or participates in the illegal transaction, he will not be permitted to sue upon the contract in any of our courts of justice (*t*). If the vendor is merely cognizant of the intention of the purchaser to smuggle the goods, and confines himself simply to the act of selling, rendering no aid or assistance to the purchasers in the prosecution of the smuggling, our courts of law will not refuse to assist him to recover the price (*u*). Although a foreigner is not bound to take notice of the revenue laws of this

(*o*) See *Berry* v. *Henderson*, L.R. 9 Q.B. 296; 39 L.J. M.C. 77; *Pharmaceutical Soc.* v. *London & Prov. Supply Ass.*, 5 App.Cas. 857; 49 L.J. Q.B. 736; *Templeman* v. *Trafford*, 8 Q.B.D. 397; 51 L.J. M.C. 4.

(*p*) 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30; 50 & 51 Vict. c. 29; 62 & 63 Vict. c. 51. As to horse flesh, see 52 & 53 Vict. c. 11. See *Parsons* v. *Birmingham Dairy Co.*, 9 Q.B.D. 172; 51 L.J. M.C. 111.

(*q*) 57 & 58 Vict. c. 60, ss. 538—543.

(*r*) 62 & 63 Vict. c. 23, s. 1.

(*s*) *Ibid.* s. 2.

(*t*) *Biggs* v. *Lawrence*, 3 T.R. 454; *Clugas* v. *Penaluna*, 4 *ib.* 466; *Lightfoot* v. *Tenant*, 1 B. & P. 556.

(*u*) *Holman* v. *Johnson*, 1 Cowp. 341; *Pellecat* v. *Angell*, 2 C. M. & R. 311; 4 L.J. Ex. 326.

country, yet, if he makes himself a direct party to the act of breaking them, he cannot here recover the fruits of his illegal act (*v*).

Illegal sale of exciseable articles.—Many Acts of Parliament, passed for the mere purpose of raising a revenue, require persons dealing in certain classes of goods to take out a licence or permit, and impose a penalty upon them in case of their neglect so to do. The omission to take out a licence required for mere revenue purposes does not render contracts of sale, entered into by such dealers in the way of their trade, unlawful, unless such contracts are expressly forbidden, but only exposes them to the penalty imposed by the statute (*w*). But, when the licence is required for the protection of the public and the prevention of improper persons from acting in a particular capacity, and is not confined to revenue purposes, the imposition of the penalty amounts to a positive prohibition of the contract (*x*). In order to legalise the sale of wines, beer, and spirituous liquors, two licences are necessary, one from the excise, the other from the magistrates in sessions. The licence granted by the magistrates has no reference whatever to revenue purposes; it is required solely for the protection and preservation of public morals, and the prevention of crimes and offences which are subversive of good order and the public safety. Every person, therefore, who sells wines, spirits, &c. without being duly licensed so to do, has no remedy for the recovery of the price thereof (*y*). A brewer who sells beer to be consumed in a public-house is not bound to ascertain whether the party who orders the beer is duly licensed before he supplies the article (*z*). Mere knowledge, moreover, on the part of the vendor, that the buyer will make an illegal use of goods sold to him, is not sufficient to deprive the vendor of his right to payment of the price. It is necessary that the vendor should be a sharer in the illegal transaction, and should render some aid beyond that of merely selling the goods (*a*).

Sunday sales and trading.—By sect. 1 of the Sunday Observance Act, 1677 (*b*), commonly called the Lord's Day Act, it is enacted that no tradesman, artificer, workman, or labourer, shall exercise the worldly labour, business, or work of his ordinary calling upon the Lord's day (works of necessity and charity only

(*v*) *Waymell* v. *Reed*, 5 T.R. 600.

(*w*) *Johnson* v. *Hudson*, 11 East, 180; *Smith* v. *Mawhood*, 14 M. & W. 463; 15 L.J. Ex. 149; *Brown* v. *Duncan*, 10 B. & C. 93; 8 L.J. (O.S.) K.B. 60; *Wetherell* v. *Jones*, 3 B. & Ad. 221; 1 L.J. K.B. 39.

(*x*) *Cope* v. *Rowlands*, 2 M. & W. 157; 6 L.J. Ex. 63. See *Melliss* v. *Shirley Local Board*, 16 Q.B.D. 446; 55 L.J. Q.B. 143.

(*y*) *Ritchie* v. *Smith*, 6 C.B. 474; 18 L.J. C.P. 9.

(*z*) *Brooker* v. *Wood*, 5 B. & Ad. 1052; 3 L.J. K.B. 96.

(*a*) *Hodgson* v. *Temple*, 5 Taunt. 181; 1 Marsh. 5.

(*b*) 29 Car. 2, c. 7.

excepted); and a penalty is imposed upon all persons of the age of fourteen years who offend against the statute. No action, consequently, can be brought for the price of goods sold on Sunday in the ordinary course of trade or business of the vendor (*c*), unless the sale is within the exception of the Act, which permits (sect. 3) food to be dressed or sold in inns, cook-shops, and victualling-houses, to persons who cannot be otherwise provided for, and milk to be carried about and sold at stated hours; or unless the sale is of bread, the baking and sale of which on Sundays are sanctioned under certain restrictions (*d*). If the sale or other contract was not made in the exercise of the trade or ordinary calling of the party against whom it is sought to be enforced, it is not invalidated by the statute (*e*). The sale of a horse, for example, by a person who is not a horse-dealer, is not within the statute; and, if a sale is merely proposed on a Sunday, and carried into effect on a subsequent week-day, it is not illegal. But, if the contract of sale is concluded on the Sunday, it will be void, although it may not be fulfilled by the delivery of the goods until a subsequent week-day (*f*).

If the goods are actually delivered to the purchaser under the void contract, the latter will have no right to detain them against the owner, unless it can be considered that both parties are *in pari delicto*. If the owner, subsequently to the void sale, demand on a week-day either the goods or the price, and the intended purchaser then promises to pay for them, a new and valid contract of purchase and sale arises between the parties which may be enforced by action. But the law will not imply a promise to pay the price from the mere fact of the detention or use of the goods (*g*). The hiring by a farmer of a labourer or servant is not an exercise of the farmer's ordinary calling, and, consequently, is not within the letter or spirit of the Act (*h*). Neither is a contract by a farmer for the covering of a mare with a stallion (*i*); nor an agreement by a solicitor to become personally responsible for the payment of the debt of a client (*k*). Farmers, attorneys, and surgeons, moreover, do not range under the classes of persons (tradesmen, artificers, workmen, and labourers) mentioned in the

(*c*) *Fennell* v. *Ridler*, 5 B. & C. 406; 4 L.J. (O.S.) K.B. 207.

(*d*) *Rex* v. *Cox*, 2 Burr. 787; *Rex* v. *Younger*, 5 T.R. 449.

(*e*) *Drury* v. *Defontaine*, 1 Taunt. 131.

(*f*) *Bloxsome* v. *Williams*, 2 L.J. (O.S.) K.B. 224; 3 B. & C. 233, 234; *Smith* v. *Sparrow*, 12 Moore, 266; 5 L.J. (O.S.) C.P. 80.

(*g*) *Williams* v. *Paul*, 6 Bing. 653; 8 L.J. (O.S.) C.P. 280; *Simpson* v. *Nicholls*, 3 M. & W. 240; 7 L.J. Ex. 117.

(*h*) *Rex* v. *Whitnash*, 7 B. & C. 602; 6 L.J. (O.S.) M.C. 26; *Reg.* v. *Silvester*, 33 L.J. M.C. 79; *S.C.*, *R.* v. *Cleworth*, 4 B. & S. 927.

(*i*) *Searfe* v. *Morgan*, 4 M. & W. 270; 7 L.J. Ex. 324.

(*k*) *Peate* v. *Dicken*, 1 C. M. & R. 422; 4 L.J. Ex. 28.

statute. A coach-proprietor, or the driver of a hackney-coach, is not a workman or labourer within the meaning of the statute; and a contract, therefore, for the hire of his coach or carriage, or a place therein, is not illegal, although made on a Sunday (*l*).

Contracts for prohibited services.—Printers are required (32 & 33 Vict. c. 24) to affix their names and places of abode or business to all papers printed by them for reward; and, if a printer neglects to comply with the requisitions of the statute, he cannot maintain an action for his labour, or for the materials provided for the printing (*m*). But, as the name is required to be printed on the first or last leaf of every book, the omission might be rectified by the tender of the requisite printed leaf to the author or publisher at any time before actual publication. As soon as a printer discovers that he is printing libellous matter he ought to stop, and may then recover for what he has done; but, if he goes on with his printing, he makes himself a party to the unlawful transaction, and cannot recover his charges (*n*).

Unauthorised medical practitioners.—By sect. 32 of the Medical Act, 1858 (*o*), it is enacted that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice or attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under that statute. This section is not repealed by the later statute (*p*), although sect. 31 is repealed. It is not confined to cases in which the patient is sued; and an unregistered practitioner cannot sue a registered practitioner for medicine supplied to, or attendance upon, the patients of the latter at his request (*q*). But every person registered under the Act may sue for his reasonable charges, unless he is a fellow or member of a college of physicians which has passed a bye-law prohibiting their fellows and members from suing for their charges (*r*), in which case the bye-law may be pleaded in bar to the action (*p*). This Act, however, does not repeal sect. 21 of the Apothecaries Act, 1815 (*s*); and, consequently, a medical practitioner who is registered as a member of the College of Surgeons only, and who has no other qualification, cannot recover for attendance and medicines supplied in other than sur-

(*l*) *Sandiman* v. *Breach*, 7 B. & C. 96; 5 L.J. (O.S.) K.B. 298.

(*m*) *Bensley* v. *Bignold*, 5 B. & Ald. 340; *Marchant* v. *Evans*, 2 Moore, 14.

(*n*) *Clay* v. *Yates*, 1 H. & N. 73; 25 L.J. Ex. 237; as to the registration of printing presses, see *Day* v. *Hemming*, 9 W.R. 703. As to registration of newspapers, see 44 & 45 Vict. c. 60, amended by 51 & 52 Vict. c. 64.

(*o*) 21 & 22 Vict. c. 90, s. 32.

(*p*) 49 & 50 Vict. c. 48, s. 6.

(*q*) *Alvarez de la Rosa* v. *Prieto*, 16 C.B. N.S. 578; 33 L.J. C.P. 262.

(*r*) *Gibbon* v. *Budd*, 2 H. & C. 92; 32 L.J. Ex. 182.

(*s*) 55 Geo. 3, c. 194.

gical cases (*t*). Proof of the registration of the plaintiff at the time of the trial is insufficient; and it is necessary to show that he was registered at the time the services were rendered (*u*). If a chemist attends patients, and applies and administers medicines, he practises as an apothecary, subjects himself to a penalty for so doing, and is disabled from suing for his charges. When an action has been brought to recover the amount of a chemist's bill, and it is contended that the items are properly within the scope of an apothecary's profession, the proper question to be submitted to the jury is, whether the plaintiff acted as a chemist or as an apothecary, and not whether he has charged as a chemist or as an apothecary (*x*). It was held that a qualified practitioner could not recover for the services of his brother (not qualified), not performed under his advice and direction (*y*).

Unlicensed brokers.—By sect. 4 of 6 Anne, c. 68 (*z*), any person who shall take upon him to act as broker, or employ any other under him to act as such, within the city of London and liberties, not being admitted by the court of Mayor and Aldermen, is liable to be fined. This has been taken to imply a prohibition of all unadmitted persons to act as brokers, and, consequently, to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting. A broker, consequently, cannot sue for commission and charges in respect of work done or services rendered in the city of London, unless he has been duly licensed (*a*). But the want of a licence does not prevent the broker from maintaining an action for the recovery of money paid out of his own pocket for shares purchased by him by order of his principal (*b*). By 30 Vict. c. 23, s. 16, it is made unlawful for any broker, agent, or other person negotiating or transacting or making any sea insurances, to charge his employer any sum for his services, or for any money paid by way of premium, unless the policy is written on vellum, parchment, or paper, duly stamped; and every sum paid by such employer contrary to that Act is to be deemed to have been paid without consideration, and is to remain the property of such employer, his executors, administrators, or assigns.

(*t*) *Leman* v. *Fletcher*, L.R. 8 Q.B. 319; 42 L.J. Q.B. 214.

(*u*) *Leman* v. *Houseley*, L.R. 10 Q.B. 66; 44 L.J. Q.B. 22.

(*x*) *Richmond* v. *Coles*, 1 Dowl. N.S. 560; 11 L.J. Q.B. 155.

(*y*) *Howarth* v. *Brearley*, 19 Q.B.D. 303; 56 L.J. Q.B. 543. See also *Davies* v. *Makuna*, 29 Ch.D. 596; 54 L.J. Ch. 1148. An agreement to carry on an illegal business as an unqualified practitioner will not be enforced.

(*z*) Ruffh. c. 16.

(*a*) *Cope* v. *Rowlands*, 2 M. & W. 159; 6 L.J. Ex. 63; the jurisdiction of the Court of Aldermen over brokers has almost ceased since the 33 & 34 Vict. c. 60.

(*b*) *Pidgeon* v. *Burslem*, 3 Exch. 470; 18 L.J. Exch. 193; *Smith* v. *Lindo*, 5 C.B. N.S. 587; 27 L.J. C.P. 196; *Jessopp* v. *Lutwyche*, 10 Exch. 614; 24 L.J. Ex. 65.

Uncertificated solicitors.—By sect. 26 of the Solicitors Act, 1843 (*c*), no person who as an attorney or solicitor shall prosecute, defend, or carry on any proceeding in any court without having previously obtained a stamped certificate which shall then be in force, shall be capable of maintaining any action or suit for the recovery of any fee, or reward, or disbursement in respect of any business done by him as an attorney or solicitor whilst he shall have been without such certificate (*d*). But the debt is still subsisting, although he can take no steps to enforce its payment (*e*); and, though uncertificated and unable to sue for his fees, he may do acts in his capacity of solicitor which will be valid, and will bind his client (*f*). By sect. 12 of the Solicitors Act, 1874 (*g*), no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act, shall be recoverable in any action, suit, or matter, by any person or persons whomsoever (*h*).

Contracts by waywardens.—By sect. 1 of the Highway Act, 1863 (*i*), no waywarden may, directly or indirectly, in his own name or in the name of any other person, contract for the repair of any road, or for any other work to be executed under the provisions of the Highway Act, 1862 (*k*), within the parish for which he is elected waywarden, or within any other parish in the same district; and by sect. 2 it is made unlawful for any highway board to pay knowingly for any repair or work so contracted for; and any money paid by any board under any such contract may be recovered by them from the person to whom the same shall have been paid. But, by sect. 20 of the Highway Act, 1864 (*l*), any waywarden may contract for the supply or cartage of materials within the parish for which he is waywarden, with the licence of two justices assembled at petty sessions, to be granted on such application as is therein provided.

Illegality of contracts for payment of work otherwise than in current coin.—The truck system.—By the Truck Act, 1831 (*m*), it is enacted (sect. 1) that in all contracts for the hiring of any artificer (*n*) in

(*c*) 6 & 7 Vict. c. 73.
(*d*) *Brunswick* (*Duke*) v. *Crowl*, 4 Exch. 492; 19 L.J. Ex. 112.
(*e*) *Jones, In re*, L.R. 9 Eq. 63; 39 L.J. Ch. 83; *Fullalove* v. *Parker*, 31 L.J. C.P. 239, 240; 12 C.B. N.S. 246.
(*f*) *Holdgate* v. *Slight*, 21 L.J. Q.B. 75; *Sparling* v. *Brereton*, L.R. 2 Eq. 64; 35 L.J. Ch. 461.
(*g*) 37 & 38 Vict. c. 68.
(*h*) See *Fowler* v. *Monmouthshire Canal Co.*, 4 Q.B.D. 334; 48 L.J. Q.B. 457.
(*i*) 26 & 27 Vict. c. 61.
(*k*) 25 & 26 Vict. c. 61.
(*l*) 27 & 28 Vict. c. 101.
(*m*) 1 & 2 Will. 4, c. 37.
(*n*) As to the meaning and extent of the term, see *Riley* v. *Warden*, 2 Exch. 59; 18 L.J. Ex. 120; *Sharman* v. *Sanders*, 22 L.J. C.P. 86; 13 C.B. 166; *Weaver* v. *Floyd*, 21 L.J. Q.B. 151; 16 Jur. 289; *Bowers* v. *Lovekin*, 6 E. & B. 584; 25 L.J. Q.B. 371; *Ingram* v. *Barnes*, 7 E. & B. 115, 132; 26 L.J. Q.B. 82; *Sleeman* v. *Barrett*, 33 L.J. Ex. 153; 2 H. & C. 934; *Moorhouse* v. *Lee*, 4 F. & F. 355. See now, however, 50 & 51 Vict. c. 46, s. 2.

the iron or steel manufactures, or in the working of mines of coal, iron, limestone, or salt-rock, or the getting of stone, slate, or clay, or in the preparing of salt, bricks, tiles, or quarries, or in the manufacturing of nails, chains, rivets, &c., spades, shovels, &c., or any articles of hardware, of iron or steel, or plated articles of cutlery, or goods or wares made of brass, tin, or other metal, or of any japanned goods or wares, or in the spinning, throwing, twisting, &c., weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen or worsted yarn, stuff, &c., cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever, or in the glass, porcelain, china, or earthenware manufacture, or in the making or preparing of bone, thread, silk, or cotton-lace, &c., the wages of such artificer shall be made payable in the current coin of the realm only; and that, if in any such contract the whole or any part of such wages shall be made payable in any other manner, such contract shall be illegal, null, and void (*o*). Also (sect. 2), that, if in any contract between any artificer in any of the trades enumerated and his employer any provision shall be made "respecting the place where, or the manner in which, or the person with whom, the whole or any part of the wages" of such artificer shall be expended, such contract shall be illegal and void. All such artificers are empowered (sect. 4) to sue for and recover any wages that have not been paid them in the current coin of the realm. Payment may, however, be made (sect. 8) in bank notes, if such artificer consent thereto. The provisions of the Act are extended, by the Truck Act, 1887 (*p*), to all workmen, as defined in the Employers and Workmen Act, 1875 (*q*), and in some cases include artificers working at their own homes and selling their work to shopkeepers or dealers (*r*).

The object of the legislation is to give the workman full remuneration for his labour and no more; and, therefore, deductions of sums which never belonged to the workman as part of his wages do not invalidate the contract. Thus, when the plaintiff, a framework-knitter, agreed with the defendant, an undertaker or middleman, to make gloves at a certain agreed price per dozen, subject to a deduction of 1*s.* 6*d.* a week for the use of the frames furnished by such middleman, and 1*s.* 6*d.* a week as a remuneration for the use of a workshop, and for his trouble in procuring and conveying to the plaintiff materials for his work and returning them safe to the master manufacturer, also 7*d.* per week for winding the yarn, and a penny in the shilling on the amount of the plaintiff's

(*o*) *Ashersmith* v. *Drury*, 28 L.J. M.C. 5; 1 E. & E. 46.
(*p*) 50 & 51 Vict. c. 46.
(*q*) 38 & 39 Vict. c. 90, s. 10.
(*r*) 50 & 51 Vict. c. 46, s. 10.

weekly earnings above 14*s.* in the week net for repairs of certain machinery, all which deductions were fair and reasonable, and in accordance with the custom and usage of the trade, it was held that the contract was not invalidated by the statute (*s*). Payment in damaged cloth was held not payment in coin (*t*). If the employer set up a shop, and make use of any compulsion to induce his workmen to lay out their wages at this shop, the wages thus received and compulsorily expended at the employer's shop are not, it seems, valid payment of wages, but are within the mischief intended to be provided against by the Truck Acts (*u*). It is illegal for an employer to impose upon a workman as a condition of his employment any terms as to spending any part of his wages at any particular shop, &c. (*x*). But a payment made by an employer at the instance of the person employed is not within the Act; and therefore where an employé agreed to become a member of a sick club, and the employer weekly deducted from his wages the payment to the club, and handed it over to the club treasurer with the assent of the employé, it was held that he could not recover the amount thus deducted, although he had derived no benefit from the club (*y*).

By sect. 23 of the Truck Act, 1831 (*z*), the employer may contract to supply the artificer with medicine, medical attendance, and materials to be employed in his occupation if a miner, and may demise to the artificer a tenement at any rent reserved, and may contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages is in writing (*a*), and signed by the artificer. The amount to be deducted in respect of each head of deduction need not be specified in the contract (*b*). The employer may deduct 6*d.* a week for medicine to be paid by the miner towards a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as may require them (*c*); but, in order to be valid, the contract for the supply of materials must be an absolute contract of sale, and not a mere contract of hiring by the artificer (*d*). Deductions or stoppages in the hosiery trade in respect of frame-rent, machine-rent, standing of frames and

(*s*) *Chawner* v. *Cummings*, 8 Q.B. 325; 15 L.J. Q.B. 161; but see now the Hosiery Act, 1874 (37 & 38 Vict. c. 48), ss. 1—5, by which these deductions and stoppages are made illegal.

(*t*) *Smith* v. *Walton*, 3 C.P.D. 109; 47 L.J. M.C. 45.

(*u*) *Olding* v. *Smith*, 16 Jur. 497. See 50 & 51 Vict. c. 46, s. 5.

(*x*) 50 & 51 Vict. c. 46, s. 6.

(*y*) *Hewlett* v. *Allen*, (1894) A.C. 383; 63 L.J. Q.B. 608.

(*z*) 1 & 2 Will. 4, c. 37.

(*a*) *Pillar* v. *Llynvi Coal Co.*, L.R. 4 C.P. 752; 38 L.J. Q.B. 294. See *Lamb* v. *G. N. Ry.*, (1891) 2 Q.B. 281; 60 L.J. Q.B. 489.

(*b*) *Cutts* v. *Ward*, L.R. 2 Q.B. 357; 36 L.J. Q.B. 161.

(*c*) *Cutts* v. *Ward*, *supra*.

(*d*) *Ibid.*

machines, winding the material, fines for irregular attendance, gas for lighting the factory, and fire in waiting-room, amounting to about 3*s.* 9*d.* per week and being fixed charges, have been held not to be illegal (*e*). And by 50 & 51 Vict. c. 46, s. 4, it is not illegal to give a servant in husbandry food, non-intoxicating drink, &c. in addition to his money wages, as a remuneration for his services. The Truck Act, 1896 (*f*), provides for the deduction of fines, or payments in respect of damaged goods or of materials from the sum contracted to be paid under certain very strictly limited conditions. A fine imposed for breach of a rule that all workers shall observe good order is one in respect of "an act or omission" likely to cause damage to the employer within the meaning of sect. 1, sub-sect. 1, of the Act (*g*).

Divisible contracts, part being good and part bad.—If there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced, although the other fails. The invalidity of the one will not necessarily induce the destruction of the other (*h*). If a deed of conveyance contains limitations and grants of land and tenements to uses, some of which are charitable uses within the 9 Geo. 2, c. 36, the deed will be void so far as it relates to the charitable uses, but valid so far as it passes the other lands to the other uses (*i*). If a settlement contains provisions for the case of a future separation between the husband and wife, those provisions are void; but the rest of the settlement may be valid (*k*). Where a rector granted a yearly rent-charge, payable out of his benefice, and covenanted to pay the rent-charge, and the grant was avoided by the 13 Eliz. c. 30, it was held that the rector was nevertheless liable upon his covenant to pay annually to the plaintiff the amount intended to have been charged upon the benefice (*l*). A covenant to pay rent and taxes has been held not to be avoided by including property tax (*m*). Where a corporation had by a deed which was *ultra vires* borrowed money for a purpose to which the borough fund was inapplicable, though the substance of the deed was held bad, yet the covenant for repayment of the money was held capable of being enforced (*n*). Where, on a contract for the sale of a perfumer's business, the vendor covenanted not to

(*e*) *Archer* v. *James*, 2 B. & S. 61; 31 L.J. Q.B. 153; but see note (*s*), *supra*, p. 108.

(*f*) 59 & 60 Vict. c. 44.

(*g*) *Squire* v. *Bayer*, (1901) 2 K.B. 299; 70 L.J. K.B. 705.

(*h*) *Collins* v. *Blantern*, 2 Wils. 341; *Chester* (*Bishop*) v. *Freeland*, Ley, 79; 1 Vin. Abr. 332.

(*i*) *Doe* v. *Pitcher*, 6 Taunt. 369; *Howe* v. *Synge*, 15 East, 440.

(*k*) *Merryweather* v. *Jones*, 4 Giff. 509; *Hamilton* v. *Hector*, L.R. 13 Eq. 511.

(*l*) *Mouys* v. *Leake*, cited *Kerrison* v. *Cole*, 8 East, 231.

(*m*) *Gaskell* v. *King*, 11 East, 165.

(*n*) *Payne* v. *Brecon Corporation*, 3 H. & N. 572; 27 L.J. Ex. 495.

carry on the trade of a perfumer within the cities of London and Westminster, or within the distance of 600 miles from the same, it was held that the covenant was good so far as it related to the cities of London and Westminster, though it was void as to the 600 miles (*o*). But the court will not carve out of the covenant such a distance as will be reasonable (*p*). The covenant must be capable of being construed divisibly (*q*). And where there are separate and independent covenants in the same deed, the illegality of one of the covenants does not invalidate the others (*r*). Where there are two considerations, the one good and the other bad, and general damages have been recovered, they will be deemed to have been given in respect of the good consideration alone (*s*).

Indivisible contracts.—If there is one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void. Thus, where one sum is to be paid for the doing of a legal and an illegal act, the whole contract is void (*t*). And, if a contract or promise be founded upon a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal consideration and rejected, the illegality of part vitiates the whole (*u*). Where a bill of exchange was given to secure payment of a debt, part of which consisted of money lawfully advanced, and the rest of money due upon an illegal sale, it was held that the good part of the consideration for the bill could not be separated from the rest, and that the whole was void (*x*). Every secret bargain in fraud of creditors is void when it is made, and cannot be enforced even against a fraudulent party; and, when a part is fraudulent, the bargain, being entire, is altogether fraudulent and void. The creditor, therefore, can enforce no part of it; and it is no matter that part of the agreement is by deed and part by parol (*y*). If, upon a contract for the hiring and service of a housekeeper at certain agreed wages, it appears to have been part of the contract that the housekeeper should cohabit with her master, the whole will be void, and the wages irrecoverable (*z*). Where a verbal

(*o*) *Price* v. *Green*, 16 M. & W. 346; 16 L.J. Ex. 108. "London" means the city of London, and not the metropolis generally: *Mallan* v. *May*, 13 M. & W. 517; 14 L.J. Ex. 48.

(*p*) *Baker* v. *Hedgecock*, 39 Ch.D. 520; 57 L.J. Ch. 889.

(*q*) *Price* v. *Green*, *supra*; *Nicholls* v. *Stretton*, 10 Q.B. 346; 7 Beav. 42; *Baines* v. *Geary*, 35 Ch.D. 154; 56 L.J. Ch. 935; *Perls* v. *Saalfeld*, (1892) 2 Ch. 149; 61 L.J. Ch. 409; *Rogers* v. *Maddocks*, (1892) 3 Ch. 346; 62 L.J. Ch. 219.

(*r*) *Wigg* v. *Shuttleworth*, 13 East, 87.

(*s*) Ley, 79; *Best* v. *Jolly*, 1 Sid. 38.

(*t*) *Hopkins* v. *Prescott*, 16 L.J. C.P. 263; 4 C.B. 578.

(*u*) *Featherston* v. *Hutchinson*, Cro. Eliz. 199; *Lound* v. *Grimwade*, 39 Ch.D. 605; 57 L.J. Ch. 725.

(*x*) *Scott* v. *Gillmore*, 3 Taunt. 226; *Thomas* v. *Williams*, 10 B. & C. 671; 8 L.J. (O.S.) K.B. 314; *Fergusson* v. *Norman*, 6 Sc. 810; 8 L.J. C.P. 3; *Willyams* v. *Bullmore*, 32 Beav. 574; 33 L.J. Ch. 461.

(*y*) *Higgins* v. *Pitt*, 4 Exch. 324.

(*z*) *Rex* v. *Northwingfield*, 1 B. & Ad. 912.

agreement was made to pay the debt of a third party (which is void by the Statute of Frauds, unless it is authenticated by writing), and to pay certain expenses connected therewith, it was held that the agreement was indivisible, and the whole invalid (*a*). Upon a contract for the sale of tobacco, it was agreed that counterfeit money should be taken in payment, and, the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive it, and brought an action for the price of the tobacco; but, per Buller, J., "It cannot be said that the sale is good and that the payment is bad; if it be an illegal contract, it is equally bad for the whole. . . . The parties are *in pari delicto*, and *potior est conditio defendentis*" (*b*).

Void foreign contracts.—As a general rule, a contract will not be enforced, unless it is valid by the law both of the country in which it was made and of that in which it is sought to be enforced (*c*).

Effect of avoidance.—A person who has authorised the application of his money to an illegal purpose may revoke the authority and recover back the money at any time before it has been paid over (*d*); and, so long as an illegal contract remains unperformed, money deposited by one of the parties in furtherance of the fulfilment of the contract may be recovered back (*e*), but not when the parties have carried out their unlawful intention, in any material part (*f*), and both are *in pari delicto* (*g*). Money lost at play (*h*), or paid for the purpose of procuring a pardon (*i*), or for insurance in the nature of a wager (*k*), or for supplying wine, &c. for a debauch at a brothel (*l*), or for compounding a felony, or purchasing false evidence, or inducing a party not to appear and give evidence at a trial, or indemnifying bail with a like object, cannot be recovered from the person to whom it has been paid (*m*). If indentures of apprenticeship are void by reason of the amount of the premium paid with the apprentice not being truly or correctly stated pursuant to the requirements of the Stamp Acts, the money actually given with the apprentice cannot be recovered back on the ground of a failure of consideration, as both parties are *in pari*

(*a*) *Lexington* v. *Clarke*, 2 Ventr. 223; *Chater* v. *Beckett*, 7 T.R. 201.
(*b*) *Alexander* v. *Owen*, 1 T.R. 227.
(*c*) *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L.J. Ch. 417.
(*d*) *Bone* v. *Ekless*, 29 L.J. Ex. 438; 5 H. & N. 925.
(*e*) *Walker* v. *Chapman*, cited 2 Doug. 471 a.
(*f*) *Kearley* v. *Thomson*, 24 Q.B.D. 742; 59 L.J. Q.B. 288.
(*g*) *Palyart* v. *Leckie*, 6 M. & S. 293; *Wilson* v. *Ray*, 10 Ad. & E. 88; 8 L.J. Q.B. 224.
(*h*) *Thistlewood* v. *Craeroft*, 1 M. & S. 500; *Webb* v. *Bishop*, Bull. N.P. 132.
(*i*) *Norman* v. *Cole*, 3 Esp. 253.
(*k*) *Edgar* v. *Fowler*, 3 East, 225.
(*l*) *Taylor* v. *Chester*, L.R. 4 Q.B. 309; 38 L.J. Q.B. 225.
(*m*) *Wilson* v. *Strugnell*, 7 Q.B.D. 548; 50 L.J. Q.B. 145; *Herman* v. *Jeuchner*, 15 Q.B.D. 561; 54 L.J. Q.B. 340; *Consolidated Exploration Co.* v. *Musgrave*, (1900) 1 Ch. 37; 69 L.J. Ch. 11.

delicto (*n*). When, however, the parties are not *in pari delicto*, the most innocent of the two may obtain the assistance of the law for the recovery of money paid by him to the other under the illegal contract, although the unlawful act may have been fully accomplished. And it has been held that a debtor paying money to one creditor as the price of procuring a fraud on his other creditors before the creditors enter into a composition can recover back the money, the parties not being *in pari delicto* (*o*).

Money in hands of depositaries and stakeholders.—The Gaming Acts of 1845 and 1892 (*p*) were intended to prevent the recovery of the stake by the party who assumed to have won the wager, and not to prevent either of the parties depositing the money with a stakeholder from withdrawing his assent to the contract before the determination of the wager, and thus of his own free will preventing the result which the Acts were passed to prevent (*q*). So long as the money has not been actually paid over by the stakeholder or depositary to the winner, it may be recovered back by the depositor (*r*), but not afterwards (*s*), unless previous notice has been given not to pay over the money (*t*). Where, however, a billiard player, who was an undischarged bankrupt, played and won a match for 100*l.* a side, the money being deposited with a stakeholder, it was held that in the absence of any claim by the unsuccessful player, the whole sum must be paid by the stakeholder to the bankrupt's trustee. The stakeholder had interpleaded, but the court expressed doubt whether he ought to have been allowed to do so, saying that persons who enter into wagering contracts ought not to have the assistance of the court to recover their winnings (*u*). Money deposited as "cover" against loss on gaming transactions, which has never been required or appropriated for that purpose, can be recovered back from the depositary (*v*).

(*n*) *Stokes* v. *Twitchen*, 2 Moore, 538.

(*o*) *Atkinson* v. *Denby*, 31 L.J. Ex. 362; 7 H. & N. 934; *Lenzberg's Policy*, *In re*, 7 Ch.D. 650; 47 L.J. Ch. 178.

(*p*) 8 & 9 Vict. c. 109; 55 Vict. c. 9.

(*q*) *Varney* v. *Hickman*, 5 C.B. 271; 17 L.J. C.P. 102; *ante*, p. 98; *Martin* v. *Hewson*, 24 L.J. Ex. 174; 10 Exch. 737.

(*r*) *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398; *Cotton* v. *Thurland*, 5 T.R. 405; *Marryat* v. *Broderick*, 2 M. & W. 369; 6 L.J. Ex. 113; *Hampden* v. *Walsh*, 1 Q.B.D. 189; 45 L.J. Q.B. 238; *Diggle* v. *Higgs*, 2 Ex. D. 422; 46 L.J. Ex. 721; *Trimble* v. *Hill*, 5 App.Cas. 342; 49 L.J. P.C. 49.

(*s*) *Howson* v. *Hancock*, 8 T.R. 575.

(*t*) *Hastelow* v. *Jackson*, 8 B. & C. 221; 6 L.J. (O.S.) K.B. 318; *Bone* v. *Ekless*, 5 H. & N. 925; 29 L.J. Ex. 438.

(*u*) *Shoolbred* v. *Roberts*, (1900) 2 Q.B. 497; 69 L.J. Q.B. 800.

(*v*) *Cronmire*, *In re*, (1898) 2 Q.B. 383; 67 L.J. Q.B. 620.

SECTION II.

VOIDABLE CONTRACTS.

Avoidance of contracts on ground of fraud and unfair dealing.—If one man obtain another's money by reason of a promise to do some particular thing, and refuses to do it, but keeps the money, it is a fraud; and it is at the election of the party injured either to affirm the contract by bringing an action for the non-performance of it, or to disaffirm it, *ab initio*, by reason of the fraud, and bring an action for the money (*x*). If a person obtains goods under a contract of sale with the fraudulent intention of never paying for them, the contract is voidable as far as the vendor is concerned, and the goods may be recovered by the latter (*y*), provided he makes his election before the goods have been resold and transferred to a *bonâ fide* purchaser (*z*); but, if the vendor does not think fit to avail himself of the fraud, he may treat the contract as a subsisting contract, and sue for the price. Where a workman has agreed to do a certain job for a certain sum, upon the faith of a false and fraudulent representation by the employer, the workman may treat the special agreement as a nullity, and sue for the recovery of a fair and reasonable remuneration (*a*). But, if the workman has exercised, or ought to have exercised, his own judgment in the matter, and ought not to have depended upon the representation of the employer, he will not be permitted to avoid the contract on the ground of fraud (*b*). If a man is drawn in to drink, in order that he may be thrown off his guard, and an unfair bargain be imposed upon him, the contract cannot be enforced (*c*). Where a fraudulent misrepresentation "*dans locum contractui*," or giving occasion to the contract, has been made by one who is no party to the contract, there the contract cannot be avoided; but the person who made the representation will be compelled to make good his assertion as far as this may be possible. But, where the false representation has been made by a person who is a party to the agreement, then the contract may be avoided by the party who has been deceived (*d*).

(*x*) Mansfield, C. J., *Moses* v. *Macferlan*, 2 Burr. 1011.

(*y*) *Load* v. *Green*, 15 M. & W. 216; 15 L.J. Ex. 113.

(*z*) *White* v. *Garden*, 10 C.B. 919; 20 L.J. C.P. 167.

(*a*) *Selway* v. *Fogg*, 5 M. & W. 86; 8 L.J. Ex. 199.

(*b*) *Baily* v. *Merrell*, 3 Bulstr. 94.

(*c*) *Johnson* v. *Medlicott*, 3 P. Wms. 130, *in notis*; *Pitt* v. *Smith*, 3 Campb. 33.

(*d*) *Pulsford* v. *Richards*, 17 Beav. 95; 22 L.J. Ch. 559; *Rawlins* v. *Wickham*, 3 De G. & J. 304; 28 L.J. Ch. 188; Ld. Wensleydale, *Smith* v. *Kay*, 30 L.J. Ch. 45, 61; 7 H.L.C. 775.

But a contract cannot be avoided by reason of a representation concerning some matter altogether collateral to the contract. Where, therefore, an agreement was entered into for the letting of apartments on the strength of a representation by the hirer that he wanted them for a perfumer's business, and, as soon as the agreement was executed, and he had obtained possession, he used the premises as a common bawdy house, it was held that the landlord had no right to avoid the contract and treat the tenant as a trespasser (*e*). Where, however, a defendant, holding under a lease which was not assignable without the consent of the landlord, was desirous of selling his lease, and the plaintiff, in order to obtain an assignment of the lease to a friend, represented the latter to be a responsible person, and upon the faith of this representation obtained from the defendant an agreement to assign the lease to such friend, and also the landlord's written consent to the assignment, and the representation was false to the knowledge of the plaintiff at the time he made it, and therefore fraudulent, it was held that the representation went to the very essence of the contract, and entitled the defendant to rescind the agreement (*f*).

False representations.—In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But, when there has only been an innocent misrepresentation, it is no ground for a rescission, unless it was such that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration (*g*); or perhaps where it is a material inducement for entering into the contract (*h*). A representation is made fraudulently, when it is made knowingly, or without belief in its truth, or recklessly without caring whether it be true or false (*i*). Where there has been a fraudulent misrepresentation, or a wilful concealment of fact, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it that he might have known the truth by proper inquiry (*k*). If a person makes a representation calculated to induce another to assume a particular liability, and the circumstances are afterwards,

(*e*) *Ferret* v. *Hill*, 15 C.B. 225; 23 L.J. C.P. 186.

(*f*) *Canham* v. *Barry*, 24 L.J. C.P. 100; 15 C.B. 603.

(*g*) *Kennedy* v. *Panama, &c. Royal Mail Co.*, 36 L.J. Q.B. 260; L.R. 2 Q.B. 580; *Mackay* v. *Dick*, 6 App.Cas. 251, 265, *per* Ld. Blackburn.

(*h*) *Rawlins* v. *Wickham*, 3 De G. & J. 304; 28 L.J. Ch. 188; *Fane* v. *Fane*, L.R. 20 Eq. 698; Pollock on Contracts, 520, 540.

(*i*) *Behn* v. *Burness*, 3 B. & S. 751; 32 L.J. Q.B. 204; *Reese River Silver Mining Co.* v. *Smith*, L.R. 4 H. L. 64; 39 L.J. Ch. 849; *Derry* v. *Peek*, 14 App. Cas. 337; 58 L.J. Ch. 864; *Glasier* v. *Rolls*, 42 Ch.D. 436; 58 L.J. Ch. 325.

(*k*) *Venezuela Co.* v. *Kisch*, L.R. 2 H.L. 99; 36 L.J. Ch. 849; *Redgrave* v. *Hurd*, 20 Ch.D. 1; 51 L.J. Ch. 113. As to ambiguous statements, see *Smith* v. *Chadwick*, 9 App.Cas. 187; 51 L.J. Ch. 597.

before liability assumed, materially altered, it is the duty of the person who made the representation to communicate to the person to whom he made it the alteration of those circumstances; and the person to whom the representation has been made will not be bound in equity by any contract entered into on the faith thereof, unless such a communication has been made (*l*). But, in the case of a sale, the maxim *caveat emptor* applies; and the vendor is not bound to inform the purchaser that he is labouring under a mistake in no way induced by the act of the vendor (*m*).

Fraudulent concealment.—Suppression of the truth, as much as misrepresentation of a material fact, will vitiate any contract the validity of which depends upon the truth and accuracy of the representation on which it was made (*n*). Where the trustee of a deed of separation obtained a covenant from the husband to pay him an annuity for the wife's benefit, and the trustee concealed from the husband the fact that, at the time of the execution of the deed and covenant, he had committed adultery with the wife, it was held that the husband might avoid the deed (*o*). A seller who stands in a fiduciary relation to the purchaser is more strictly bound to disclose all facts within his knowledge (*p*).

Fraud by means of agents.—If a principal, desirous of selling or letting property, knows of a latent defect, and expressly authorises his agent to state that it does not exist, or to make any statement of similar import, or if he purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he was dealing; in either of these cases the representation of the agent will be the representation of the principal, and, coupled with the principal's knowledge of its falsehood, will be a fraud. There is no implied undertaking on the part of the lessor of realty that it is fit for the purpose for which it is let, or that it is in any particular condition at the time of the demise; and it has accordingly been held that, although a principal who employs an agent to let a house knows that the house is encumbered with a nuisance of so serious a nature as to render it an unfit place of residence for any family of respectability, yet he is not guilty of any fraud in the eye of the law by neglecting to make known the existence of the nuisance to the agent, and through him to the parties who contract for the hiring of the house (*q*).

(*l*) *Traill* v. *Baring*, 33 L.J. Ch. 521; 4 Giff. 485.

(*m*) *Smith* v. *Hughes*, L.R. 6 Q.B. 597; 40 L.J. Q.B. 221; but see *post*, p. 121. As to sale of goods, see 56 & 57 Vict. c. 71, s. 14, *post*, p. 525.

(*n*) *Prideaux* v. *Lonsdale*, 4 Giff. 159; 32 L.J. Ch. 317.

(*o*) *Evans* v. *Edmonds*, 22 L.J. C.P. 211, 214; 13 C.B. 777.

(*p*) *Cooks* v. *Boswell*, 11 App.Cas. 232; 55 L.J. Ch. 761.

(*q*) *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L.J. Ex. 297; see *post*, p. 625. As

Fraudulent misrepresentations by directors of companies.—The same rules as to false representations which are applicable to contracts between individuals are also applicable to contracts between an individual and a company. No mis-statement or concealment of any material circumstances can be permitted in a prospectus issued to invite persons to become shareholders in a projected company (*r*). The public are in such a case entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess (*s*). But there must be a misrepresentation of some matter of fact, and not merely an incorrect statement of a matter of law (*t*). Mere exaggerated views of the advantages of the company, not containing any material mis-statement of fact, are not sufficient to avoid the contract (*u*). Where an applicant for shares agrees to be bound by the articles and memorandum of association, he must be taken to have notice of their contents, but not of documents referred to in them and misrepresented by the prospectus (*x*). Where a person believes that he has been misled by representations which are false or deceptive into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay (*y*); but it is not necessary for him expressly to repudiate the contract (*z*). But the contract between a shareholder who has been deceived by a fraudulent prospectus and the company is voidable only, and not void, and can only be avoided subject to the rights of creditors where there is a winding-up order (*a*), or a voluntary winding-up (*b*).

But, where persons have been induced by fraud to take shares in a company, and have, within a reasonable time after discovery of the fraud, repudiated the shares, and have taken proceedings to have their names removed from the list of shareholders, they are entitled to have their names removed, although a decree for that

to liability of principal for acts of his agent, see Addison on Torts, 751 (ed. 7).

(*r*) With regard to specific requirements as to particulars of prospectus, see 63 & 64 Vict. c. 48, s. 10. See also *Broome* v. *Speak*, 71 L.J. Ch. 716.

(*s*) *Venezuela Ry.* v. *Kisch*, L.R. 2 H. L. 99; 36 L.J. Ch. 849.

(*t*) *Rashdall* v. *Ford*, L.R. 2 Eq. 750; 35 L.J. Ch. 769; *Beattie* v. *Ebury* (*Lord*), L.R. 7 H.L. 102; 44 L.J. Ch. 30; see *Eaglesfield* v. *Londonderry* (*Marquis*), 4 Ch.D. 693; *West London Commercial Bank* v. *Kitson*, 13 Q.B.D. 360; 53 L.J. Q.B. 345.

(*u*) *Denton* v. *Macneil*, L.R. 2 Eq. 352.

(*x*) *Kisch* v. *Venezuela Ry.*, 34 L.J. Ch. 545.

(*y*) *Venezuela Ry.* v. *Kisch*, L.R. 2 H.L. 99; 36 L. J. Ch. 849; *Ashley's case*, L.R. 9 Eq. 263; 39 L.J. Ch. 354; *M'Niell's case*, L.R. 10 Eq. 503; 39 L.J. Ch. 822.

(*z*) *Aarons Reefs* v. *Twiss*, (1896) A.C. 273; 65 L.J. P.C. 54.

(*a*) *Oakes* v. *Turquand*, 36 L.J. Ch. 949; L.R. 2 H.L. 325; *Kent* v. *Freehold Land Co.*, L.R. 3 Ch. 493; 37 L.J. Ch. 653; *Houldsworth* v. *City of Glasgow Bank*, 5 App.Cas. 317.

(*b*) *Stone* v. *City Bank*, 3 C.P.D. 282; 47 L.J. C.P. 681.

purpose may not have actually been obtained at the date of the winding-up order (*c*).

The general rule of law that a person purchasing goods in consequence of a fraudulent representation may retain the goods, and still have his action for damages, does not apply to shares in a joint stock company; for a shareholder, becoming a partner, can bring no action for damages while he remains in the company. His only remedy is *restitutio in integrum*, and rescission of the contract; and, if that is impossible by the winding-up of the company, or for any other reason, his action for damages cannot be maintained (*d*).

Fraudulent misreading of a deed.—If a man who cannot read executes a deed which is falsely read, or the sense declared different from the truth, the deed will not bind him (*e*). "It is at the peril of the party to whom the writing is made that the true effect and purport of the writing be declared if it be required; but, if the party who should deliver the deed doth not require it, he shall be bound by the deed, although it be penned against his meaning" (*f*).

Where the defendant's signature upon the back of a bill of exchange was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and was not guilty of any negligence in so signing the paper, it was held that he was not liable in an action against him as indorser by a *bonâ fide* holder for value (*g*). So, where the plaintiff was induced to sign a receipt for compensation for injuries in a railway collision by false representations, it was held that the document did not operate as a valid release (*h*).

The effect of fraud is not absolutely to avoid a contract induced by it, but to render it voidable at the option of the party defrauded (*i*); and the contract continues valid until the party defrauded has determined his election by avoiding it (*k*). In the case, therefore, of a sale or purchase obtained by fraud, the property in the thing sold passes by the contract until the contract is avoided,

(*c*) *Pawle's case*, L.R. 4 Ch. 497; 38 L.J. Ch. 412; *Reese River Mining Co.* v. *Smith*, L.R. 4 H.L. 64; 39 L.J. Ch. 849.

(*d*) *Houldsworth* v. *City of Glasgow Bank*, 5 App.Cas. 317; *Addlestone Linoleum Co., In re*, 37 Ch.D. 191; 57 L.J. Ch. 249.

(*e*) 2 Rolle's Abr. 28, Faits, S.; *Simons* v. *G. W. Ry.*, 2 C.B. N.S. 620; 26 L.J. C.P. 25; Com. Dig. Fait (B. 2); *Hirschfield* v. *L. B. & S. C. Ry.*, 2 Q.B.D. 1; 46 L.J. Q.B. 94.

(*f*) *Thoroughgood's case*, 2 Co. 9, a, b.

(*g*) *Foster* v. *Mackinnon*, L.R. 4 C.P. 704; 38 L.J. C.P. 310; *Lewis* v. *Clay*, 67 L.J. Q.B. 224. See 45 & 46 Vict. c. 61, s. 27, *post*, p. 1121.

(*h*) *Hirschfield* v. *L. B. & S. C. Ry.*, 2 Q.B.D. 1; 46 L.J. Q.B. 94.

(*i*) *Reese River Silver Mining Co.* v. *Smith*, L.R. 4 H.L. 64; 39 L.J. Ch. 849.

(*k*) *Clough* v. *L. & N. W. Ry.*, L.R. 7 Ex. 26, 34; 41 L.J. Ex. 17; *Gordon* v. *Street*, (1899) 2 Q.B. 641; 69 L.J. Q.B. 45.

so that an innocent party buying from a fraudulent purchaser may acquire an indisputable title to the subject-matter of the contract, though the contract is voidable as between the original parties. All mesne dispositions of the property to persons not cognizant of the fraud are valid (*l*).

Determination of power of avoidance.—A party who intends to repudiate a contract on the ground of fraud should do so as soon as he discovers the fraud; for, if, after the discovery of the fraud, he treats the contract as a subsisting contract, or, if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected (*m*), he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit (*n*). And, whenever a party to a contract has a right to elect whether he will avoid it or treat it as a subsisting contract, his election may be manifested by acts as well as by words, and when once made is final, and cannot be retracted (*o*). Moreover, lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and, when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But the mere fact that one who is a party to the fraud has commenced an action before the rescission, is not such a change of position as will preclude the defrauded party from exercising his election to rescind; nor is it necessary that there should be a declaration of his intention to rescind prior to the plea (*p*). The discovery of a new incident in the fraud, which only strengthens the evidence of the original fraud, cannot revive a right of repudiation which has once been waived (*q*).

The right of repudiation of a contract on the ground of fraud does not prevail where a man has by his own act put it out of his power to place the parties in the same position as they were in at the time the contract was made. A purchaser who has obtained possession of property under a contract of sale cannot rescind the contract on the ground of fraud, and bring an action for the recovery of the purchase-money, unless he can restore the subject-

(*l*) *White* v. *Garden*, 10 C.B. 927; 20 L.J. C.P. 166; *Stevenson* v. *Newnham*, 13 C.B. 302; 22 L.J. C.P. 110; *Ward, Ex parte*, 20 Ch.D. 356; 51 L.J. Ch. 752.

(*m*) *Clough* v. *L. & N. W. Ry.*, L.R. 7 Ex. 26, 35; 41 L.J. Ex. 17; *Morrison* v. *Universal Marine Ins. Co.*, L.R. 8 Ex. 197, 204; 42 L.J. Ex. 115.

(*n*) *Selway* v. *Fogg*, 5 M. & W. 86; 8 L.J. Ex. 199; *Read* v. *Hutchinson*, 3 Campb. 352.

(*o*) *Ward* v. *Day*, 33 L.J. Q.B. 13; 5 B. & S. 359.

(*p*) *Clough* v. *L. & N. W. Ry.*, L.R. 7 Ex. 26, 35; 41 L.J. Ex. 17; *Scarf* v. *Jardine*, 7 App.Cas. 345; 51 L.J. Q.B. 613.

(*q*) *Campbell* v. *Fleming*, 1 Ad. & E. 40; 3 L.J. K.B. 136.

matter of the sale to the vendor (*r*). Thus, if a butcher has bought live cattle upon the faith of a fraudulent representation, he cannot, after he has killed the cattle, rescind the contract, and recover back the price, but he must bring an action for damages for the deceit (*s*). And, if a voidable contract has been acted upon by a party who might have avoided it, and who has refrained from doing so in the hope that it may turn out to his advantage, such party cannot then, after abiding the event, or dealing with the subject-matter of the contract, elect to annul the transaction (*t*). But where a person purchased a business which by its own inherent vice became worthless, he was held entitled to a rescission of the contract and repayment (*u*). A person who has applied for shares in a company which have been duly allotted to him, seeking to have his name removed from the register of shareholders, on the ground of a substantial variance between the prospectus upon the faith of which the shares were applied for and the memorandum of association, must show that he used due diligence in ascertaining the contents of the memorandum, and that he repudiated the shares at the earliest practicable moment. If the memorandum and articles of association are in existence at the time when he applies for the shares, and if he agrees to take his shares on the footing of the memorandum and articles of association, he must be held bound to look at them before he applies for shares. If they are not in existence at the time, then at the very latest when he receives his allotment of shares he ought to satisfy himself that there is nothing in them to which he desires to make any objection (*x*).

Constructive fraud.—"Trustees, agents, commissioners, and assignees of bankrupts, solicitors to commissions of bankruptcy, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of the state of his property," are incapable of entering into any contract for the purchase of such property for themselves, except under certain restrictions and limitations (*y*); and a purchase made under such circumstances will be set aside, even after it has been completed, and a reconveyance will be directed (*z*). A trustee or an agent for

(*r*) *Udell* v. *Atherton*, 7 H. & N. 172; 30 L.J. Ex. 337; see *post*, Contract of Sale, p. 440.

(*s*) *Clarke* v. *Dickson*, E. B. & E. 155; 27 L.J. Q.B. 223; *Mixer, Ex parte*, 4 De G. & J. 575; 28 L.J. Ch. 879; *Sheffield Nickel Co.* v. *Unwin*, 2 Q.B.D. 214; 46 L.J. Q.B. 299; *Urquhart* v. *Macpherson*, 3 App.Cas. 831; *Tennent* v. *City of Glasgow Bank*, 4 App.Cas. 615.

(*t*) *Ormes* v. *Beadel*, 30 L.J. Ch. 4; *Campbell* v. *Fleming*, 1 Ad. & E. 40; 3 L.J. K.B. 136.

(*u*) *Adam* v. *Newbiggin*, 13 App.Cas. 308; 57 L.J. Ch. 1066.

(*x*) *Peel's case*, L.R. 2 Ch. 674; 36 L.J. Ch. 757.

(*y*) *York Buildings Co.* v. *Mackenzie*, 8 Bro. P.C. 93; *Tate* v. *Williamson*, L.R. 2 Ch. 55; *Luff* v. *Lord*, 34 Beav. 220; *Summers* v. *Griffiths*, 35 Beav. 27.

(*z*) *Clark* v. *Malpas*, 31 Beav. 80; 31

sale cannot, under ordinary circumstances, become himself the purchaser of the property confided to him to sell (*a*). A solicitor cannot buy an estate of his client, unless he deals with him "at arm's length" through the intervention of another solicitor, from whom no necessary information is withheld, and who properly discharges his duty (*b*); or unless he shows to demonstration that no industry on his part could have got a better bargain (*c*); nor can an arbitrator purchase from the parties to the reference, nor a guardian from his ward, nor a trustee from his *cestui que trust*, unless the surrounding circumstances prove beyond all doubt that the transaction was perfectly fair and advantageous for the client, *cestui que trust*, or other parties affected by it (*d*). And, although a solicitor or agent can show that he is entitled to purchase, yet, if, instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, such purchase cannot stand (*e*). An agent for sale, who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the exact nature of his interest, and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiring (*f*). If the agent does purchase, the agency is dissolved; he comes forth as a principal, and can claim no commission or remuneration as agent (*g*).

Any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, and if it renders it impossible for him to have the full benefit of the contract, entitles him, if he applies in time, to have it set aside (*h*). It is immaterial whether the mind of the agent was biassed by such dealing or not (*i*). So also trustees lending themselves to a fraud by their *cestui que trust* and receiving money from the defrauded party cannot escape the liability which attaches alike to them and to their *cestui que trust*, and must refund money paid to them in consideration of their fraud (*k*). Whenever there exists

L.J. Ch. 696; *Gresley* v. *Mousley*, 31 L.J. Ch. 537; 3 De G. F. & J. 433; *Douglas* v. *Culverwell*, 31 L.J. Ch. 543; 3 Giff. 251; *Clanricarde* v. *Henning*, 30 L.J. Ch. 865; 30 Beav. 175; *Hannah* v. *Hodgson*, 30 L.J. Ch. 738; 30 Beav. 19.

(*a*) *Crowe* v. *Ballard*, 3 Bro. Ch.C. 119; *Lacey*, *Ex parte*, 6 Ves. 626; see *Hickley* v. *Hickley*, 2 Ch.D. 190; 45 L.J. Ch. 401.

(*b*) *Gibbs* v. *Daniel*, 4 Giff. 1; *Simpson* v. *Lamb*, 7 E. & B. 84; 26 L.J. Q.B. 121; *Davis* v. *Freethy*, 24 Q.B.D. 519; 59 L.J. Q.B. 318.

(*c*) *Cutts* v. *Salmon*, 21 L.J. Ch. 750; 4 De G. & S. 125; *Champion* v. *Rigby*, 1 Russ. & Myl. 539; *Casborne* v. *Barsham*, 2 Beav. 76; *Hatch* v. *Hatch*, 9 Ves. 296; *Wright* v. *Proud*, 13 Ves. 138; *Gibson* v. *Jeyes*, 6 Ves. 266; *Gibbs* v. *Daniel*, *supra*.

(*d*) *Cane* v. *Allen* (*Lord*), 2 Dow. 289; *Dawson* v. *Massey*, 1 Ball & B. 219; *Hardwicke* (*Lord*) v. *Vernon*, 4 Ves. 411; 14 Ves. 504.

(*e*) *Lewis* v. *Hillman*, 3 H.L.C. 607, 630.

(*f*) *Dunne* v. *English*, L.R. 18 Eq. 524.

(*g*) *Salomons* v. *Pender*, 34 L.J. Ex. 95; 3 H. & C. 639.

(*h*) *Panama and South Pacific Telegraph Co.* v. *India Rubber Co.*, L.R. 10 Ch. 515.

(*i*) *Shipway* v. *Broadwood*, (1899) 1 Q.B. 369; 68 L.J. Q.B. 360.

(*k*) *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch.D. 394; 45 L.J. Ch. 465.

such a confidence as enables one person to exert influence over another, the court will not allow any transactions between the parties to stand, unless there has been the fullest communication of every particular known to the one who seeks to establish a contract (*l*).

Duress.—Any agreement made under improper pressure is voidable (*m*). Thus, where B. discounted bills to which he had forged his father's signature, and the holders of the forgeries, working on the fears of the father for his son's safety, but without holding out any direct threat, or making any distinct promise not to prosecute, obtained from the father equitable security for the amount of the bills, it was held that the security was void (*n*). If a man pays money or gives securities to redeem his goods from the custody of the law, that is not a case of duress; nor can he recover back his money or defend himself from proceedings taken to enforce the securities which he has paid or given under legal compulsion (*o*). If a person, having been constrained by duress to make a contract, afterwards voluntarily acts upon it, he thereby affirms its validity and loses the right of avoiding it (*p*).

Mistake.—Where one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, and the terms have not been reduced into writing, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other (*q*). And even if the terms of the contract have been reduced into writing, and there is a latent ambiguity, and the parol evidence adduced to explain it shows that the parties were not of one mind, there is no contract. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that there are two persons or ships to which the description in the contract equally applies, and that each of the parties, misled by the similarity, had a different person or ship in his mind, no contract exists between them (*r*). Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract (*s*); but where the

(*l*) *Tate* v. *Williamson*, L.R. 2 Ch. 55; *Rees* v. *De Bernardy*, (1896) 2 Ch. 437; 65 L.J. Ch. 656.

(*m*) See, however, *Barnes* v. *Richards*, 71 L.J. K.B. 341. As to an extortionate demand for salvage, see *The Mark Lane*, 15 P.D. 135; *The Rialto*, (1891) P. 175; 60 L.J. P. 71.

(*n*) *Williams* v. *Bayley*, L.R. 1 H.L. 200; 35 L.J. Ch. 717; see *Flower* v. *Sadler*, 10 Q.B.D. 572; *Jones* v. *Merioneth Building Society*, (1892) 1 Ch. 173; 61 L.J. Ch. 138.

(*o*) *Liverpool Marine Credit Co.* v. *Hunter*, L.R. 3 Ch. 487; 37 L.J. Ch. 386.

(*p*) *Ormes* v. *Beadel*, 2 De G. F. & J. 333; 30 L.J. Ch. 1.

(*q*) *Scott* v. *Littledale*, 8 E. & B. 815; 27 L.J. Q.B. 201.

(*r*) *Raffles* v. *Wichelhaus*, 2 H. & C. 906; 33 L.J. Ex. 160.

(*s*) *Gordon* v. *Street*, (1899) 2 Q.B. 641; 69 L.J. Q.B. 45.

person sought to be bound would have been equally willing to make the same contract with any other person, the contract is good (*t*).

Rectification.—Where the terms of the written instrument do not correctly represent the mind of the parties, the court will rectify it, provided the mistake is one of fact (*u*) and common to both parties (*x*). And where a contract has been entered into upon the faith of a state of things which does not exist (*y*), or where one of the parties has made a mistake to which the other has by his acts contributed, even unintentionally, the contract will be rescinded (*z*), provided the Court can replace the parties in their original condition (*a*), or specific performance will not be enforced (*b*). Where in the making of an agreement between two parties there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interfering to grant relief; and the Court will not decline to do so merely because circumstances may have rendered it difficult to restore the parties exactly to their original condition: and, although, where the mistake arises from ignorance of a well-known rule of law, the Court will not interfere, yet, where it arises upon a construction of a document of doubtful meaning, the doctrine of *ignorantia juris neminem excusat* will not apply, and the court will give relief (*c*). So also the court will, it seems, give relief where there has been a mutual mistake without fraud, even where the contract has been completed (*d*). Where there has been no misrepresentation of fact, but a mutual mistake in law, the court will not make one party responsible (*e*). Where there is a mistake upon a sale of land in the acreage, and not in the essence or corpus with which the contract deals, the court will decree performance (*f*). But the court will not decree specific performance of a contract where the contract was made by the defendant under a *bonâ fide* mistake and there would be a manifest injustice in holding him to his bargain (*g*). In all cases, however, the special circumstances are to be con-

(*t*) *Smith* v. *Wheatcroft*, 9 Ch.D. 223; 47 L.J. Ch. 745; *Hardman* v. *Booth*, 1 H. & C. 803; 32 L.J. Ex. 105.

(*u*) *Powell* v. *Smith*, L.R. 14 Eq. 85; 41 L.J. Ch. 734; *Mid. G. W. Ry.* v. *Johnson*, 6 H.L.C. 798.

(*x*) *Harris* v. *Pepperell*, L.R. 5 Eq. 1; *Paget* v. *Marshall*, 28 Ch.D. 255; 54 L.J. Ch. 575; *Fowler* v. *Fowler*, 4 De G. & J. 250; *Cooper* v. *Phibbs*, L.R. 2 H.L. 149.

(*y*) *Emmerson's case*, L.R. 1 Ch. 433; 36 L.J. Ch. 177.

(*z*) *Torrance* v. *Bolton*, L.R. 8 Ch. 118; 42 L.J. Ch. 177; *Wilding* v. *Sanderson*, (1897) 2 Ch. 534; 66 L.J. Ch. 684.

(*a*) *Emmerson's case*, *supra*.

(*b*) *Baskcomb* v. *Beckwith*, L.R. 8 Eq. 100; 38 L.J. Ch. 536.

(*c*) *Beauchamp* (*Earl*) v. *Winn*, L.R. 6 H.L. 223, 224.

(*d*) *Jones* v. *Clifford*, 3 Ch.D. 779; 45 L.J. Ch. 809.

(*e*) *Eaglesfield* v. *Londonderry* (*Marquis*), 4 Ch.D. 693.

(*f*) *McKenzie* v. *Hesketh*, 7 Ch.D. 675; 47 L.J. Ch. 231.

(*g*) *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L.J. Ch. 652.

sidered (*h*). Sometimes the court has decreed cancellation of a contract with the option to the defendant to accept rectification (*i*).

Where the mistake is unilateral, and the party by whom it was made is the sufferer, relief will not be granted unless there has been some undue influence, misrepresentation, surprise, or abuse of confidence (*k*). But the fact that one party has put an erroneous construction on the contract, and has thought that it included more than it did actually include, does not avoid the contract or preclude him from obtaining specific performance according to what is admitted by the other party to be the true meaning of the contract (*l*). The burden of proving the facts which will warrant the court in rectifying the contract is cast upon the person desiring rectification (*m*). After judgment and money paid, an action for rectification cannot be had (*n*). "The rectification or setting aside or cancellation of deeds or other written instruments" is, by sect. 34 of the Judicature Act, 1873, reserved to the Chancery Division; but the King's Bench Division can also rectify contracts under sect. 24, sub-sect. 1 (*o*). Upon parol evidence of mistake the court may rectify a contract and decree specific performance thereof so rectified, where the Statute of Frauds is not a bar (*p*).

Failure of consideration.—When a contract is simply null and void, and not tainted with illegality, money paid by one of the contracting parties to the other may, in general, be recovered back on the ground of a failure of consideration. If a contract is made for the sale and purchase of railway scrip or shares, foreign state bonds, railway debentures, or other securities, and the scrip, shares, or bonds turn out to be forgeries, so that the purchaser has never obtained that which he agreed to buy and the vendor to sell, he is entitled to maintain an action for the recovery of his purchase-money, on the ground that there has been a total failure of consideration (*q*). Where the defendant sold a bill to the plaintiff, which purported on the face of it to be drawn at Sierra Leone, where no stamp would be required, but the bill turned out to have been drawn in London, and to be of no value for want of a stamp, it was held that the plaintiff was entitled to recover back the

(*h*) *Tamplin* v. *James*, 15 Ch.D. 215.

(*i*) *Paget* v. *Marshall*, 28 Ch.D. 255; 54 L.J. Ch. 575.

(*k*) *Broughton* v. *Hutt*, 3 De G. & J. 501; 28 L.J. Ch. 167; *Bentley* v. *Mackay*, 31 Beav. 143; 31 L.J. Ch. 697; see *Phillipson* v. *Kerry*, 32 Beav. 628.

(*l*) *Preston* v. *Luck*, 27 Ch.D. 497.

(*m*) *Tucker* v. *Bennett*, 38 Ch.D. 1; 57 L.J. Ch. 507.

(*n*) *Caird* v. *Moss*, 33 Ch.D. 22; 55 L.J. Ch. 854.

(*o*) *Mostyn* v. *West Mostyn Coal Co.*, 1 C.P.D. 145; 45 L.J. C.P. 401; *Storey* v. *Waddle*, 4 Q.B.D. 289, where rectification by inserting a right of way into a deed was sought by counter-claim. As to power of County Courts, see 51 & 52 Vict. c. 43, s. 67.

(*p*) *Olley* v. *Fisher*, 34 Ch.D. 367; 56 L.J. Ch. 208.

(*q*) *Young* v. *Cole*, 3 Bing. N.C. 730; 6 L.J. C.P. 201.

money he had paid for the bill, as the bill was not what, upon the face of it, it purported to be, and was not such a bill as the defendant had agreed to sell and the plaintiff to buy (*r*).

If a thing does not answer the description of that for which it is sold, the buyer is not bound to take it; and, if he has paid for it, he may recover back the money as upon a failure of consideration (*s*). But the purchaser cannot recover back the price where he has got what he bargained for, although the subject-matter of the sale may subsequently turn out to be a thing of no value (*t*). Thus, where the vendor agreed to sell, and the purchaser to buy, scrip certificates of shares in the Kentish Coast Railway, and the certificates were delivered by the vendor, and the purchase-money paid, but the Kentish Coast Railway scheme was subsequently abandoned, and the company dissolved, and the scrip repudiated on the ground that the secretary had issued it without authority, it was held that the purchaser could not recover from the vendor the money he had paid for it, as he had got what was intended to be bought and sold (*u*).

If a man goes into the money market with a bill or note, and gets it discounted without putting his own name on the back of it, he is not bound to refund the money he receives if the bill is dishonoured; but, if it is not the bill or note of the parties whose names appear upon it, the money received in exchange for it cannot lawfully be retained. Where one man discounted a forged victualling bill, and another a forged navy bill, and another a forged private bill of exchange, it was held that each of the parties was entitled to recover back the money he had paid (*x*). But the holder of a bill is entitled to know, on the day it becomes due, whether it is an honoured or dishonoured bill; and, therefore, notice of the forgery must be given to him on the very day that the payment is made to him, so as to enable him to send notice of the dishonour of the bill to the prior parties on that day. If, therefore, he receives the money, and is permitted to retain it during the whole of that day without any such notice having been given him, the parties who paid him the money cannot recover it back; for otherwise, they would deprive the holder of his right to proceed against the other parties to the bill (*y*).

(*r*) *Gompertz* v. *Bartlett*, 23 L.J. Q.B. 65; 2 E. & B. 849; *Kempson* v. *Saunders*, 12 Moore, 49; 5 L.J. (O.S.) C.P. 6; *Westropp* v. *Solomon*, 8 C.B. 345; 19 L.J. C.P. 1.

(*s*) Blackburn, J., *Azemar* v. *Casella*, L.R. 2 C.P. 678; 36 L.J. C.P. 263. See also 56 & 57 Vict. c. 71, s. 13.

(*t*) *Hall* v. *Conder*, 26 L.J. C.P. 138; 2 C.B. N.S. 22.

(*u*) *Lumert* v. *Heath*, 15 M. & W. 486; 15 L.J. Ex. 297.

(*x*) *Jones* v. *Ryde*, 5 Taunt. 494; *Wilkinson* v. *Johnston*, 3 B. & C. 428; 3 L.J. (O.S.) K.B. 58; *Rogers* v. *Langford*, 1 Cr. & M. 637; *Gurney* v. *Womersley*, 4 E. & B. 133; 24 L.J. Q.B. 46.

(*y*) *Cocks* v. *Masterman*, 9 B. & C. 908; 8 L.J. (O.S.) K.B. 77; *London and River Plate Bank* v. *Bank of Liverpool*, (1896) 1

The acceptor of a bill of exchange is bound to know the handwriting of the drawer, and cannot recover money which he has paid upon a forged bill accepted by him, and which has gone into the market accredited with his genuine signature (*z*). It is as much the duty also of bankers to know the handwriting of their customers who draw on them, as it is of an acceptor of a bill to know the drawer's handwriting; and, therefore, if a bill purporting to be drawn by a customer of the banker's is made payable at the bank, and the bankers take up and pay the bill to a *bonâ fide* indorsee for value, who presents it to them for payment, they cannot recover the amount from such indorsee (*a*). But when a banker merely discounts a bill it is otherwise (*b*). If a party whose signature to a bill of exchange has been forged pays the bill, supposing the signature to be genuine, and so delays the defendant of his remedy against the other parties to the bill, he cannot recover back the money he has paid (*c*).

Partial failure of consideration.—The general rule of law is that, when a contract has been in part performed, no part of the money paid under such contract can be recovered back (*d*), unless the consideration is clearly severable (*e*). Where money has been paid as a premium with an apprentice, it is not apportionable, and no part can be recovered back on the ground of failure of consideration by the death of the master (*f*). So, where the plaintiff had deposited with the defendant the half of a 50*l.* bank-note by way of pledge to secure the payment of a debt due from the plaintiff to the defendant for wines and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch, and the plaintiff brought an action to recover the half-note, it was held that as the plaintiff could not recover without showing the true character of the deposit, and that it was on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back (*g*).

Q.B. 7; 65 L.J. Q.B. 80. See, now, sect. 49 (12) of 45 & 46 Vict. c. 61, *post*, p. 1138.

(*z*) *Price* v. *Neal*, 3 Burr. 1357. See sect. 54 of 45 & 46 Vict. c. 61, *post*, p. 1129.

(*a*) *Smith* v. *Mercer*, 6 Taunt. 81. See *Vagliano* v. *Bank of England*, *post*, p. 1110.

(*b*) *Fuller* v. *Smith*, 1 C. & P. 198.

(*c*) *Mather* v. *Maidstone* (*Lord*), 18 C.B. 295; 25 L.J. C.P. 311.

(*d*) *Hunt* v. *Silk*, 5 East, 449; *Blackburn* v. *Smith*, 2 Exch. 783; 18 L.J. Ex. 187; *Nicholson* v. *Ricketts*, 29 L.J. Q.B. 55.

(*e*) *Astle* v. *Wright*, 25 L.J. Ch. 864; 23 Beav. 77.

(*f*) *Whincup* v. *Hughes*, L.R. 6 C.P. 78; 40 L.J. C.P. 104; *Ferns* v. *Carr*, 28 Ch.D. 409; 54 L.J. Ch. 478.

(*g*) *Taylor* v. *Chester*, L.R. 4 Q.B. 309.

CHAPTER IV.

THE DISCHARGE OF CONTRACTS.

SECTION I.

DISCHARGE BY PERFORMANCE.

Mode of performance.—When the contract is silent as to the mode of performance, it must be performed in accordance with the usage of the place where it is made (*a*). The party who is to do the act may accomplish it in any manner that is most convenient to himself (*b*); but the performance must be a substantial, *bonâ fide* performance, in accordance with the true meaning of the parties, and not a mere compliance with the letter of the engagement, in violation of the spirit of the compact. If a man enters into an engagement to deliver up a bond or lease, he does not fulfil his contract by returning it cancelled, or with the seal torn off (*c*). If payment is to be made, it must be a true and effectual payment to the right party. If something is to be done according to the direction of a third party, the party bound to do the act must procure the necessary direction. If the concurrence of a stranger is essential, he must procure such concurrence. If he is to deliver corn on board a ship at such a port on such a day, he must go in quest of the ship, and must not wait for notice that the ship is ready. If he is bound to repair a house on timber being found him by the landlord, he must go and seek the timber and say what he wants, and not wait for the timber to come to him (*d*). If the condition of a bond be to deliver twenty quarters of wheat or twenty loads of timber, the obligor is not bound to seek the obligee with it, but the obligor, before the day, must go to the obligee, and know where he will appoint to receive it, and there it must be delivered; and "so note a diversity between money and things

(*a*) *Greaves* v. *Legg*, 11 Exch. 645; 26 L.J. Ex. 316.
(*b*) *Reade* v. *Meniaeff*, 7 C.B. 162.
(*c*) *Richardson* v. *Barnes*, 4 Exch. 128; 18 L.J. Ex. 468.
(*d*) Com. Dig. CONDITION, G. L.

ponderous or of great weight" (*e*). If in an agreement for the sale and purchase of realty the vendor engages that certain named parties shall join in a conveyance, this sometimes amounts to a warranty that they are in a position to join with effect. It is not sufficient for them to join as trustees, if their doing so will have the effect of involving the purchaser in an action (*f*). If a lessee covenants to insure in the joint names of himself and the lessor, and insures in the name of the lessor only, the covenant is nevertheless well performed; but, if he has covenanted to insure in the sole name of the lessor, and then effects an insurance in the joint names of himself and the lessor, there is no performance of the covenant (*g*). A covenant to keep a ship insured is broken if the ship is actually uninsured, although for three days only, and although the usual slip for the insurance has been delivered by the underwriters, and a policy is afterwards executed in accordance therewith (*h*). A covenant not to sell farmyard manure off the premises is broken by selling any off, although the covenantor brings back more manure, and of better quality, than that carried off (*i*). A contract to deliver coals of a certain description is not performed by delivering some of that description and some of an inferior quality mixed together (*k*).

Cumulative and alternative stipulations.—If a party engages to do two things, the one is cumulative upon the other, and he must perform both the things agreed to be done; but, if the contract is in the alternative for the performance of one or the other of two different acts, the liability is discharged by the performance of one of the acts (*l*). Under an agreement to perform one of two things, the right of election is in the party who is to do either one or other of the two things (*m*). "If a man granteth a rent of 20*s.* or a robe to one and to his heirs, the grantor shall have the election; for he is the first agent by payment of the one or delivery of the other. So, if a man maketh a lease rendering a rent or a robe, the lessee shall have the election. And if one grant to another twenty loads of hazel, or twenty loads of maple, to be taken in his wood, there the grantee shall have election, for he ought to do the first act, viz., to fell and take the same" (*n*). If a vendor of corn agrees to deliver to the purchaser 50 or 100 quarters of

(*e*) Co. Litt. 210, b; Bac. Abr. AGREEMENTS, B. 3.

(*f*) *Mosley* v. *Hide*, 20 L.J. Q.B. 539; 17 Q.B. 91.

(*g*) *Havens* v. *Middleton*, 22 L.J. Ch. 746; 10 Hare, 641.

(*h*) *Parry* v. *Great Ship. Co.*, 4 B. & S. 556; 33 L.J. Q.B. 41.

(*i*) *Leigh* v. *Lillie*, 6 H. & N. 165; 30 L.J. Ex. 25.

(*k*) *Nicholson* v. *Bradfield Union*, L.R. 1 Q.B. 620; 35 L.J. Q.B. 176; *Josling* v. *Kingsford*, 13 C.B. N.S. 447; 32 L.J. C.P. 94. See also 56 & 57 Vict. c. 71, ss. 13, 30.

(*l*) *G. N. Ry.* v. *Kennedy*, 4 Exch. 425; 19 L.J. Ex. 11.

(*m*) *Layton* v. *Pearce*, 1 Doug. 16.

(*n*) Co. Litt. 145 a.

corn by a day named, at so much a quarter, and the purchaser agrees to pay the price on the corn being delivered to him, the vendor will have to do the first act, and will have his election to deliver, and demand payment for, either the 50 or the 100 quarters (*o*). If one party has bound himself to do one of two things at the choice of the other, he must, in pleading the performance of his engagement, show that he was ready and offered to do either of them. Therefore, if he is to deliver 20*l.* or ten kine at the option of the other party, he does not perform his contract by tendering the kine without the money (*p*). Where a party has his election of doing one of two things, and makes his election, he is bound by it (*q*). Thus, where a man has got the right to elect whether he will avail himself of a forfeiture and avoid a lease or other contract, and once make his election, he makes it for ever (*r*). So, if a purchaser, on the delivery of goods, has a right to elect whether he will pay by bill or cash, and fails to give the bill, he will be deemed to have made his election to pay cash, and cannot afterwards revoke it (*s*).

Time of performance.—Where no time is fixed for the performance of the contract, it must be performed within a reasonable time, according to the circumstances (*t*). In the case of a contract for the sale of goods, the question, what is a reasonable time, is one of fact (*u*). A contract to do a particular thing "directly," or "as soon as possible," or "forthwith," does not mean that it is to be done *instanter;* but there must be no delay in performance; and such a contract requires a much more speedy fulfilment than a contract to do a thing within a reasonable time (*x*). When a party covenants to pay money "immediately on demand," the word "immediately" must receive a reasonable construction, so as to allow the debtor time to procure the money; and, if the demand is not made by the creditor himself, to inquire into the authority of the person making it (*y*). In the case of a covenant to pay rates, the payment must be made within a reasonable time after the rate is made, and public

(*o*) *Penney* v. *Porter*, 2 East, 2; *Chippendale* v. *Thurston*, 4 C. & P. 98.

(*p*) *Fordley's case*, 1 Leon. 68.

(*q*) Co. Litt. 146; *Brown* v. *Royal Ins. Society*, 28 L.J. Q.B. 278; 1 E. & E. 853; *Gath* v. *Lees*, 3 H. & C. 558; see *Borrowman* v. *Free*, 4 Q.B.D. 500; 48 L.J. Q.B. 65.

(*r*) *Ward* v. *Day*, 33 L.J. Q.B. 13; 5 B. & S. 359.

(*s*) *Rugg* v. *Weir*, 16 C.B. N.S. 477; see also 56 & 57 Vict. c. 71, ss. 27, 28, and 41.

(*t*) Rolfe, B., *Startup* v. *Macdonald*, 6 M. & G. 593, 610; 10 L.J. C.P. 84; *Hales* v. *L. & N. W. Ry.*, 4 B. & S. 66; 32 L.J. Q.B. 292.

(*u*) 56 & 57 Vict. c. 71, s. 56.

(*x*) *Duncan* v. *Topham*, 8 C.B. 225; 18 L.J. C.P. 310; *Attwood* v. *Emery*, 1 C.B. N.S. 110; 26 L.J. C.P. 73; *Toms* v. *Wilson*, 4 B. & S. 442; 32 L.J. Q.B. 382; *Roberts* v. *Brett*, 20 C.B. N.S. 148; 34 L.J. C.P. 241; *Brighty* v. *Norton*, 3 B. & S. 305; 32 L.J. Q.B. 38.

(*y*) *Toms* v. *Wilson*, 4 B. & S. 442; 32 L.J. Q.B. 382; *Brighty* v. *Norton*, 3 B. & S. 305; 32 L.J. Q.B. 38; *Massey* v. *Sladen*, L.R. 4 Ex. 13; 38 L.J. Ex. 34.

notice given thereof on the church door; it is not necessary to give the covenantor notice to pay, or to make any personal demand upon him, it being his duty to seek out the proper parties to whom the rates are to be paid (*z*). Where a railway company had contracted with the plaintiff for the supply of 350,000 railway sleepers within a certain limited period, to be delivered from time to time in such quantities as should be required, it was held that the company was bound to give the orders, and take the whole quantity, within the specified period (*a*). Whenever time has not been made of the essence of the contract, and either party is guilty of delay, a notice in writing by the other to the effect that he shall consider the contract at an end if it be not completed within a named period (the same being a reasonable time for its completion), will be binding on the party to whom it is given (*b*). By the Sale of Goods Act, 1893 (*c*), "unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of the contract. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract." A person who has covenanted to do a particular act, impliedly covenants to do nothing which must necessarily have the effect of preventing him from performing his covenant (*d*). And, where a party has agreed to do a particular act, and has deprived himself of the power of performance, or has absolutely refused to perform it (*e*), he may be sued for damages before the expiration of the time limited for performance (*f*), even where the performance is made to depend on a contingency (*g*). By the Bank Holidays Act, 1871 (*h*), no person can be compelled to do any act upon the bank holidays thereby established which he would not be compelled to do on Christmas Day or Good Friday; and the obligation to do such act is postponed to the day following such bank holiday. By the Judicature Act, 1873, s. 25 (7), "Stipulations in contracts as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contract in a Court of Equity, shall receive in all Courts the

(*z*) *Davis* v. *Burrell*, 10 C.B. 821.

(*a*) *G. N. Ry.* v. *Harrison*, 12 C.B. 576; 22 L.J. C.P. 49.

(*b*) *Reynolds* v. *Nelson*, 6 Mad. 26; Sugd. V. & P. 243 (ed. 14).

(*c*) 56 & 57 Vict. c. 71, s. 10 (1).

(*d*) *Stirling* v. *Maitland*, 34 L.J. Q.B. 3; 5 B. & S. 840.

(*e*) *Danube and Black Sea Ry.* v. *Xenos*, 11 C.B. N.S. 152; 13 *ib.* 825; 31 L.J. C.P. 84, 284; *Hochster* v. *De la Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455.

(*f*) *Lovelock* v. *Franklyn*, 8 Q.B. 378; 15 L.J. Q.B. 146; *Short* v. *Stone*, 8 Q.B. 369; 15 L.J. Q.B. 143; *Ford* v. *Tiley*, 6 B. & C. 325; 5 L.J. (O.S.) K.B. 169; *Bowdell* v. *Parsons*, 10 East, 359; *Wild* v. *Harris*, 7 C.B. 1004; 18 L.J. C.P. 297.

(*g*) *Frost* v. *Knight*, L.R. 7 Ex. 111; 41 L.J. Ex. 78.

(*h*) 34 Vict. c. 17, s. 3. See also 38 Vict. c. 13.

same construction and effect as they would have heretofore received in equity."

Conditions precedent to performance.—Sometimes the performance of a contract by one party depends on something to be previously done by the other; and, when that is the case, an action will not lie for non-performance if default has been made in the accomplishment of the precedent act (*i*). Where shares are sold upon the faith of an undertaking by the vendors to take them back at the expiration of six months from the date of the sale if the shares do not in the meantime rise in the market, a tender of the shares by the purchaser to the vendor is a precedent act to be performed by the purchaser before there can be any default on the part of the vendor, or any breach of his undertaking (*k*). "Where mutual covenants," observes Lord Mansfield, "go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a part, and where a recompense may be had in damages, there the defendant has a remedy upon his covenant, and shall not plead it as a condition precedent" (*l*). Where a plaintiff covenanted to take out 280 passengers to Jamaica, and the defendant covenanted to have them ready for shipment, and to pay 5*l.* a man for their conveyance, and the plaintiff only took and carried 180 of them, it was held that the contract was divisible, and that the plaintiff was entitled to maintain an action in respect of his partial performance of the contract (*m*). Where a covenant for the performance of various acts and duties by one party constitutes the consideration for a subsequent covenant by another party, it is not in all cases essential that there should be an exact performance of the precedent covenant in every minute particular in order to create a liability upon the subsequent covenant (*n*). Where the conditions of a sale by auction stated that the lots were to be "cleared away within three days after the sale at the purchaser's expense," this was held not to be a condition precedent to the plaintiff's right to claim delivery (*o*).

The time appointed for the performance of some precedent act or condition is sometimes of the very essence of the contract, so

(*i*) *French* v. *Campbell*, 2 H. Bl. 178; *Marlborough (Duke)* v. *Osborn*, 33 L.J. Q.B. 148; 5 B. & S. 67.

(*k*) *Blackwell* v. *Nash*, 1 Str. 535; *Lancashire* v. *Killingworth*, 1 Raym. 686; *Jones* v. *Barkley*, 2 Doug. 684; *Startup* v. *Macdonald*, 6 M. & G. 593, 610; 12 L.J. Ex. 483, *ante*, p. 128, *post*, p. 505.

(*l*) *Boone* v. *Eyre*, 1 H. Bl. 273 (n.); Le Blanc, J., *Glazebrook* v. *Woodrow*, 8 T.R. 375; *Franklyn* v. *Miller*, 4 Ad. & E. 605; *Newson* v. *Smythies*, 3 H. & N. 840; 28 L.J. Ex. 97; *London Gas Co.* v. *Chelsea Vestry*, 8 C.B. N.S. 215; *Eastern Counties Ry.* v. *Philipson*, 16 C.B. 12.

(*m*) *Tomson* v. *Noel*, 1 Lev. 16; 1 Keb. 100.

(*n*) *Campbell* v. *Jones*, 6 T.R. 573; *Glazebrook* v. *Woodrow*, 8 T.R. 375; *Carpenter* v. *Creswell*, 1 M. & P. 77; *Stavers* v. *Curling*, 3 Bing. N.C. 355; 6 L.J. C.P. 41.

(*o*) *Woolfe* v. *Horne*, 2 Q.B.D. 355; 46 L.J. Q.B. 534.

that, if the party who was to do the act fails in performance at the time specified, he is liable in damages to the party in whose favour the act was to be done, and the latter is enabled to decline all further performance of the contract (*p*), unless the condition or precedent act has been waived by acceptance or part performance, so as to render it a mere collateral stipulation (*q*). When one thing only is to be done by a day named, it depends on the course of trade and the intention of the parties whether the time appointed for the doing of the act is of the essence of the contract or not; but, when the contract is for the performance of several acts and duties at different periods of time, the performance of any particular act at the exact period specified will not be a condition precedent to the right of action upon the contract, unless the neglect has had the effect of precluding the defendant from deriving any benefit or advantage from the contract (*r*).

Demand of performance, when necessary.—Where a penalty or forfeiture attaches for non-payment of money or for non-performance of a particular act after demand, demand of performance is a condition precedent to a right of action for the penalty or the forfeiture (*s*); and personal demand is, in these cases, generally necessary, so that demand made upon the wife or servant of the party in his absence, though made at his dwelling-house, is insufficient (*t*). Where, by the express terms of a contract, the duty to pay money or to render some particular service is not to arise until *after* demand has been made, there is no cause of action until demand has been made. Thus, where a man covenants or agrees to pay the debt of some third party on demand, or to deliver up a bond to be cancelled on request, there the demand or request is a condition precedent to the existence of any cause of action (*u*). So, when a promissory note is made for the payment of a certain sum of money within a certain limited time after demand, there is no debt or duty or cause of action until demand has been made, and the time limited has elapsed (*x*). Where, however, there is a debt due, and a promise by the debtor to pay the debt on request, and no particular place for payment is specified, no request need be

(*p*) *Tidey* v. *Mollett*, 16 C.B. N.S. 308, *ante*, p. 41; *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L.J. Ex. 73; *Honck* v. *Muller*, 7 Q.B.D. 92; 50 L.J. Q.B. 529.

(*q*) *Behn* v. *Burness*, 3 B. & S. 753; 32 L.J. Q.B. 204, *ante*, p. 51.

(*r*) *Payne* v. *Banner*, 15 L.J. Ch. 227.

(*s*) *Carter* v. *Ring*, 3 Campb. 460; *Fitz-Hugh* v. *Dennington*, 6 Mod. 227, 259; *Toms* v. *Wilson*, 4 B. & S. 442; 32 L.J. Q.B. 33, 382.

(*t*) See as to licence to distrain after demand, *Belding* v. *Read*, 3 H. & C. 955; 34 L.J. Ex. 212.

(*u*) *Sicklemore* v. *Thistleton*, 6 M. & S. 9; *Topham* v. *Braddick*, 1 Taunt. 573; *Simpson* v. *Routh*, 2 B. & C. 682; 2 L.J. (O.S.) K.B. 162; *Bach* v. *Owen*, 5 T.R. 409; *Bowdell* v. *Parsons*, 10 East, 360; *Peck* v. *Methold*, 3 Bulstr. 297; *Webb* v. *Martin*, 1 Lev. 48.

(*x*) *Thorpe* v. *Booth*, Ry. & M. 388; *Holmes* v. *Kerrison*, 2 Taunt. 323.

made; for the law casts upon the debtor the duty of seeking out his creditor whilst he remains within the realm of England (*y*), and paying the money without any request (*z*). Where the debt is payable abroad, the debtor must seek his creditor abroad (*a*). A plea, therefore, that he has not been requested to pay the money is no defence (*b*). Where, however, a place for payment is specified, it appears that there must be a demand for payment at the particular place (*c*). Where the bond, covenant, or promise is for the payment of money generally, the duty to pay arises as soon as the contract is made, and may be at once enforced by action. When the instrument provides for payment by a day named, there is no debt due, or cause of action, until the day arrives; and then the issue of a writ is the only demand that need be made (*d*); and, wherever a debt accrues, or a duty to pay arises, on the performance of certain stipulated acts by the plaintiff, and the precedent acts are done, the duty of performance on the part of the defendant arises without any request on the part of the plaintiff (*e*).

Waiver of demand of performance.—When a request or demand for performance is, by the contract, made a condition precedent to any liability for non-performance, if the party who is to do the act has disabled himself from performance, the stipulation as to the request is dispensed with (*f*).

Dispensation of performance of conditions precedent.—That which is a condition precedent to the liability upon a promise when the contract is made may cease to be so by the subsequent conduct of the promisor in treating the contract as a continuing contract, and taking the benefit of a part performance of it, after the expiration of the time appointed for the fulfilment of the condition (*g*). A man may always dispense with the performance of a condition in his own favour; and, if there are several precedent or contemporaneous acts to be performed, and the one party discharges the other from the performance of some of them, it is the same thing as if the things dispensed with had been done (*h*). Thus, if a vendor is to make out a good title to an estate, and a purchaser is

(*y*) Co. Litt. 210 b.

(*z*) *Collins* v. *Benning*, 12 Mod. 444; *Wallis* v. *Scott*, 1 Str. 88; *Master Butchers'*, *&c. Co.* v. *Bullock*, 3 B. & P. 434; *Robey* v. *Snaefell Mining Co.*, 20 Q.B.D. 152; 57 L.J. Q.B. 134.

(*a*) *Fessard* v. *Mugnier*, 18 C.B. N.S. 286; 34 L.J. C.P. 126.

(*b*) *Capp* v. *Lancaster*, Cro. Eliz. 548; *Thomson* v. *Butler*, *ib.* 721; *Rumball* v. *Ball*, 10 Mod. 38.

(*c*) *Thorn* v. *City Rice Mills*, 40 Ch.D. 357; 58 L.J. Ch. 297.

(*d*) *Gibbs* v. *Southam*, 5 B. & Ad. 911; *Frampton* v. *Coulson*, 1 Wils. 33; *Absolom* v. *Gething*, 32 Beav. 322; 32 L.J. Ch. 786.

(*e*) *Spaeth* v. *Hare*, 9 M. & W. 326; 11 L.J. Ex. 104.

(*f*) *Bowdell* v. *Parsons*, 10 East, 361.

(*g*) *Newson* v. *Smythies*, 3 H. & N. 840; 28 L.J. Ex. 97; *White* v. *Beeton*, 7 H. & N. 42; 30 L.J. Ex. 376.

(*h*) *Jones* v. *Barkley*, 2 Doug. 684. As to when the dispensation must be by deed, see *Thames Ironworks Co.* v. *Royal Mail Packet Co.*, 31 L.J. C.P. 169.

to prepare and tender a conveyance to the vendor, and the latter is then to execute it, and the purchaser discharges the vendor from the duty of executing the conveyance, it is the same as if the vendor had actually executed it (*i*). Every contract has to be interpreted in connection with the surrounding circumstances; and the acts done by the contracting parties in fulfilment of the contract may be regarded in order to see what interpretation they have themselves put upon it, and what conditions have been waived or performed; and the construction of the instrument may thus be varied by matter *ex post facto* (*k*). When an incoming tenant, on taking possession of a farm, agreed to pay the out-going tenant for the hay and straw a fair price, to be settled by valuers appointed on both sides, and valuers were appointed who were unable to agree, and in the meantime the incoming tenant consumed all the hay and straw, it was held that he had dispensed with the valuation by two valuers, and must pay for the hay and straw whatever a jury might consider to be a "fair price" (*l*). Where the plaintiffs agreed to sell and the defendants to buy certain casks of butter, to be shipped in October, and the butter was not shipped until November, and, that fact being communicated to the defendants, they at first demurred, but afterwards assented, and received the invoice and bill of lading, which was indorsed to them, and after that the vessel with the butter on board went ashore, and part of the butter was lost and the remainder damaged, and the defendants then repudiated the contract, contending that the condition, that the butter should be shipped in the month of October, had not been performed, it was held that the assent of the defendants to the shipment in November, and the acceptance by them of the indorsed bill of lading, amounted to a waiver of the precedent condition; and, the condition being waived, it was the same as if it had never been inserted in the contract at all (*m*). In certain cases, where a party intends to waive a condition in his favour, and to hold the other party liable notwithstanding the non-performance of the condition, he is bound to give notice of his intention (*n*).

Tender of performance.—If the act agreed to be done by one party cannot be completed without the concurrence of the party for whom it is to be done, the former must do all that he can do without such concurrence to complete the act; and, if he does this, he

(*i*) *Laird* v. *Pim*, 7 M. & W. 485; 10 L.J. Ex. 259; *East London Union* v. *Metropolitan Ry.*, L.R. 4 Ex. 309; 38 L.J. Ex. 225.

(*k*) *Pust* v. *Dowie*, 32 L J. Q.B. 179; 5 B. & S. 20, *ante*, p. 51.

(*l*) *Clarke* v. *Westrope*, 18 C.B. 784; 25 L.J. C.P. 287.

(*m*) *Alexander* v. *Gardner*, 1 Bing. N.C. 671; 3 L.J. C.P. 223; *Wing* v. *Harvey*, 23 L.J. Ch. 511; 5 De G. M. & G. 265.

(*n*) *Morten* v. *Marshall*, 33 L.J. Ex. 54; 2 H. & C. 305.

does what is equivalent in law to actual performance (*o*). Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract (*p*). If a vendor is ready and offers to deliver at the place appointed by the contract, and the purchaser insists upon a delivery at another place, this, if persisted in, is a refusal to accept according to the contract (*q*).

Prevention of performance.—It is a principle of law, that a man shall not avail himself of the non-performance which he has himself occasioned. Where, therefore, it was covenanted between the plaintiff and the defendant that the plaintiff should execute a release to the defendant, and the plaintiff offered to execute the release, and tendered a draft for the defendant's perusal, but the defendant refused to look at it, and said he would have nothing to do with it, it was held that the defendant had discharged the plaintiff from doing anything further (*r*). If a man has covenanted to build a house on the land of a covenantee, performance of the covenant is excused if the covenantee will not suffer the covenantor to come upon the land to build, as he cannot lawfully come there without the permission of the covenantee (*s*). So, if a man has covenanted with me to collect my rents in such a hamlet, and I interrupt him in collecting them, this excuses him from the performance of his covenant (*t*). If the presence of the plaintiff was essential to the performance of the act, and the plaintiff, by his absence, has prevented performance, he has no ground of action for non-performance; for "whenever the plaintiff himself has occasioned the breach of contract, that is an answer to the complaint founded on that breach, not on the ground of an agreement, but because the act complained of was the act of the plaintiff himself, and not, as charged, the act of the defendant. The defendant may say, 'This is your own act; and therefore you are not damnified'" (*u*). Where the lessee of a house covenanted to repair it, and some sparks of fire from the lessor's adjoining chimney fell on the house, and burnt it, it was held that the lessee was not

(*o*) *Hall* v. *Conder*, 26 L.J. C.P. 288; 2 C.B. N.S. 22.

(*p*) 56 & 57 Vict. c. 71, s. 34 (2); *Startup* v. *Macdonald*, 6 M. & Gr. 593; 12 L.J. Ex. 483; *Isherwood* v. *Whitmore*, 11 M. & W. 350; 12 L.J. Ex. 93.

(*q*) *Lancashire* v. *Killingworth*, 1 Raym. 686; *Ripley* v. *M'Clure*, 4 Ex. 357; 18 L.J. Ex. 419, *ante*, p. 52; *Cort* v. *Ambergate Ry.*, 17 Q.B. 148; 20 L.J. Q.B. 466.

(*r*) *Jones* v. *Barkley*, 2 Doug. 694.

(*s*) 1 Rolle Abr. CONDITION, N. pl. 3, p. 453.

(*t*) *Ib.*, p. 454, pl. 7; *Doe* v. *Sutton*, C. & P. 706; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15.

(*u*) Tindal, C. J., *West* v. *Blakeway*, 2 M. & Gr. 751; Com. Dig. CONDITION, L. 5.

liable upon his covenant to repair the damage, the fire having been caused by the lessor himself (*x*). If the obligee of a bond has himself prevented the obligor from fulfilling the condition of the bond, he shall never take advantage of the non-performance of the condition; for that would be enabling him to benefit by his own wrong. Therefore, if the condition of a bond be that the son of the obligor shall serve the obligee for a term of years, and the obligor tenders his son, and the obligee refuses to receive him, or takes him, and within the term commands him to go away, the condition will be deemed to have been fulfilled, and the bond will not be forfeited (*y*). Where one of the two contracting parties so conducts himself as to subject the other to an action at the suit of some third person if he duly performs the contract, the non-performance is excused (*z*).

Impossibility of performance is, in general, no answer to an action for damages for non-performance (*a*). If the thing to be done is notoriously physically impossible, and was known to be so by both parties at the time of the making of the contract, the contract will be a void contract; unless the promisor has taken upon himself to warrant that it is possible (*b*). If a married man exchanges mutual promises of marriage with a single woman, it is no answer to an action by the latter to recover damages for non-performance, to set up the illegality of a second marriage, unless the fact of the existing marriage of the promisor was known to the woman at the time of the making the contract, in which case it would be an illegal and void contract (*c*). If the thing to be done was possible at the time of the making of the contract, but has become impossible since, the promisor is liable to an action for damages for non-performance, if he has either expressly or impliedly undertaken, without any qualification, to do it. Where the impossibility of performance has been occasioned by the act of a stranger, or by the act of the defendant himself, it constitutes no defence to an action (*d*). Where the charterer of a ship had covenanted to send a cargo alongside at a foreign port, but, in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the authorities of the place, he was held

(*x*) 1 Rolle Abr. p. 454, CONDITION, N. pl. 8.

(*y*) 1 Rolle Abr. 455, CONDITION, P. pl. 1; Q. pl. 1; *Hayward* v. *Bennett*, 3 C.B. 423; 15 L.J. C.P. 315; *Holme* v. *Guppy*, 3 M. & W. 389.

(*z*) *European Royal Mail Co.* v. *Royal Mail Packet Co.*, 30 L.J. C.P. 246.

(*a*) *Ashmore* v. *Cox*, (1899) 1 Q.B. 436; 68 L.J. Q.B. 72.

(*b*) *Clifford* v. *Watts*, L.R. 5 C.P. 577, 585; 40 L.J. C.P. 36; *Hills* v. *Sughrue*, 15 M. & W. 253; *Jones* v. *St. John's College, Oxford*, L.R. 6 Q.B. 124; 40 L.J. Q.B. 80.

(*c*) *Wild* v. *Harris*, 7 C.B. 1005; 18 L.J. C.P. 297; *Millward* v. *Littlewood*, 5 Exch. 775; 20 L.J. Ex. 2.

(*d*) Bro. Abr. CONDITION, pl. 127; Holt, C. J., *Thornborow* v. *Whitacre*, 2 Raym. 1164; *Hochster* v. *De la Tour*, 2 E. & B. 688; 22 L.J. Q.B. 455.

to be responsible in damages for the non-performance of his covenant (*e*). So, where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, his plea was held insufficient (*f*). It was there resolved that, "where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him;" but, "where the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and, therefore, if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, he ought to repair it." This has sometimes been construed to mean that the promisor is answerable in damages where the performance of his promise has become impossible by the act of God, and sometimes that he is answerable where performance has become not impossible, but only more burdensome. A covenant in a lease of a mine, to raise so many tons a year, or to pay a certain minimum rent, is not discharged by proof that the mine is exhausted (*g*). Where, in an action for breach of promise of marriage, the defendant pleaded that consummation had become impossible without danger to his life, it was held to be no answer to the action (*h*). But, where, after the making of the contract, performance has become impossible by the act of God, it would seem that the promisor is excused, unless it clearly appears from the terms of the contract that the promisor was intended to be liable in all events. Where a man, upon the marriage of his daughter, covenanted with her intended husband to give and bequeath unto her, by deed or will, an equal share with his other children of the property he should die possessed of, and the daughter died in the lifetime of the covenantor, it was held that the liability upon this covenant was discharged by the death of the daughter, as performance had then become impossible by the act of God (*i*). And where the occupier of a music hall agreed with the plaintiff that the plaintiff should have the use of the hall on certain days for the purpose of giving concerts therein, and the plaintiff agreed to pay a certain sum *per diem* for the use of the hall, and before the first of the appointed days the hall was consumed by fire, it was held

(*e*) *Barker* v. *Hodgson*, 3 M. & S. 267.

(*f*) *Paradine* v. *Jane*, Aleyn, 26.

(*g*) *Bute* (*Marquis*) v. *Thompson*, 13 M. & W. 493; 14 L.J. Ex. 95; *Clark* v. *Glasgow Assurance Co.*, 1 Macq. 668.

(*h*) *Hall* v. *Wright*, E. B. & E. 749; 27 L.J. Q.B. 345.

(*i*) *Jones* v. *How*, 9 C.B. 19; 7 Hare, 267; 19 L.J. Ch. 324; *Brookman's Trusts, In re*, L.R. 5 Ch. 182; 39 L.J. Ch. 138.

that both parties were discharged from the contract (*k*). Where the plaintiffs contracted with the defendant to erect certain machinery upon his buildings in his own occupation for a specified sum, and to keep the whole in order under fair wear and tear for two years, and, when the machinery was only partly erected, a fire accidentally broke out in the buildings, and, without any fault by either party, destroyed both the buildings and the machinery then erected thereon, it was held that both parties were excused from the further performance of the contract, but that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, as the whole work contracted to be done by them had not been completed (*l*). Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void (*m*). Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided (*n*). A contract to sell potatoes off a specific piece of land is a contract for a specific crop, although the crop is not then sown; and is subject to the implied condition that the defendant shall be excused, if, before breach, performance becomes impossible by reason of a potato disease which no care of the defendant could prevent (*o*). Incapacity, by reason of the intervention of an act of God, to perform personal service is an excuse for its non-performance, notwithstanding a covenant to serve, absolute and unconditional in its terms, because the parties at the time of entering into the covenant must be supposed to have contemplated the continuance of the covenantor's ability to perform the service as one of the conditions of the contract (*p*). It has been said that it is an inaccurate expression to say that the act of God excuses the breach of the contract, and that what is meant is that the breach is not within the contract (*q*). If a man has covenanted or agreed to do one of two things, and the performance of one of them is rendered impossible, he is not discharged from his liability to do the other (*r*).

(*k*) *Taylor* v. *Caldwell*, 3 B. & S. 837; 33 L.J. Q.B. 164; *Nickoll* v. *Ashton*, (1901) 2 K.B. 126; 70 L.J. K.B. 600. The question depends on the intention of the parties as expressed by the contract. See *Turner* v. *Goldsmith*, (1891) 1 Q.B. 544; 60 L.J. Q.B. 274.

(*l*) *Appleby* v. *Myers*, L.R. 2 C.P. 3651; 6 L.J. C.P. 331.

(*m*) 56 & 57 Vict. c. 71, s. 6.

(*n*) *Ibid.* s. 7.

(*o*) *Howell* v. *Coupland*, 1 Q.B.D. 258; 46 L.J. Q.B. 147.

(*p*) *Boast* v. *Firth*, L.R. 4 C.P. 1; 38 L.J. C.P. 1; *Robinson* v. *Davison*, L.R. 6 Ex. 269; 40 L.J. Ex. 172; but see *Hall* v. *Wright*, E. B. & E. 749; 27 L.J. Q.B. 345.

(*q*) Hannen, J., *Baily* v. *De Crespigny*, L.R. 4 Q.B. 185; 38 L.J. Q.B. 98.

(*r*) *Barkworth* v. *Young*, 4 Drew. 24; 26 L.J. Ch. 153.

Performance is also excused where it has been rendered impossible by act and operation of law (*s*). "Where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed" (*t*). And, where the defendant covenanted for himself and his assigns not to permit any messuage, &c. to be built on a certain piece of land, which was afterwards taken by a railway company under their compulsory powers and built upon, it was held that the defendant was not liable for the act of the railway company (*u*). But the fact that a railway company has given the lessee a notice to treat does not absolve him from the obligation to perform his covenants down to the time of the execution of the conveyance to the company (*x*). There is, indeed, nothing to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law; but people in general must always be considered as contracting with reference to the law as existing at the time of the contract; and the words showing a contrary intention ought to be very clear to rebut that presumption (*y*).

Payment and acceptance of part of an admitted simple contract debt is not in general a satisfaction of such debt (*z*); but, if disputes exist as to the exact amount due, or the money be paid in advance, or some consideration be given and accepted, then the payment and acceptance of the smaller sum may be a satisfaction and discharge of the claim for the larger amount (*a*); and a creditor may agree to take less than the amount of his debt, provided payment is made by a particular day, and in default may recover the whole debt (*b*). Composition deeds, moreover, form an exception to this rule (*c*). Where money is paid and accepted as a composition on a debt under a mistake of law, it is a discharge (*d*).

(*s*) *Brown* v. *London* (*Mayor, &c.*), 30 L.J. C.P. 225; 9 C.B. N.S. 726; 31 L.J. C. P. 280; 13 C.B. N.S. 828.

(*t*) *Brewster* v. *Kitchell*, 1 Salk. 198; *Newington Local Board* v. *Cottingham Local Board*, 12 Ch.D. 725; 48 L.J. Ch. 226.

(*u*) *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180; 38 L.J. Q.B. 98; *Slipper* v. *Tottenham Junction Ry.*, L.R. 4 Eq. 112; 36 L.J. Ch. 841; *Newby* v. *Sharp*, 8 Ch.D. 39; 47 L.J. Ch. 617.

(*x*) *Mills* v. *East London Union*, L.R. 8 C.P. 79; 42 L.J. C.P. 46.

(*y*) *Berwick* (*Mayor*) v. *Oswald*, 3 E. & B. 665; 23 L.J. Q.B. 324.

(*z*) *Watters* v. *Smith*, 2 B. & Ad. 890; 1 L.J. K.B. 31; *Down* v. *Hatcher*, 10 Ad. & E. 121; 8 L.J. Q.B. 190; *Foakes* v. *Beer*, 9 App.Cas. 605; 54 L.J. Q.B. 130; *Underwood* v. *Underwood*, (1894) P. 204; 63 L.J. P. 109.

(*a*) *Cumber* v. *Wane*, 1 Smith's L. C. 325 (ed. 10); *Cooper* v. *Parker*, 15 C.B. 822; 24 L.J. C.P. 68; *post*, p. 169.

(*b*) *Thompson* v. *Hudson*, L.R. 2 Ch. 255; 36 L.J. Ch. 388.

(*c*) *Post*, p. 170; *Pfleger* v. *Browne*, 28 Beav. 391.

(*d*) *Kitchin* v. *Hawkins*, L.R. 2 C.P. 22.

Payment and acceptance of part of an admitted debt may, under certain circumstances, be evidence of a gift of the remainder (*e*). Payment by a negotiable security for a smaller amount is a good accord and satisfaction (*f*).

Payment and acceptance before action.—Payment of the full amount of an admitted simple contract debt is a satisfaction of the debt and of the nominal damages resulting from the detention or non-payment of the debt (*g*). A payment good by the law of the country where it is made is good here (*h*). If parties meet together and state an account, and various pecuniary claims are allowed on both sides, and a balance is struck, and the account settled, the allowances in account are, in contemplation of law, payments (*i*). But this is not the case where the items are all on one side (*k*).

Payment according to direction of creditor.—If a debtor is directed by his creditor to remit the amount of the debt by the post, the debtor is discharged by the delivery at the post-office of a letter containing the money addressed to the creditor at his usual place of residence. But the debtor is not discharged by the transmission through the post of a letter addressed to the creditor at some large town, without any specification of the street or number of the house in which the latter resides, unless it be shown that the letter and money came safe to hand, or that the address was given by the creditor himself (*l*). If a creditor desires his debtor to pay the amount of the debt to his (the creditor's) account at a particular banker's the debt is discharged as soon as the payment has been made pursuant to the directions given; and, if a creditor and debtor both keep an account with the same banker, and the amount of the debt is, at the request or with the assent of the creditor, transferred by the banker from the debtor's to the creditor's account, the transfer is equivalent to a payment, and the debt is extinguished (*m*). But a promise to make a transfer of the credit from one account to the other is not equivalent to an actual transfer; and, therefore, where a debtor directed his banker to place a sum of money to the credit or to the account of the creditor at a future day, and the banker promised to do so, but became bank-

(*e*) *Bramston* v. *Robins*, 12 Moore, 80; 5 L.J. (O.S.) C.P. 13.

(*f*) See *post*, p. 170.

(*g*) *Beaumont* v. *Greathead*, 2 C.B. 500; 15 L.J. C.P. 130; *Triston* v. *Barrington*, 16 M. & W. 61; 16 L.J. Ex. 2; *Gell* v. *Burgess*, 7 C.B. 16; 18 L.J. C.P. 153; *Thame* v. *Boast*, 12 Q.B. 815; 17 L.J. Q.B. 339.

(*h*) *Ralli* v. *Dennistoun*, 6 Exch. 483; 20 L.J. Ex. 278.

(*i*) *Callander* v. *Howard*, 10 C.B. 290; 19 L.J. C.P. 312; *Holland* v. *Russell*, 30 L.J. Q.B. 313; 1 B. & S. 424.

(*k*) *Perry* v. *Attwood*, 25 L.J. Q.B. 408; 6 E. & B. 691.

(*l*) *Warwicke* v. *Noakes*, 1 Peake, 98; *Hawkins* v. *Rutt*, *ib.* 248.

(*m*) *Eyles* v. *Ellis*, 4 Bing. 112; 5 L.J. (O.S.) C.P. 110; *Bolton* v. *Richard*, 6 T.R. 139; *Bodenham* v. *Purchas*, 2 B. & Ald. 47.

rupt before the time arrived, it was held that there was no payment and no extinguishment of the debt (*n*).

Payment to a person found in a merchant's counting-house, in possession of the merchant's account books, and apparently intrusted with the conduct of the business, is a good payment to the merchant himself, although the party receiving the money has in fact no authority from the merchant to receive it, and is not in his employment (*o*). But, where goods deposited with a warehouse-keeper were sold by the owner, and the warehouse-keeper's clerk, after the sale, wrote without authority to the purchaser, and falsely represented that his employer, the warehouse-keeper, was authorised to receive the money on behalf of the vendor, and induced the purchaser, by false statements, to send a remittance by post, in a letter addressed to the warehouse-keeper, and the clerk got possession of the letter, and absconded with the money, it was held that there had been no payment to the vendor (*p*). If a creditor requests his debtor to pay a sum of money on his (the creditor's) account to a third party, and the money is paid, this is equivalent to a payment to the creditor himself (*q*). And, if part of a money demand is paid in cash, and the residue is, by agreement, paid into the hands of a stake-holder or trustee to await the adjustment of certain differences, the payment is a good payment in satisfaction and discharge of the original cause of action (*r*).

Payment by bill or note.—Generally speaking, when a bill or note is taken in lieu of present payment of a debt, it is no more than giving an extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security, so that, if the bill or note is not paid at maturity, the creditor may sue for his demand independently of the bill or note, just as if it had never been given (*s*). But, if the creditor has received the bill or note as cash, or if at the time of receiving it he has agreed to take upon himself the risk of its being paid at maturity, or if the security is marred by the creditor's own *laches* in omitting to present it or give notice of its dishonour, the bill becomes money in his hands as between himself and the person from whom he

(*n*) *Pedder* v. *Watt*, 2 Peake, 41.

(*o*) *Barrett* v. *Deere*, Moo. & M. 200; *Wilmot* v. *Smith*, 3 C. & P. 453; Moo. & M. 238; Maule, J., *Mitcheson* v. *Oliver*, 5 E. & B. 349; 25 L.J. Q.B. 39.

(*p*) *Kaye* v. *Brett*, 19 L.J. Ex. 346; 5 Exch. 269.

(*q*) *Roper* v. *Bumford*, 3 Taunt. 76.

(*r*) *Page* v. *Meek*, 32 L.J. Q.B. 4; 3 B. & S. 259.

(*s*) *Sayer* v. *Wagstaff*, 5 Beav. 423; 14 L.J. Ch. 116; *Maillard* v. *Argyll (Duke)*, 6 Sc. N.R. 938; *London, Birmingham, and South Staffordshire Bank, In re*, 34 L.J. Ch. 418; 34 Beav. 332.

received it (*t*), and the debt will be actually paid and discharged by the delivery and acceptance of the security (*u*). If a creditor, after he has received a bill or note on account of a debt, sues for the debt, a plea by the debtor that a bill or note payable to a third person, or his order, or to bearer, or made by a third person, was given by him, or by a stranger, to the creditor, and was accepted by him for and on account of the debt, is a sufficient answer in the first instance to the action; and it is for the plaintiff to rebut the plea by showing that the bill was overdue and unpaid at the time of the commencement of the action, and that it remains dishonoured in his possession or that of his agents (*x*). It is no answer that the debtor has been sued upon the bill, and that judgment has been obtained against him, if the judgment is unsatisfied and the creditor alone is entitled to put it in execution (*y*). In the absence of any agreement to the contrary, the acceptance of a bill of exchange only suspends the remedy for a debt, and does not deprive the creditor of any lien he may have for the debt (*z*). If the creditor of a firm in partnership takes the separate bill or note of one of the partners on account of the partnership debt, his remedy against the firm will be suspended whilst the note is running; but the firm at large will not be discharged in case of the non-payment of the instrument when it arrives at maturity, unless it can be proved to have been given and received in satisfaction and discharge of the partnership debt, or unless there have been laches on the part of the creditor or holder in not using the customary means of obtaining payment, and the partnership has consequently been prejudiced thereby (*a*). If payment is to be made by "approved bills," and the debtor, without indorsing it, hands to the creditor a bill which "is approved," the payment is conditional only; and, if the bill is dishonoured, the debtor will be liable to the same extent as if he had indorsed it, but to that extent only, and will be discharged if he does not receive due notice of dishonour (*b*).

(*t*) *Peacock* v. *Pursell*, 14 C.B. N.S. 728; 32 L.J. C.P. 266. As to lien upon bills, see 45 & 46 Vict. c. 61, s. 27 (3), *post*, p. 1121.

(*u*) *Sard* v. *Rhodes*, 1 M. & W. 155; 5 L.J. Ex. 91; *Lichfield Union* v. *Greene*, 1 H. & N. 889; 26 L.J. Ex. 140; *Caine* v. *Coulton*, 1 H. & C. 768; 32 L.J. Ex. 97.

(*x*) *Belshaw* v. *Bush*, 11 C.B. 201; 22 L.J. C.P. 24; *Simon* v. *Lloyd*, 2 C.M. & R. 189; 4 L.J. Ex. 195; *James* v. *Williams*, 13 M. & W. 833; 14 L.J. Ex. 220; *Mercer* v. *Cheese*, 5 Sc. N.R. 664; 12 L.J. C.P. 56; *Maillard* v. *Argyll* (*Duke*), 6 Sc. N.R. 938; *Price* v. *Price*, 16 M. & W. 241; 16 L.J. Ex. 99; *Fearn* v. *Cochrane*, 4 C.B. 285; 16 L.J. C.P. 161.

(*y*) *Tarleton* v. *Allhusen*, 2 Ad. & E. 32.

(*z*) *London, Birmingham, and South Staffordshire Bank, In re*, 34 L.J. Ch. 418; 34 Beav. 332.

(*a*) *Bedford* v. *Deakin*, 2 B. & Ald. 217. In these cases there is the joint liability of the whole firm in case of non-payment, in addition to the separate liability of the single partner on the bill: *Bottomley* v. *Nuttall*, 5 C.B. N.S. 144; 28 L.J. C.P. 110.

(*b*) *Smith* v. *Mercer*, L.R. 2 Ex. 51; 37 L.J. Ex. 24; but see *Swinyard* v. *Bow*, 6 M. & S. 62, and see 45 & 46 Vict. c. 61, s. 52 (3), *post*, p. 1134.

Acceptance of renewed bills.—Where an action was brought upon a bill of exchange, and it was agreed between the parties that the action should be stayed, and that the defendants should pay the costs, renew the bill, and give a warranty of attorney to secure the debt, and the defendants renewed the bill and gave the warrant of attorney, but did not pay the costs, it was held that the plaintiff might bring a fresh action upon the first bill while the second was outstanding in the hands of an indorsee (*c*). But, where a bill was dishonoured, and the debtor gave the creditor another bill, and a warrant of attorney to confess judgment in case of the non-payment of the second bill, and agreed to pay the expenses of the execution of the warrant of attorney, and the second bill was duly honoured, but those expenses were not paid, it was held that the creditor could not sue the debtor upon the original bill for the purpose of recovering those expenses, as the payment of the second bill operated as a discharge of the first, but that they might be recovered as money paid by the creditor for the use of the debtor (*d*). If a renewed bill is taken in exchange for a former bill no action can be maintained upon the first bill until the second bill becomes due and has been dishonoured and returned (*e*), unless the second bill does not extend to and cover the interest that had accrued due on the first bill at the time such second bill was given, in which case the giving of the second bill does not preclude the creditor from suing upon the first bill for the recovery of such interest (*f*).

Actions for debts secured by dishonoured bills or notes.—When a plaintiff sues for a debt for which a dishonoured bill or note has been given, he must be prepared to show that the instrument is in his possession or under his control, and not outstanding in the hands of an indorsee or any party entitled to sue upon it (*g*); but where, at the request of the creditor, the debtor delivers a promissory note on account of the debt to third persons, as trustees for the creditor, and the debtor knows at the time that these persons are such trustees, the fact that the note is still in their hands is no answer to an action by the creditor for the recovery of his original debt when the note is due and unpaid (*h*). He must, also, if the bill or note is made or accepted by some third party, and is indorsed by the debtor himself, show that it was

(*c*) *Norris* v. *Aylett*, 2 Campb. 328.

(*d*) *Dillon* v. *Rimmer*, 7 Moore, 431; 1 L.J. (O.S.) C.P. 3.

(*e*) *Kendrick* v. *Lomax*, 2 C. & J. 405; 1 L.J. Ex. 145.

(*f*) *Lumley* v. *Musgrave*, 4 Bing. N.C. 9; 7 L.J. C.P. 49.

(*g*) *Hadwen* v. *Mendizabel*, 10 Moore, 477; 2 C. & P. 20; *Burden* v. *Halton*, 4 Bing. 454; 6 L.J. (O.S.) C.P. 61; *Price* v. *Price*, 16 M. & W. 243; 16 L.J. Ex. 99.

(*h*) *National Savings Bk. Association* v. *Tranah*, L.R. 2 C.P. 556; 36 L.J. C.P. 260; *Davis* v. *Reilly*, (1898) 1 Q.B. 1; 66 L.J. Q.B. 844.

presented for payment at the time it became due, and that it was dishonoured (*i*); but, if the debtor's name does not appear upon the face of the bill, the creditor is not bound to prove that he gave notice of dishonour either to the drawer or the debtor (*k*). The keeping of the security an unreasonable time without presenting it for payment has been held to be evidence that the creditor accepted it by way of payment in satisfaction and discharge of the debt (*l*). If the bill or note is duly honoured at maturity, the payment dates from the time the money due on it was paid, and not from the time the bill or note was originally given, unless there be circumstances to show that the delivery and acceptance of the security were regarded by the parties as actual payment (*m*). Fraudulent and invalid bills and notes may in general be considered as waste paper; and the creditor may resort at once to his original demand (*n*).

Payment by cheque.—The production of a cheque drawn by the defendant on his bankers, having the plaintiff's name or signature in his own handwriting, or that of his agent, on the cheque, is *primâ facie* evidence of payment (*o*). The circumstance, also, of a cheque having been made payable to a person, and of that person having received the amount of the cheque, is proof of payment (*p*). If the debtor makes an order upon his banker for payment of the amount of the debt, and the creditor accepts it, and keeps it in his hands an unreasonable time before presenting it for payment, and the banker becomes insolvent, the debtor is discharged on account of the laches of the creditor. It is difficult to say what is an unreasonable time; and probably each case must depend more or less on its own circumstances. In one case four months (*q*), and in another three weeks (*r*), were held to be an unreasonable time for a draft, cheque, or order on a banker to be retained without presentment in the hands of the creditor (*s*). If the creditor, on presenting the draft or order to the banker or person on whom it is made, has the opportunity of receiving a cash payment, and for his own

(*i*) *Peacock* v. *Pursell*, 32 L.J. C.P. 266; 14 C.B. N.S. 728.

(*k*) *Goodwin* v. *Coates*, 1 Moo. & R. 221; *Swinyard* v. *Bowes*, 5 M. & S. 62; *Bishop* v. *Rowe*, 3 M. & S. 368.

(*l*) *Griffith* v. *Pope*, cited Andr. 189.

(*m*) *Harries, In re*, 13 M. & W. 3; 13 L.J. Ex. 259.

(*n*) *Bristol (Earl)* v. *Wilsmore*, 1 B. & C. 514; 1 L.J. (O.S.) K.B. 179; Tindal, C.J., *Maillard* v. *Argyll (Duke)*, 6 Sc. N R. 945; *Wilson* v. *Vysar*, 4 Taunt. 288; *Cundy* v. *Marriott*, 1 B. & Ad. 696; 9 L.J. (O.S.) K.B. 70. As to fraud with respect to bills, see 45 & 46 Vict. c. 61, s. 29 (2); s. 30, *post*, p. 1119.

(*o*) *Egg* v. *Barnett*, 3 Esp. 197.

(*p*) *Mountford* v. *Harper*, 16 L.J. Ex. 184; 16 M. & W. 825.

(*q*) *Chamberlyn* v. *Delarive*, 2 Wils. 353; *Smith* v. *Wilson*, Andr. 190.

(*r*) *Hopkins* v. *Ware*, L.R. 4 Ex. 265; 38 L.J. Ex. 147.

(*s*) As to what is a reasonable time for presentment, see sect. 74 of 45 & 46 Vict. c. 61, *post*, p. 1154.

convenience, or the convenience of the drawee, elects to take a note or bill for the amount, the original debt is discharged (*t*).

Payment by stolen bank note.—A bank note payable to bearer, and transferable by delivery, is considered as money, so that every person who takes it by way of payment of a debt, in the ordinary course of business, has a good title to it, and his right to enforce payment of it is unaffected by any infirmity of title in the person who delivered it to him (*u*). If, therefore, a tradesman gives change for a stolen note in ignorance that the note has been stolen, and then pays the note to a creditor in discharge of a debt, the payment is a good payment, the creditor having a valid title to the note, and being able to enforce the security against the banker who has issued it (*x*).

Payment by stranger.—Where one makes a payment in the name and on behalf of another without authority, it is competent for the debtor to adopt and ratify the payment (*y*), even after the creditor has commenced an action for the debt (*z*); but, where the payment is not made by way of gift for the benefit of the debtor, but by a person who intended that he should be reimbursed by the debtor, but who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, and thereupon the effect of payment is at an end, and the debtor remains responsible (*a*).

Proof of payment.—Where the plaintiff's solicitor wrote to the defendant requesting him to remit the balance due to the plaintiff with 13*s.* 4*d.* costs, and the defendant sent a bank bill for the amount of the debt only, which the plaintiff's solicitor by letter refused to receive but nevertheless retained, it was held that the facts constituted evidence of payment, and that the solicitor had no right to keep the bank bill and then proceed as if he had never received it (*b*). Where, however, there was a request to remit, and a post-office order was sent which was not available because a mistake had been made in the name of the payee, it was held that there was no evidence of payment, although the order had been retained by the latter (*c*); and, where the defendant sent the plaintiff a cheque which purported to be drawn for the balance

(*t*) *Post*, p. 147.

(*u*) *Raphael* v. *Bank of England*, 17 C.B. 161; 25 L.J. C.P. 33; and see *Lucas* v. *Wilkinson*, 1 H. & N. 420; 26 L.J. Ex. 13.

(*x*) *Miller* v. *Race*, 1 Burr. 452; *Grant* v. *Vaughan*, 3 Burr. 1516.

(*y*) Co. Litt. 206 b; *Belshaw* v. *Bush*, 11 C.B. 191; 22 L.J. C.P. 24; *Cork* v. *Lister*, 13 C.B. N.S. 543, 594; 32 L.J. C.P. 121, 126.

(*z*) *Simpson* v. *Egginton*, 10 Exch. 845; 24 L.J. Ex. 312.

(*a*) *Walter* v. *James*, L.R. 6 Ex. 124; 40 L.J. Ex. 104.

(*b*) *Caine* v. *Coulton*, 1 H. & C. 768; 32 L.J. Ex. 97.

(*c*) *Gordon* v. *Strange*, 1 Exch. 477.

of the plaintiff's account, and would, consequently, if presented by him, have been tantamount to the giving a receipt in full for all demands, and the plaintiff by letter declined to receive the cheque as a payment of all that was due, and expressed his willingness to return it, but retained it in his hand, it was held that there was no evidence of payment (*d*).

Presumption of payment.—Any great lapse of time, without demand of payment, and without any acknowledgment of the existence of a debt, affords a *primâ facie* presumption that payment has been made (*e*). Where servants are in the habit of being paid weekly or monthly, and supporting themselves by their week's or month's wages, the presumption is in favour of a regular payment having been made, according to the ordinary course of the business or employment, in the absence of any demand of payment on the part of the servant, or any admission or acknowledgment on the part of the employer of arrears being due (*f*). A general receipt on the back of a bill of exchange is no evidence of payment of the bill by the acceptor; the receipt of itself proves nothing until it is explained (*g*). But, when bills, proved to have been once in circulation after having been accepted, get back again into the hands of the acceptor, and are produced by him, the presumption is that he has got them back by having paid them. Receipts on the bills, to be evidence of payment, must be shown to be in the handwriting of the defendant, or of some other person authorised to receive payment of the bills (*h*). A receipt is nothing more than a *primâ facie* acknowledgment that money has been paid, and may be contradicted or explained (*i*).

Payment to an agent in the ordinary course of business is a payment to the principal, unless the latter has countermanded the agent's authority, and given the proper notice to the defendant before the payment was made. Payment to the solicitor of a plaintiff in an action is a payment to the plaintiff himself, but a payment to an agent of the solicitor is not (*k*). An agent employed to sell an estate has no implied authority to receive the purchase-money (*l*); nor has a solicitor who has possession of a mortgage deed signed by the mortgagor (*m*). An authority to receive the interest of a sum of money, invested on mortgage or other real or

(*d*) *Hough* v. *May*, 4 Ad. & E. 954; 5 L.J. K.B. 186.

(*e*) *Cooper* v. *Turner*, 2 Stark. 497.

(*f*) *Lucas* v. *Novosilieski*, 1 Esp. 295.

(*g*) *Phillips* v. *Warren*, 14 M. & W. 380; 15 L.J. Ex. 3.

(*h*) *Pfiel* v. *Vanbatenberg*, 2 Campb. 439.

(*i*) *Skaife* v. *Jackson*, 3 B. & C. 421; 3 L.J. (O.S.) K.B. 43; *Graves* v. *Key*, 3 B. & Ad. 313; *Lee* v. *Lancashire and Yorkshire Ry.*, L.R. 6 Ch. 527.

(*k*) *Yates* v. *Frickleton*, 2 Doug. 623.

(*l*) *Mynn* v. *Joliffe*, 1 Moo. & R. 327.

(*m*) *Swinbanks, Ex parte*, 11 Ch.D. 525; 48 L.J. Bankr. 120. See *Gordon* v. *James*, 30 Ch.D. 249.

personal security, does not carry with it any authority to receive the principal, unless the party receiving the interest was himself previously intrusted with possession of the principal, and has himself invested it, and dealt with it in pursuit of the ordinary trade of a money-lender. But a money-lender who lends out another man's money on mortgage, and holds the mortgage deeds, has no implied authority to receive the principal after the day appointed for payment by the ordinary condition of defeasance has passed. He has himself no power to re-convey the estate, and cannot release the mortgage debt (*n*).

Mode of payment to agents.—A money payment is, in the absence of any custom of the trade to the contrary, the only authorised mode of payment, as between commission-agents for sale and the purchasers with whom they deal (*o*); and, therefore, if a person buys goods of an agent, knowing him to be an agent, and knowing who the principal is, he cannot, by paying the agent in goods, discharge himself from liability for the price to the principal, without ascertaining whether such a course of dealing has been authorised by the latter (*p*). So, if a person buys goods of another, having notice that he is an agent and not a principal, though he does not know who the principal is, he cannot set off a debt due to him from such agent, in an action by the principal for the price of the goods (*q*). Where an agent, employed by a coal-merchant to sell coals, made a bargain with a tailor to furnish the latter with coals in return for clothes, and the coals when sent in were accompanied by a ticket, in which the coal-merchant's name was inserted as the vendor of the coals, it was held that the tailor, after he had received such a ticket, giving notice who the real owner was, ought to have ascertained whether the course of dealing was sanctioned by the latter, and that, not having done so, he could not set up the delivery of clothes to the agent as an answer to the coal-merchant's action for the price of the coals (*r*).

Payment by delivery of a bill of exchange to the agent is not a valid payment to the principal, unless the agent was expressly authorised to receive payment by bill, or unless such payment was in accordance with the usual and customary course of business, or

(*n*) *Wilkinson* v. *Candlish*, 5 Exch. 91; 19 L.J. Ex. 166.

(*o*) *Barker* v. *Greenwood*, 2 Y. & C. Ex. 414, 419; 6 L.J. Ex. (Eq.) 54; *Sweeting* v. *Pearce*, 7 C.B. N.S. 485; 29 L.J. C.P. 272.

(*p*) *Capel* v. *Thornton*, 3 C. & P. 352; *Howard* v. *Chapman*, 4 C. & P. 508.

(*q*) *Semenza* v. *Brinsley*, 34 L.J. C.P. 161; 18 C.B. N.S. 467; *Dresser* v. *Norwood*, 17 C.B. N.S. 466; 34 L.J. C.P. 48; see *Dixon, Ex parte*, 4 Ch.D. 133; 46 L.J. Bankr. 20.

(*r*) *Pratt* v. *Willey*, 2 C. & P. 350; *Cornish* v. *Abington*, 4 H. & N. 555; 28 L.J. Ex. 262.

has been assented to and adopted by the principal (*s*). But payment by a cheque which is duly honoured is a good payment (*t*). "The general rule of law is that, if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but, if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged" (*u*). Thus, where the known agent of a wine-merchant sold wine to a customer, who paid for it by returning to the agent his own cheque, which the customer had cashed a few days previously, it was held that this was not, as between the principal and the customer, a payment for the wine sold to the latter through the medium of the agent (*x*). A solicitor as agent gave to a stockbroker directions to sell stock, and the stockbroker sent him a cheque for part of the purchase-money, and carried the balance to the solicitor's credit in the account between them, which account was afterwards settled; it was held that the stockbroker must have had notice that the solicitor was an agent, and that carrying the balance to the credit of the solicitor's account was not a payment (*y*).

An assurance broker, as agent of the assured, is, in general, only entitled to receive payment for the assured from the underwriter in money (*z*). But, where an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and when the known general course of the business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in accounts with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied; but it must be understood that, where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the intention and with the authority of the principal (*a*).

When money has been paid to an agent to be transmitted to his principal, or to be placed to the credit of the latter in his account with his agent, the party paying the money loses all control over it as soon as it reaches the hands of the agent (*b*).

(*s*) *Ward* v. *Evans*, 2 Ld. Raym. 930; *Williams* v. *Evans*, L.R. 1 Q.B. 352; 35 L.J. Q.B. 111.

(*t*) *Bridges* v. *Garrett*, L.R. 5 C.P. 451; 39 L.J. C.P. 251; *Pape* v. *Westacott*, (1894) 1 Q.B. 272; 63 L.J. Q.B. 22.

(*u*) *Russell* v. *Bangley*, 4 B. & Ald. 398.

(*x*) *Underwood* v. *Nicholls*, 17 C.B. 239; 25 L.J. C.P. 79.

(*y*) *Pearson* v. *Scott*, 9 Ch.D. 198; 47 L.J. Ch. 705.

(*z*) *Todd* v. *Reid*, 4 B. & Ald. 210; *Wall* v. *Cockerell*, 10 H.L.C. 229; 32 L.J. Ch. 276; but see *Catterall* v. *Hindle*, L.R. 2 C.P. 368; 35 L.J. Q.B. 161.

(*a*) *Stewart* v. *Aberdein*, 4 M. & W. 211; 7 L.J. Ex. 292; *Catterall* v. *Hindle*, *supra*.

(*b*) *Williams* v. *Deacon*, 4 Exch. 497.

Payment to creditor of creditor.—Payment by a garnishee, on execution levied upon him, is a valid discharge to the garnishee, as against the judgment debtor, to the amount paid or levied, although the proceedings may be set aside or the judgment reversed (*c*). But to discharge the garnishee there must be a judge's order for payment; payment upon notice of attachment only is no discharge (*d*). The order of attachment does not conclusively vest the debt in the judgment creditor as against the trustee of the judgment debtor, if the latter is adjudicated a bankrupt before the order is made absolute, and therefore in such a case the garnishee should show cause against the order being made absolute (*e*). But, if the order is made absolute, and payment is made under it without notice of the adjudication, the payment is a good discharge (*f*). Whether it is equally a discharge where there has been notice of the adjudication after the order was made absolute, and in sufficient time to enable the garnishee to apply for a stay of execution, is unsettled. In such a case the safer course for the garnishee is either to apply for a stay of execution, or to give the trustee notice of the order informing him that it would be obeyed unless the trustee got the order set aside (*g*). If the trustee waives his claim, the garnishee has no independent right to resist payment to the judgment creditor (*h*).

Payment by agent.—If the principal has authorised the agent to pledge his, the principal's, credit in the commercial world, and the principal is consequently disclosed and debited in the first instance, he at once becomes responsible upon the contract, and continues liable until the creditor has received actual payment, or has taken security from the agent, having had an option of a cash payment from the latter at the time he did so. If the principal furnishes the agent with money to pay the debt, and the agent, instead of making a cash payment, gives the creditor a bill of exchange or promissory note, or a cheque on a banker, and the security fails or is dishonoured, the principal is not discharged, unless it appears that the creditor knew that he might have had cash, but preferred a bill for his own accommodation. If, having had the option of receiving money, he nevertheless thinks fit to take the acceptance of the agent, he is deemed to have accepted the credit of the latter, in lieu of that of the principal, and to have discharged

(*c*) Order XLV., rule 7; *Smith, In re*, 20 Q.B.D. 321; 57 L.J. Q.B. 212.

(*d*) *Turner* v. *Jones*, 1 H. & N. 878; 26 L.J. Ex. 262.

(*e*) *Holmes* v. *Tutton*, 5 E. & B. 15; 24 L.J. Q.B. 346.

(*f*) *Wood* v. *Dunn*, L.R. 2 Q.B. 73; 36 L.J. Q.B. 27.

(*g*) *Wood* v. *Dunn*, *supra*.

(*h*) *European Bank* v. *Fox*, L.R. 2 Q.B. 85, note.

the principal (*i*). If the agent pays by a cheque of his own, the creditor, if he accepts it, must present it for payment within a reasonable time; and if he, by his delay, alters for the worse the position of the debtor, the latter is discharged (*k*). And, if he gives his receipt to the agent as for a cash payment, when he has only obtained a bill, and the principal pays money to the agent, and alters the state of his accounts with the latter to the principal's own prejudice, upon the supposition that the demand has been satisfied as the receipt imports, the creditor cannot afterwards, in case of the insolvency of the agent, and the failure of the security he has taken from the latter, resort to the principal for payment (*l*).

If, on the other hand, the principal is not known or disclosed at the time of the making of the contract, if the agent deals in his own name, and is debited accordingly, and the principal, in ignorance of the intention of the creditor to look to him for payment, and being misled by the conduct of the creditor, has furnished the agent with funds for the liquidation of the debt, he is thenceforth discharged, and the creditor cannot afterwards, if the agent dies, or becomes insolvent with the money in his hands, resort to the principal for payment (*m*). The mere circumstance of the agent's being indebted to the principal at the time of his insolvency, or of his having a balance in hand out of which he might have paid the debt, is not of itself sufficient to discharge the principal (*n*). The principal must show that the creditor has himself misled him into supposing that the creditor has elected to give exclusive credit to the agent, and that the principal has been prejudiced by that supposition. Mere delay by the creditor in enforcing payment from the agent, even although it has misled the principal into settling with the agent, will not be sufficient to discharge the principal from liability (*o*).

Payments to trustees, executors, &c.—Payment to one of two trustees, acting in the execution of a trust, is a payment to both, unless the payment be a payment as between banker and customer (*p*). It is part of the law merchant that bankers shall not pay to one of several persons jointly interested without the consent

(*i*) *Marsh* v. *Pedder*, 4 Camp. 257; *Strong* v. *Hart*, 6 B. & C. 160; *Smith* v. *Ferrand*, 7 B. & C. 19; 5 L.J. (O.S.) K.B. 355; *Tapley* v. *Martens*, 8 T.R. 453; *Robinson* v. *Read*, 9 B. & C. 449; 7 L.J. (O.S.) K.B. 237; *Clarke* v. *Noel*, 3 Camp. 411; *Everett* v. *Collins*, 2 Camp. 515; *Anderson* v. *Hillies*, 12 C.B. 504; 21 L.J. C.P. 150.

(*k*) *Hopkins* v. *Wave*, L.R. 4 Ex. 268; 28 L.J. Ex. 147.

(*l*) *Wyatt* v. *Hertford*, 3 East, 147.

(*m*) *Heald* v. *Kenworthy*, 10 Exch. 739; 24 L.J. Ex. 76; *Armstrong* v. *Stokes*, L.R. 7 Q.B. 598; 41 L.J. Q.B. 253; as explained by *Irvine* v. *Watson*, 5 Q.B.D. 414; 49 L.J. Q.B. 531.

(*n*) *Waring* v. *Favenck*, 1 Camp. 85.

(*o*) *Davison* v. *Donaldson*, 9 Q.B.D. 623.

(*p*) *Husband* v. *Davies*, 10 C.B. 645; 20 L.J. C.P. 118; *Wallace* v. *Kelsall*, 7 M. & W. 272; 10 L.J. Ex. 12.

of the others except by express agreement. Therefore, if two persons give a power of attorney to bankers to sell out their joint stock, the bankers must place the proceeds to the joint account of the two, and both must concur in drawing out the money. If it is meant that the money should be paid to one, an authority ought to be given to that effect by the other to the bankers (*q*); and, if money is paid into a bank by three persons not partners, one of them cannot draw cheques without the concurrence of the others, as it would defeat the object of paying in the money jointly (*r*). Payment to one of several executors of a debt due to their testator is a good payment as against the others; for each executor has authority under the will to collect debts due to the estate independently of his co-executors (*s*). Payment to a person who has obtained probate of a forged will is a discharge to the party so paying, although the probate be afterwards declared null, and administration be granted to the intestate's next of kin; for the debtor cannot controvert the authority of the probate so long as it remains unrepealed (*t*). Payment, also, to an administrator, before the will is found, is a good defence to an action subsequently brought by an executor (*u*). Payment, also, to one of several assignees of a bankrupt's estate of a debt due to the bankrupt is a valid payment to the assignees generally (*x*), unless the other assignees have expressed their dissent, and interfered to prevent the payment (*y*).

Payments made to bankrupt.—By the Bankruptcy Act, 1883, nothing therein contained is to render invalid any payment made for value received to any bankrupt before the date of the receiving order by a person not having at the time of such payment notice of any available act of bankruptcy committed by the bankrupt before that time (*z*).

Appropriation of payments.—The general rule of law is that the party who pays money has a right to apply that payment as he thinks fit (*a*). If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money (*b*). If, therefore, money becomes due on a bond, and a debt is also owing for goods sold and delivered, and

(*q*) *Stone* v. *Marsh*, 6 B. & C. 551; 5 L.J. (O.S.) K.B. 201.

(*r*) *Innes* v. *Stephenson*, 1 Moo. & R. 147.

(*s*) *Can* v. *Read*, 3 Atk. 695.

(*t*) *Allen* v. *Dundas*, 3 T.R. 125.

(*u*) *Pond* v. *Underwood*, 2 Ld. Raym. 1210.

(*x*) *Smith* v. *Jamesons*, 1 Esp. 114.

(*y*) *Bristow* v. *Eastman*, *ib.* 174.

(*z*) 46 & 47 Vict. c. 52, s. 49, *post*, p. 401.

(*a*) *Croft* v. *Lumley*, 6 H.L.C. 705; 27 L.J. Q.B. 334.

(*b*) *Simson* v. *Ingham*, 2 B. & C. 72; 1 L.J. (O.S.) K.B. 234; *Hooper* v. *Keay*, 1 Q.B.D. 178.

the debtor makes a payment, declaring it to be on account of the bond debt, the creditor cannot appropriate it to the simple contract debt. But, if the payment be made generally on account, the creditor may appropriate it to whichever debt he pleases (*c*). And the application of the money is governed, not by any rule of law, but by the intention of the creditor expressed, implied, or presumed. He may exercise the right of appropriation up to the last moment (*d*). Where two debts were due to the plaintiff, one on a covenant, and the other on a simple contract debt, it was held that he might appropriate payments made generally on account to the simple contract debt (*e*). And, where a creditor had received money without any specific appropriation by the debtor, he was permitted to appropriate it to the discharge of a purely equitable debt (*f*). The appropriation by the creditor may be made at any time before the case comes under the consideration of a jury; and he is not bound at the time he makes the appropriation to give the debtor any notice thereof (*g*). If, however, he communicates his election to the debtor, he is bound thereby, and cannot make a different appropriation without the assent of the debtor. The rule that payments on account are to be appropriated to interest before principal does not apply where, in the case of bankers' accounts, the interest has, upon making up the account half-yearly, been converted into capital (*h*).

Appropriation by debtor.—If there are several debts due, and application is made by the creditor for one of these in particular, the payment made in answer to the application is obviously made on account of the specific debt named, and cannot be appropriated by the creditor to a different debt (*i*). If a bill of exchange becomes due, and the exact amount of the bill is paid by the party liable, the payment is deemed to have been made on account of the bill (*k*). If goods are sold and delivered on credit for a certain sum, and the exact amount of the purchase-money is subsequently paid, the irresistible presumption is, that the payment was a payment of the price of the goods (*l*). Where money is paid as an instalment of a composition in respect of several debts, it must be appropriated to those debts rateably (*m*).

Appropriation by creditor.—If there be one debt due on a

(*c*) *Anon.*, Cro. Eliz. 78; *Clayton's case*, 1 Mer. 585; *Kinnaird* v. *Webster*, 10 Ch.D. 139; 48 L.J. Ch. 348.

(*d*) *The Mecca*, (1897) A.C. 286; 66 L.J. P. 86.

(*e*) *Peters* v. *Anderson*, 5 Taunt. 596.

(*f*) *Bosanquet* v. *Wray*, 6 Taunt. 597.

(*g*) *Philpott* v. *Jones*, 2 Ad. & E. 44; 4 L.J. K.B. 65.

(*h*) *Parr's Banking Co.* v. *Yates*, (1898) 2 Q.B. 460; 67 L.J. Q.B. 851.

(*i*) *Shaw* v. *Picton*, 4 B. & C. 715; 4 L.J. (O.S.) K.B. 29.

(*k*) *Newmarch* v. *Clay*, 14 East, 244.

(*l*) *Marryatts* v. *White*, 2 Stark. 102.

(*m*) *Thompson* v. *Hudson*, L.R. 6 Ch. 320; 40 L.J. Ch. 28; *Accidental Death Ins. Co., In re*, 7 Ch.D. 568; 47 L.J. Ch. 396.

lawful contract, and another debt arising out of an illegal transaction, the creditor cannot appropriate the payment to the unlawful demand so as to enable him to sue for the lawful debt (*n*); but, if the contract creating the debt is not absolutely unlawful, the creditor being merely prevented from suing upon it by some statutory enactment framed for the purpose of protecting the debtor from particular actions, then the creditor may appropriate the payment to the demand the right of action for which is barred by the statute, and sue for the other debt. Such is the case when the right of action for one of two debts is barred by the Statute of Limitations, or by the Acts regulating the sale of spirituous liquors on credit (*o*). Where a solicitor had several claims against a corporation for work and services and money paid, some of which he could enforce by action against the body corporate, and some of which he was precluded from enforcing by reason of a technical defect in his appointment, it was held that he might appropriate a general payment to the latter claims, and proceed for the recovery of those debts which the law permitted him to enforce (*p*). But, where a solicitor delivered a bill containing taxable and untaxable items, and a general payment was made on account, it was held that the attorney could not appropriate the payment to the taxable items, so as to enable him to sue for the other charges without delivering a signed bill pursuant to the statute (*q*). If there be a debt due from the debtor in a representative character, and another in his own right, a general payment on account is deemed to be a payment of the debt due from the debtor in his own right, and the creditor cannot, without the express assent of such debtor, appropriate it in discharge of a debt due from him as executor (*r*).

Separate accounts and one entire running account.—Where there are distinct accounts and a general payment, and no appropriation by the debtor at the time of payment, the creditor may apply the payment to which account he pleases; but, where a variety of transactions are included in one general account, the items of credit are, in the absence of other appropriation, to be appropriated to the items of debit in order of date (*s*). This presumption, however, may be rebutted by an express stipulation, or by a particular mode of dealing between the parties (*t*), or by the circumstances of the case showing that this could not have been their inten-

(*n*) *Wright* v. *Laing*, 3 B. & C. 165.

(*o*) *Mills* v. *Fowkes*, 5 Bing. N.C. 461; 8 L.J. C.P. 276; *Williams* v. *Griffith*, 5 M. & W. 300; *Cruickshanks* v. *Rose*, 1 Moo. & R. 100; *Philpott* v. *Jones*, 2 Ad. & E. 41; 4 L.J. K.B. 65.

(*p*) *Arnold* v. *Poole* (*Mayor*), 5 Sc. N.R. 741; 12 L.J. C.P. 97.

(*q*) *James* v. *Child*, 2 Cr. & J. 678; 2 L.J. Ex. 78.

(*r*) *Goddard* v. *Cox*, 2 Str. 1194.

(*s*) *Clayton's case*, 1 Mer. 608; *Bodenham* v. *Purchas*, 2 B. & Ald. 39.

(*t*) *Henniker* v. *Wigg*, 4 Q.B. 795; *Williams* v. *Rawlinson*, 10 Moo. 362; 3 L.J. (O.S.) C.P. 164; *Sherry, In re*, 25 Ch.D. 692; 53 L.J. Ch. 404.

tion (*u*). And the presumption does not apply to a case where there is no account current between the parties, nor where, from an account rendered or other circumstances, it appears that the creditor intended not to make any appropriation, but to reserve the right (*x*). Where there is a secured debt and an unsecured debt, any payment is to be appropriated first to the secured debt (*y*). But, if the account is not treated as one entire running account, but is divided into separate and distinct accounts, the payments are not necessarily appropriated to the earlier items (*z*).

Avoidance of payment.—A payment good at the time as extinguishing the debt may be rendered void by matter subsequent, as, in the event of the bankruptcy of the debtor, within three months after the date of the payment (*a*). In order, however, to render a payment by the debtor within three months prior to his bankruptcy void as a fraudulent preference, there must have been an intention to prefer the creditor (*b*).

Tender of payment.—Bank of England notes are a good tender for all sums above 5*l.*, so long as the Bank of England continues to pay its notes on demand in legal coin; but neither the Bank, nor any branch bank, can make a legal tender of payment in its own notes to a party requiring gold (*c*). Gold coin is a good tender for payment of any amount. Silver coin is a good tender for sums not exceeding 40*s.*, and bronze coins for sums not exceeding 1*s.* (*d*). But no valid tender can be made of gold, silver, or bronze coin, defaced by names or words stamped thereon, or bent by any machine or instrument (*e*). If an absolute and unconditional covenant or promise be made for the payment of money, without any time of payment being mentioned, there is an immediate cause of action, in respect of which a writ may be at once issued. Every plea of tender, being pleadable only in bar of the costs of an action, must allege the defendant's continued readiness to pay, accompanied by a payment into court of the money tendered; if the plaintiff can falsify the averment of the defendant's continued readiness, he avoids the plea altogether (*f*). A demand after tender should be made personally (*g*); and, if there be two joint debtors, a demand of one is a demand of both (*h*). If the creditor is offered a larger sum

(*u*) *City Discount Co.* v. *McLean*, L.R. 9 C.P. 692; 43 L.J. C.P. 344.

(*x*) *The Mecca*, (1897) A.C. 286; 66 L.J. P. 86.

(*y*) *Kinnaird* v. *Webster*, 10 Ch.D. 139; 48 L.J. Ch. 348.

(*z*) *Simson* v. *Ingham*, 2 B. & C. 65; 1 L.J. (O.S.) K.B. 234.

(*a*) 46 & 47 Vict. c. 52, s. 48.

(*b*) *Hill, Ex parte*, 23 Ch.D. 659; 52 L.J. Ch. 903; *Taylor, Ex parte*, 18 Q.B.D. 295; 56 L.J. Q.B. 195; *Gaze, Ex parte*, 23 Q.B.D. 74; 58 L.J. Q.B. 373.

(*c*) 3 & 4 Will. 4, c. 98, s. 6.

(*d*) See 33 & 34 Vict. c. 10, s. 4, as to the legalisation of gold coins issued from colonial or foreign mints.

(*e*) 24 & 25 Vict. c. 99, s. 17; 54 & 55 Vict. c. 72, s. 1.

(*f*) *Coore* v. *Callaway*, 1 Esp. 116; *Rivers* v. *Griffiths*, 5 B. & Ald. 630.

(*g*) *Edwards* v. *Yeates*, Ry. & M. 360.

(*h*) *Peirse* v. *Bowles*, 1 Stark. 323.

than the amount due to him, and, without any objection on the ground of want of change, makes quite a collateral objection, the tender will be a good tender (*i*). If the tender is in Bank of England notes, and change is required, which the creditor says he has not got, the tender is insufficient; but, if no objection is made on the ground of want of change, the tender is good, provided enough has been tendered (*k*). If provincial bank notes or cheques on bankers are offered in payment, and not objected to, but more money is required, the tender is good, if enough money has been tendered (*l*). But where a solicitor was authorised to accept a tender of money on behalf of his client, it was held that a tender of a cheque was insufficient (*m*).

Offers of payment not amounting to tender.—An offer of money by a debtor to a creditor, and a request on the part of the latter for a day's delay before receiving it, on account of an accident, are not a tender and refusal of the money, and do not discharge the debtor (*n*). Readiness to pay a debt, without an actual tender of money or money's worth, is nothing; and, therefore, if a debtor merely offers to pay the debt, there is no tender (*o*); but if the debtor, having the money at hand, offers cash, and the creditor tells him he need not give himself the trouble of offering it, or getting it out, or producing it, as he will not take it, the actual production of the money is then dispensed with, and there is a good tender (*p*). And, where a sum of money was tendered to the maid-servant of the plaintiff, who received it, and said she would take it to her master, and retired, and then came back with the money, saying that her master would not receive it, it was held that this was evidence from which a jury, if they thought fit, might infer that a tender had been made (*q*).

Conditional tenders.—A tender clogged with reservations, and made in such terms that the party accepting the tender would be drawn into an admission against himself, is a bad tender; for the debtor has no right to expect the creditor to take the money, if by doing so he will furnish evidence against himself of the extent of his demand (*r*). Therefore an offer of money, to be accepted as

(*i*) *Bevans* v. *Rees*, 5 M. & W. 308; 8 L.J. Ex. 263; Broom's Maxims, 138 (ed. 7).

(*k*) *Black* v. *Smith*, Peake, 121; *Cadman* v. *Lubbock*, 5 Dowl. & Ry. 289; 3 L.J. (O.S.) K.B. 41.

(*l*) *Polglass* v. *Oliver*, 2 Cr. & J. 15; 1 L.J. Ex. 5; *Jones* v. *Arthur*, 8 Dowl. P.C. 442.

(*m*) *Blumberg* v. *Life Interest Corporation*, (1897) 1 Ch. 171; 66 L.J. Ch. 127; affirmed on facts, (1898) 1 Ch. 27; 67 L.J. Ch. 118.

(*n*) *Jenkyns* v. *Brown*, 14 Q.B. 503; 19 L.J. Q.B. 286.

(*o*) *Kraus* v. *Arnold*, 7 Moore, 59; *Leatherdale* v. *Sweepstone*, 3 C. & P. 342.

(*p*) *Finch* v. *Brook*, 1 Sc. 70; 4 L.J. C.P. 1; *Harding* v. *Davies*, 2 C. & P. 78.

(*q*) *Anon.*, 1 Esp. 349.

(*r*) *Hastings* (*Marquis*) v. *Thorley*, 7 C. & P. 573; *Foord* v. *Noll*, 2 Dowl. N.S 617; 12 L.J. C.P. 2.

"all that is due" (*s*), or "in full of all demands" (*t*), or "as the balance due" (*u*), or as a "settlement" (*x*), does not constitute a valid tender. But, if the party offers the money as being all that he admits to be due, not requiring the other party to accept it as all that is due, but leaving the latter free to insist upon any ulterior demand, the tender is then a good tender. If he says, "I am come to settle," or, "I am come with the amount of your bill," and then goes on to offer the money, leaving the other party, after he has got the money, to treat it as "a settlement," or as "the amount of the bill," or not, as he may think fit, the tender is a good tender (*y*). A tender "under protest" is a perfectly good tender (*z*). If a debtor tendering money requires a receipt for the amount, he ought himself to be prepared with the paper and writing materials, and the stamp, when a stamp is necessary, and tender them to the creditor together with the money (*a*). A tender to one of several joint creditors is a good tender to all (*b*). A tender to a clerk or servant having a general authority to receive money for his employer is a good tender to the latter (*c*). When by command of the creditor a solicitor writes for the debt, directing it to be paid to him at his office by a day named, tender of the money to any person found in possession of the office will, in general, be sufficient (*d*). And, if the solicitor demands payment of the cost of his letter, which is refused, and a writ is issued, the writ may be set aside (*e*). A tender to an executor may be good, although he has not proved the will, provided he afterwards proves the will, and takes upon himself the burthen of administration (*f*).

Apportionment of periodical payments.—By the Apportionment Act, 1870 (*g*), all periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) are, like interest on money lent, to be considered as accruing from day to day, and are made apportionable in respect of time accordingly. The apportioned part is payable, in the case of a continuing payment, when the entire portion becomes due;

(*s*) *Sutton* v. *Hawkins*, 8 C. & P. 259; *Field* v. *Newport, &c. Ry.*, 27 L.J. Ex. 396; 3 H. & N. 409.

(*t*) *Cheminant* v. *Thornton*, 2 C. & P. 51.

(*u*) *Evans* v. *Judkins*, 4 Campb. 156.

(*x*) *Mitchell* v. *King*, 6 C. & P. 237.

(*y*) *Bowen* v. *Owen*, 17 L.J. Q.B. 5; 11 Q.B. 135; *Robinson* v. *Ferreday*, 8 C. & P. 752; *Eckstein* v. *Reynolds*, 7 Ad. & E. 80; 6 L.J. K.B. 198; *Henwood* v. *Oliver*, 1 Q.B. 409; 10 L.J. Q.B. 158.

(*z*) *Manning* v. *Lunn*, 2 C. & K. 13; *Scott* v. *Uxbridge and Rickmansworth Ry.*, L.R. 1 C.P. 596; 35 L.J. C.P. 292; *Sweny* v. *Smith*, L.R. 7 Eq. 324; 38 L.J. Ch. 446; *Greenwood* v. *Sutcliffe*, (1892) 1 Ch. 1; 61 L.J. Ch. 59.

(*a*) *Laing* v. *Meader*, 1 C. & P. 217; *Blyther* v. *Townsend*, 4 L.J. (O.S.) K.B. 27; *Richardson* v. *Jackson*, 8 M. & W. 298; 10 L.J. Ex. 303.

(*b*) *Douglas* v. *Patrick*, 3 T.R. 683.

(*c*) *Moffat* v. *Parsons*, 5 Taunt. 308.

(*d*) *Watson* v. *Hetherington*, 1 C. & K. 36; *Kirton* v. *Braithwaite*, 1 M. & W. 312; 5 L.J. Ex. 165; *Wilmot* v. *Smith*, 3 C. & P. 454; M. & M. 239; *Barrett* v. *Deere*, *ib.* 200.

(*e*) *Holman* v. *Stevens*, 6 Jur. N.S. 124; *Caine* v. *Coulton*, 1 H. & C. 764; 32 L.J. Ex. 97.

(*f*) 1 Eq. Cas. Abr. 319.

(*g*) 33 & 34 Vict. c. 35.

and, in the case of a payment determined by death or otherwise, when the entire portion would have become due (*h*). But the Act does not extend to annual sums made payable in policies of assurance of any kind (*i*); nor to cases in which it is expressly stipulated that no apportionment shall take place (*k*); nor to any sum duly and properly paid before the happening of the event which is said to require the apportionment (*l*).

SECTION II.

DISCHARGE BY CONSENT OF THE PARTIES.

Dispensation of performance.—It is competent to the parties to a parol contract to dispense by word of mouth with performance of the contract. Thus, if a written contract for the sale of goods provides for the transmission of the goods to the purchaser on a particular day, and the purchaser subsequently gives a verbal order for them to be sent a day later, performance of the original written contract as to the time of delivery is thereby dispensed with, so that the liability upon a contract in writing may be wholly or partially discharged before breach by a subsequent verbal agreement (*m*), unless the written contract is required to be in writing by the Statute of Frauds or the Sale of Goods Act, 1893, in which case it cannot be varied by any subsequent agreement by word of mouth only (*n*). There is, however, no clause in either statute requiring the dissolution of a contract to be in writing; and it should seem that a contract required by the statute to be in writing may, before breach, be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering upon the contract which was in writing (*o*). A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must

(*h*) 33 & 34 Vict. c. 35, s. 3.
(*i*) Sect. 6.
(*k*) Sect. 7.
(*l*) *Ellis* v. *Rowbotham*, (1900) 1 Q.B. 740; 69 L.J. Q.B. 379.
(*m*) *Stead* v. *Dawber*, 10 Ad. & E. 65; 9 L.J. Q.B. 101, adopting the language of *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 65.
(*n*) *Moore* v. *Campbell*, 10 Exch. 323; 23 L.J. Ex. 310; *Noble* v. *Ward*, L.R. 2 Ex. 135; 36 L.J. Ex. 91.
(*o*) *Goss* v. *Nugent* (*Lord*), *supra*; *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47.

clearly show, not merely his own understanding, but that the other party had the same understanding (*p*).

Renunciation of a contract by one party amounting to dispensation of performance by another party.—Non-payment on the one hand or non-delivery on the other may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. Where, by the non-delivery of part of the thing contracted for, the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract (*q*). If A. has agreed to have a steam-vessel at a named port by a day specified, and there to take on board and carry a cargo to a particular destination, and B. has agreed to have a cargo in readiness for shipment at the time and place appointed, and A., before the time arrives, repudiates the contract, and declares that he will not receive the cargo, B. may treat this as a dispensation of performance of his part of the agreement, and may forthwith engage another vessel (*r*). Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach, giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated (*s*). Where a manufacturer, by a contract of sale, had agreed to manufacture and deliver to a purchaser certain goods, by a day certain, and the purchaser, before the time appointed for delivery, told the manufacturer he need not manufacture them, as he had no occasion for them, and would not accept or pay for them, performance by the manufacturer was held to have been dispensed with (*t*). Where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract (*u*).

(*p*) *Darnley* (*Earl*) v. *L. C. & D. Ry.*, 36 L.J. Ch. 404; L.R. 2 H.L. 43.

(*q*) *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L.J. Ex. 19; see also *Honck* v. *Muller*, 7 Q.B.D. 92; 50 L.J. Q.B. 529.

(*r*) *Danube and Black Sea Ry.* v. *Xenos*, 11 C.B. N.S. 152; 31 L.J. C.P. 84, 284; 13 C.B. N.S. 825; *Hochster* v. *De la Tour*, 2 E. & B. 693; 22 L.J. Q.B. 455; see *post*, p. 189.

(*s*) 55 & 56 Vict. c. 71, s. 31 (2).

(*t*) *Cort* v. *Ambergate, &c. Ry. Co.*, 17 Q.B. 127; 20 L.J. Q.B. 460; *Ripley* v. *M'Clure*, 4 Exch. 345; 18 L.J. Ex. 419.

(*u*) *Bloomer* v. *Bernstein*, L.R. 9 C.P. 588; 43 L.J. C.P. 375; *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47; *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30.

But a neglect or refusal by one party to fulfil his part of the contract will not release the other from his engagement, unless such neglect or refusal operates as an entire frustration of the whole contract (*x*). Thus, where the defendant agreed to supply the plaintiff with a certain quantity of coal, to be delivered into the plaintiff's waggons at the defendant's collieries in equal monthly quantities during the period of twelve months, and during the first month the plaintiff only sent in waggons to receive less than one-third of the stipulated quantity, it was held that the defendant was not on that account entitled to rescind the contract (*y*). So, again, non-payment for the first portion of iron contracted to be delivered in two lots, unattended by any other act on the part of the purchaser, does not put an end to the contract so as to disentitle the purchaser to maintain an action for the non-delivery of the second portion, but only gives the seller remedy by action (*z*). So where in a lease for twenty-one years, terminable by the lessee by notice at the end of the first four years, the lessor covenanted to rebuild the premises at the expiration of the first four years upon six months' notice to do so from the lessee, and before the expiration of the four years he told the lessee that he would be unable to rebuild, and the lessee thereupon gave notice that he would terminate the lease at the end of the four years, but continued after that time to occupy the premises, it was held that there had not been a repudiation of his covenant by the lessor, and that the lessee had not elected to treat what was done by the lessor as a repudiation (*a*).

Powers of revocation and defeasance of contracts.—Where two or more persons enter into a contract of a continuing nature, one of them cannot by his own act discharge himself from liability, and put an end to the contract, without the consent of the other, unless there is an express power of defeasance reserved to him. Where two railway companies mutually agreed for the running of their engines and carriages over each other's lines, and neither company reserved to itself the power of putting an end to the contract by notice or otherwise, it was held that the contract was binding upon both companies for ever, and could not be varied against either party without the consent of that party (*b*). Where one party agreed to furnish iron to another, to be delivered as required, it

(*x*) *Jonassohn* v. *Young*, 4 B. & S. 299; 32 L.J. Q.B. 385.

(*y*) *Simpson* v. *Crippin*, L.R. 8 Q.B. 14; 42 L.J. Q.B. 28.

(*z*) *Freeth* v. *Burr*, L.R. 9 C.P. 208; 43 L.J. C.P. 91; *Mersey Steel and Iron Co.* v. *Naylor*, 9 App.Cas. 434; 53 L.J. Q.B. 497; see *Rhymney Ry.* v. *Brecon, &c. Ry.*, 69 L.J. Ch. 813.

(*a*) *Johnstone* v. *Milling*, 16 Q.B.D. 460; 55 L.J. Q.B. 162; *Smith* v. *Butler*, (1900) 1 Q.B. 694; 69 L.J. Q.B. 521.

(*b*) *G. N. Ry.* v. *Manch. S. & L. Ry.*, 18 L.T. (O.S.) 344; *Llanelly Ry.* v. *L. & N. W. Ry.*, L.R. 7 H.L. 550; 45 L.J. Ch. 539.

was held that the party who had thus agreed to furnish the iron could not put an end to the contract, and refuse to supply the iron on the ground that the other party had not within a reasonable time required him to furnish iron; that he ought in the first instance to inquire of the other if he meant to have the iron, and require him to give the order, and then, if the order was not given within a reasonable time, he might abandon the contract (*c*). Parties may, by mutual agreement, reserve to themselves the power of putting an end to the contract, by notice or otherwise, at any particular period, or upon the happening of any given event. When the contract is made defeasible by notice, the notice is good although the party on whom it is served is insane (*d*). When a party has reserved to himself the power of annulling a contract under certain contingencies, the courts will not permit the power to be exercised for the purpose of perpetrating a downright fraud; but there must be a clear want of *bona fides* on the part of the person exercising the power to warrant the interference of the court (*e*).

Release and discharge of covenants before breach.—Covenants under seal could not at common law be discharged before breach by parol contract, whether executory or executed (*f*). Neither could performance of a covenant be waived by parol at common law (*g*). But the liabilities upon a deed might in equity be diminished, and the effect of the contract controlled, by collateral writings not under seal (*h*); and a parol dispensation may now be pleaded as a defence to an action upon the deed.

Release and discharge of causes of action ex contractu.—Whenever a contract, not being a bill of exchange or promissory note, had been broken, the cause of action could only be discharged at common law by a release under seal, or by an agreement that something should be given or done on the one side, and received on the other, in satisfaction and discharge of the debt or damages resulting from the breach, and by the gift or performance and acceptance of the thing agreed to be given or done, termed in law "an accord and satisfaction" (*i*). But a release, or agreement amounting to a release, made upon good consideration, though not

(*c*) *Jones* v. *Gibbons*, 8 Exch. 920; 22 L.J. Ex. 347.

(*d*) *Robertson* v. *Lockie*, 15 Sim. 286; 15 L.J. Ch. 379.

(*e*) *Page* v. *Adam*, 4 Beav. 269; 10 L.J. Ch. 407; *Roberts* v. *Wyatt*, 2 Taunt. 268; *Turpin* v. *Chambers*, 30 L.J. Ch. 470; 29 Beav. 104.

(*f*) *Spence* v. *Healey*, 8 Exch. 668; 22 L.J. Ex. 249; *Thames Iron Works Co.* v. *Royal Mail Steam Packet Co.*, 31 L.J. C.P. 169; 13 C.B. N.S. 358.

(*g*) *West* v. *Blakeway*, 3 Sc. N.R. 199; 10 L.J. C.P. 173; *Sellers* v. *Bickford*, 1 Moore, 460; *Thomson* v. *Brown*, *ib.* 358; *Cordwent* v. *Hunt*, 8 Taunt. 596; 2 Moore, 660; *Littler* v. *Holland*, 3 T.R. 592; *Gwynne* v. *Davy*, 1 M. & G. 857.

(*h*) *Smith* v. *E. I. Co.*, 16 Sim. 76; 17 L.J. Ch. 178.

(*i*) 3 Hen. 6, pl. 36; *Treswaller* v. *Keyne*, Cro. Jac. 620; *Langden* v. *Stokes*, Cro. Car. 383; *Edwards* v. *Weeks*, 1 Mod. 262; 2 Mod. 259.

under seal, might have been enforced in equity (*k*). And so might a representation by the creditor of his intention to release the debt, if acted upon by the debtor (*l*). But "an agreement to abandon a claim, unless there be a consideration shown, is a mere *nudum pactum*." Thus, if there be an admitted debt due, and the debtor agrees to pay half the debt on receiving a discharge in full, and the creditor accordingly gives a written acknowledgment of the receipt of the money in full of all demands, this will not discharge the remaining moiety of the debt, unless the acknowledgment is under seal, or some valid consideration has been given and received for the discharge. Where goods have been sold and delivered, and the purchaser has neglected to pay the price, the cause of action that has arisen cannot be discharged by a mere agreement that the contract of sale shall be rescinded, and the purchaser discharged from all liability thereon (*m*).

Oral renunciation of claims on bills and notes.—Bills of exchange, however, which are regulated by the custom of merchants, formed an exception to the general rule of law, that a cause of action once accrued could only be discharged by deed, or by accord and satisfaction; for the liability of an acceptor, though complete, might always, it was held, be discharged by an express renunciation on the part of the holder of his claim on the bill, although such renunciation were made by word of mouth only, unaccompanied with satisfaction or any solemn instrument. But now such renunciation must be in writing, unless the bill be given up (*n*).

Release of one of several joint, or joint and several, contractors.—Generally speaking, a release to one of several joint, or joint and several, covenantors or promisors releases all (*o*). Therefore, where the plaintiff, having received a sum of money from one of the parties to a promissory note, erased his name from the instrument, it was held that such erasure operated as a release to the other parties to the note (*p*). But a party may give a qualified release, and discharge one of several joint, or joint and several, covenantors or promisors, and reserve his right of action against the others (*q*). But a creditor cannot release one of several joint debtors, and hold another liable by a reserve of remedies (*r*), unless the original

(*k*) *Taylor* v. *Manners*, L.R. 1 Ch. 48; 35 L.J. Ch. 128.

(*l*) *Yeomans* v. *Williams*, L.R. 1 Eq. 184; 35 L.J. Ch. 283.

(*m*) *Edwards* v. *Chapman*, 1 M. & W. 231; 5 L.J. Ex. 139.

(*n*) 45 & 46 Vict. c. 61, s. 62, *post*, p. 1147.

(*o*) Bac. Abr. RELEASE G.; Co. Litt. 232; *Lacy* v. *Kinaston*, 1 Ld. Raym. 690.

(*p*) *Nicholson* v. *Revill*, 4 A. & E. 675; 5 L.J. K.B. 129; *Cheetham* v. *Ward*, 1 B. & P. 633; *E. W. A., In re*, (1901) 2 K.B. 642; 70 L.J. K.B. 810; *Webb* v. *Hewitt*, 3 Kay & J. 442. See, however, *Steeds* v. *Steeds*, 22 Q.B.D. 537; 58 L.J. Q.B. 302.

(*q*) *Solly* v. *Forbes*, 2 Brod. & B. 38; 4 Moore, 448; *North* v. *Wakefield*, 13 Q.B. 536; 18 L.J. Q.B. 214.

(*r*) *Cheetham* v. *Ward*, 1 B. & P. 633.

contract reserves to him the power of releasing one without discharging the others (*s*), or unless the instrument of release can by reason of the context be construed, as it generally will, as a covenant not to sue (*t*), not amounting to a release of the action, but giving rise only to a cross claim for damages in case of breach (*u*). Each particular release is to be construed according to the plain intention of the parties (*x*).

General releases.—A general release of all claims and demands will operate as a discharge of every known cause of action that existed at the date of the release (*y*); but it no longer has the extensive operation which it formerly had at common law, and will not now extend to matters of which the releasor was entirely ignorant at the time he executed the release, and to which the instrument was never intended to extend (*z*); and it may be restricted by the language of the recitals or of other parts of the deed (*a*). A receipt in full of all demands does not necessarily amount to a release (*b*). The operation of a release is of course confined to debts and causes of action which have actually become vested in the releasor at the date of the release, and does not extend to any contract which has not then been broken (*c*). Any renunciation under seal of the benefit of a contract, or a covenant not to sue upon it, or an acknowledgment that the contract has been rescinded will, if properly authenticated, operate as a release (*d*). But the operation of a release may be controlled by a written agreement not under seal (*e*). A release "of all manner of demands" is the best release to him to whom it is made that he can have, and shall enure most to his advantage (*f*). Such a release given after action brought will include the damages for the detention of the debt as well as the debt itself, and, if given after judgment recovered, will include the execution (*g*).

Conditional release.—A release may also be subject to a condition subsequent; and in that case the release will be avoided if

(*s*) *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L.J. Ex. 133.

(*t*) Parke, B., *Kearsley* v. *Cole*, 16 M. & W. 136; 16 L.J. Ex. 115; *Price* v. *Barker*, 4 E. & B. 760; 24 L.J. Q.B. 133; *Green* v. *Wynn*, L.R. 4 Ch. 204; 38 L.J. Ch. 76.

(*u*) *Ford* v. *Beech*, 11 Q.B. 852, 871; 17 L.J. Q.B. 114; *Willis* v. *De Castro*, 27 L.J. C.P. 246; 4 C.B. N.S. 216.

(*x*) *Walters* v. *Smith*, 2 B. & Ad. 889; *Good, Ex parte*, 5 Ch.D. 46; 46 L.J. Bankr. 65.

(*y*) *Tynan* v. *Bridges*, Cro. Jac. 300; Co. Litt. 291, b.

(*z*) *Lyall* v. *Edwards*, 6 H. & N. 337; 30 L.J. Ex. 193.

(*a*) *Haselgrove* v. *House*, 35 L.J. Q.B. 1; L.R. 1 Q.B. 101.

(*b*) *Lee* v. *Lancashire & Yorkshire Ry.*, L.R. 6 Ch. 527.

(*c*) *Radburn* v. *Morris*, 1 Moo. & P. 648, 654; *Neale* v. *Sheffield*, Yelv. 192; 6 L.J. (O.S.) C.P. 152; *Payler* v. *Homersham*, 4 M. & S. 423; *Lambourne* v. *Cork*, 1 D. & R. 211.

(*d*) See *Hickmot's case*, 9 Co. 52 b, as to covenants not to sue.

(*e*) *Cocks* v. *Nash*, 9 Bing. 341; 2 L.J. C.P. 28; *Baker* v. *Heard*, 9 Exch. 959; 20 L.J. Ex. 444.

(*f*) Co. Litt. 508.

(*g*) *Tetley* v. *Wanless*, L.R. 2 Ex. 275; 36 L.J. Ex. 153.

the condition is not complied with (*h*). Thus, a release may be conditional on the payment of money within a specified time, and in that case it must be shown that the money has been paid, or at any rate tendered (*i*).

Fraudulent releases.—Whenever a release has been fraudulently given to defeat an action, the court will set it aside, and not allow it to be pleaded (*k*).

Composition in bankruptcy.—A composition under the Bankruptcy Act, 1883, is, if the requirements of the Act (*l*) have been complied with, binding upon all the creditors, so far as relates to any debts due to them from the debtor, and provable in bankruptcy. The composition is, however, not binding as regards a debt or liability from which a discharge in bankruptcy would not discharge the debtor, unless the creditor has assented to the composition (*m*).

Covenants not to sue.—Where a creditor has covenanted that he will not put his contract in suit at any time, there the covenant amounts to a release; but, when the covenant is not to sue for a certain time, or not to sue, provided certain payments are made at specified times (*n*), there it is only a covenant, not a release, unless it be a covenant not to sue for a limited time, with a proviso for forfeiture if an action be brought within the time, in which case it operates as a release by force of the condition, if the action be brought within the time (*o*). Covenants not to sue have been held equivalent to a release to avoid circuity of action, *i.e.*, the absurdity of allowing A. to recover against B. in one action the identical sum which B. has a right to recover in another against A. But, if the parties thus opposed in interest are not the same, the principle cannot apply. If, therefore, one of two plaintiffs has covenanted not to sue for a joint debt due to them both, he is liable for a breach of covenant if both afterwards sue; but the covenant so entered into by the one cannot be treated as a release of the joint action by both (*p*). "Where A. is bound to B., and B. covenants never to put the bond in suit against A., if afterwards B. will sue A. on the bond he may plead the covenant by way of release; but if A. and B. be jointly and severally bound to C. in a certain sum, and C. covenants with A. not to sue him, that shall not be a release

(*h*) *Newington* v. *Levy*, L.R. 6 C.P. 180; 40 L.J. C.P. 29.

(*i*) *Fessard* v. *Mugnier*, 18 C.B. N.S. 286; 34 L.J. C.P. 126.

(*k*) *Sargent* v. *Wedlake*, 11 C.B. 732; *Manning* v. *Cox*, 7 Moore, 617; 1 L.J. (O.S.) C.P. 36; *Barker* v. *Richardson*, 1 Y. & J. 362; *Rawstorne* v. *Gandell*, 15 M. & W. 305; 15 L.J. Ex. 291; *Morrison, Ex parte, Clunn, In re*, 33 L.J. Bankr. 47; *De Pothonier* v. *De Mattos*, E. B. & E. 461; 27 L.J. Q.B. 260; as to a fraudulent release to deprive a solicitor of his costs, see *Games, Ex parte*, 3 H. & C. 294; 33 L.J. Ex. 317.

(*l*) 46 & 47 Vict. c. 52, s. 18.

(*m*) Sect. 19.

(*n*) *Ray* v. *Jones*, 19 C.B. N.S. 416; 34 L.J. C.P. 306.

(*o*) *Ailoffe* v. *Scrimpshire*, Carth. 63; *Deux* v. *Jefferies*, Cro. Eliz. 352; *Walker* v. *Nevill*, 3 H. & C. 403; 34 L.J. Ex. 73.

(*p*) *Walmesley* v. *Cooper*, 11 Ad. & E. 221; 10 L.J. Q.B. 49.

but a covenant only, because he covenants only not to sue A., but does not covenant not to sue B.; for the covenant is not a release in its nature, but only by construction, to avoid circuity of action" (*q*). A covenant not to sue one of two joint tortfeasors does not operate as a release so as to discharge the other; and an agreement to accept a sum of money from one of two joint tortfeasors in full discharge of his liability, without prejudice to the right to claim against the other, ought to be construed, not as a release, but as a covenant not to sue (*r*).

Covenants not to sue for limited time.—Covenants and agreements to suspend a right of action for some specified period of time are deemed to be contracts to forbear from suing for the time named, and are consequently not pleadable in bar of an action brought contrary to the agreement, but give rise to a cross claim for the damages resulting from the creditor's suing during the time he had agreed not to sue (*s*). But, where a deed contains a covenant for the payment of money on a particular day, subject to a proviso that no action shall be brought till after the expiration of a month, an action cannot be brought before the end of the month, as the proviso must be construed as extending the time of payment (*t*). The ancient principle of law, that a right of action once existing, and by act of the party suspended for ever so short a time, is extinguished and gone for ever, does not hold in all cases, as clauses of forfeiture and defeasance are frequently annexed to contracts if they are attempted to be put in suit before the expiration of a certain period, in which case the right to sue is effectually suspended for the limited time. There are also cases in the books where, a contract having been broken, a new contract between the debtor and creditor and additional parties, creating new rights and liabilities, has been made and accepted as a conditional accord and satisfaction and discharge of the cause of action, so that, if the new contract is carried out by the new parties in all its integrity, the original cause of action is extinguished; and, if it is not fully carried out, the party is remitted to his original right of action upon the original contract. To the general rule of law, also, that a cause of action once accrued cannot be suspended, there is an exception in favour of bills of exchange and promissory notes (*u*).

(*q*) *Fitzgerald* v. *Trant*, 11 Mod. 254; *Lacy* v. *Kinaston*, 12 *ib.* 552; *Dean* v. *Newhall*, 8 T.R. 171; *Hutton* v. *Eyre*, 6 Taunt. 294.

(*r*) *Duck* v. *Mayeu*, (1892) 2 Q.B. 511; 62 L.J. Q.B. 69.

(*s*) *Ford* v. *Beech*, 17 L.J. Q.B. 116; 11 Q.B. 866; *Webb* v. *Salmon*, 19 L.J. Q.B. 34; *Thimbleby* v. *Barron*, 3 M. & W. 216; 7 L.J. Ex. 128; *Ayliff* v. *Scrimsheire*, 1 Show. 43.

(*t*) *Foley (Lady)* v. *Fletcher*, 3 H. & N. 777; 28 L.J. Ex. 100.

(*u*) *Belshaw* v. *Bush*, 11 C.B. 201; 22 L.J. C.P. 24; *James* v. *Isaacs*, 12 C.B. 800; 22 L.J. C.P. 73; *Tatlock* v. *Smith*, 3 Moo. & P. 676; 8 L.J. (O.S.) C.P. 54; *Stracey* v. *Bank of England*, 4 Moo. & P. 639; 8 L.J. (O.S.) C.P. 234. As to payment in due course, see 45 & 46 Vict. c. 61, s. 59, *post*, p. 1115.

Release by novation and substitution.—The making of a new contract, and the substitution thereof in the place and stead of the original contract, before breach of the latter, may operate as a discharge and extinguishment of the original contract (*x*). One deed may be substituted for another, or a simple contract may be substituted for a deed; but both parties must consent to the substitution (*y*).

Substitution of new contract in place of original contract.—When several persons are mutually indebted to each other, they may, by agreement amongst themselves, vary their respective liabilities, and substitute one debt in the place of another. By a mutual arrangement between all the parties interested—creditor, debtor, and payee—the original debts are extinguished; and the annihilation of those debts is a sufficient consideration for the promise to pay the new debt (*z*). Where a quantity of gin had been sold by the plaintiff to a publican, who, being unable to pay for it, handed it over to the defendant, and, when the plaintiff applied for payment, the publican told the plaintiff that the defendant would pay him, and the latter, happening to come into the room during the conversation, confirmed the publican's statement, and agreed to keep the gin and pay for it, and the plaintiff assented to the arrangement, it was held that there was a substitution by consent of all parties of a new contract of sale and new purchaser, in lieu of the original contract (*a*).

In an action by two plaintiffs upon an account stated, it appeared that the defendant was indebted to Moor, one of the plaintiffs, in a large sum of money, and afterwards the other plaintiff was admitted a partner with Moor, and then a further debt was contracted by the defendant with the new partnership, after which an account was settled between the defendant and the two plaintiffs, and it was agreed that all the money due to Moor before his partnership with the other plaintiff should be taken into that account, and that the balance should be paid to both the plaintiffs; and it was held that the action was properly brought by them jointly (*b*). But, if there had been no special agreement or consent on the part of the defendant to substitute the one debt for the other, the plaintiffs would not, by reason of any agreement amongst themselves, have been entitled to join in the action (*c*). But there must be a mutual agreement between all the three parties, the creditor, his immediate

(*x*) *Taylor* v. *Hilary*, 1 C. M. & R. 741; 4 L.J. Ex. 72.

(*y*) *The Blairmore*, (1898) A.C. 593; 60 L.J. P.C. 96.

(*z*) Buller, J., *Tatlock* v. *Harris*, 3 T.R. 180. As to assignment of debts, see Jud. Act, 1873, s. 25, *post*, p. 203.

(*a*) *Browning* v. *Stallard*, 5 Taunt. 450; *Wilson* v. *Coupland*, 5 B. & Ald. 228; *Thompson* v. *Percival*, 5 B. & Ad. 925; 3 L.J. K.B. 98.

(*b*) *Moor* v. *Hill*, 2 Peake, 10.

(*c*) *Wilsford* v. *Wood*, 1 Esp. 183.

debtor, and the intended new debtor, for the substitution of the new debt in the place and stead of the original debt; for, if that continues to subsist, there is no consideration for the new contract, and no valid substitution takes place, and the case, as regards the intended new debtor, "is no more than if I promise a stranger to whom I do not owe anything, that, if he will accept me to be his debtor for 60*l.*, I will pay it to him: yet this is but a *nudum pactum*, because I was not indebted to him before; and my promise to pay, if the other will receive it, is nothing but a mere voluntary promise, which does not bind me at all" (*d*). Where A. and B. were both indebted to C., and B. was also indebted to A., and it was agreed between B. and C. only that B. should take A.'s debt upon himself, and pay the amount thereof to C., it was held that there was no substitution of the one debt for the other, as A. had not assented to the arrangement, and B.'s liability to him still continued (*e*). If the agreement be made between A. and B., without the concurrence of C., the situation of the parties is not altered (*f*). An agreement between a creditor and two joint debtors, that the sole and separate liability of one of them shall be substituted in extinguishment and discharge of the joint liability, is a valid agreement, founded on a good consideration, "as the sole security of one of two joint debtors may be more beneficial to the creditor than the joint responsibility of both" (*g*).

Drafts and orders for money operating by way of novation and substitution.—An order addressed by a creditor to the defendant, his debtor, given to the plaintiff, to whom such creditor is indebted, in satisfaction of his debt, and presented by the plaintiff to the defendant, and assented to by the latter, operates as a substitution of a new debt in the place of the original demand. But the mutual assent of the three parties is essential to the novation, as the original demand is not extinguished and annihilated, if the consent and concurrence of any one of the three are wanting. By the common law, there must be not only an assent on the part of the debtor to whom the order is addressed, but there must be also the express concurrence of the person in whose favour the order is made, manifesting his assent to the change of liability. If he is not a party to the contract, the original debt is not released and extinguished; there is no novation, and can be no substitution (*h*).

(*d*) *Forth* v. *Stanton*, 1 Saund. 211; *Thomas* v. *Shillibeer*, 1 M. & W. 124; 5 L.J. Ex. 138.

(*e*) *Cuxon* v. *Chadley*, 3 B. & C. 591; 3 L.J. (O.S.) K.B. 63; *Liversidge* v. *Broadbent*, 4 H. & N. 605; 28 L.J. Ex. 332.

(*f*) *Price* v. *Easton*, 4 B. & Ad. 433; 2 L.J. K.B. 51; *Cockrane* v. *Green*, 30 L.J. C.P. 97; 9 C.B. N.S. 448.

(*g*) *Lyth* v. *Ault*, 7 Exch. 673; 21 L.J. Ex. 217.

(*h*) *Williams* v. *Everett*, 14 East, 597; *Noble* v. *Nat. Disct. Co.*, 5 H. & N. 228; 29 L.J. Ex. 210.

Where a landlord, being indebted to the plaintiff, gave to the plaintiff an order upon the defendant, his tenant, to pay the plaintiff his, the landlord's, debt to the plaintiff out of the next rent that would become due, and the plaintiff transmitted this order to the defendant, but had not any communication with him upon the subject, but at the next rent-day the defendant produced the order to his landlord, and told the landlord he would pay the amount of it to the plaintiff, and then paid the difference between the amount of the order and the sum due for the rent, and thereupon obtained a receipt from the landlord for the whole amount of the rent, and the plaintiff subsequently applied to the defendant for the debt specified in the order, when the defendant refused to pay it, and the plaintiff then brought an action for the money, it was held that, as there had been no personal communication between the plaintiff and defendant upon the subject of the order, and the plaintiff had not consented to look to the defendant instead of his original debtor for the payment of the money mentioned therein, he could not maintain his action (*i*). And, where the plaintiff, being indebted to one Jones, gave the defendant 8*l.* to pay Jones, and the defendant gave the plaintiff a written promise to pay the money, but before he had communicated with Jones and promised to pay him the money, and before Jones had consented to look to him instead of the plaintiff for the amount, the plaintiff countermanded the order, and required the defendant to return him the money, it was held that he was entitled so to do, and that the defendant was bound to pay it back, inasmuch as he had not placed himself under any engagement with Jones to pay it to him (*k*).

When, however, the debtor or the depositary of the money has assented to the order, and promised the payee or remittee to hold the amount specified at his disposal, the authority to pay the money is irrevocable, the original debt is discharged, and none of the parties can then recede from the arrangement (*l*). D. applied to the plaintiff to lend him the sum of 70*l.*, but the plaintiff refused to advance it without security, whereupon D. gave to the plaintiff an order upon the defendants, who were his debtors, to pay to the plaintiff the amount of their debts. This order was forwarded by the plaintiff to the defendants, with a request that they would acknowledge their having given him, the plaintiff, credit for it. The defendants accepted the order, and promised that they would pay all the money that they owed D. to the plaintiff, and the

(*i*) *Wharton* v. *Walker*, 4 B. & C. 163; 3 L.J. (O.S.) K.B. 183.

(*k*) *Owen* v. *Bowen*, 4 C. & P. 93; *Cobb* v. *Becke*, 6 Q.B. 930; 14 L.J. Q.B. 108.

(*l*) *Meert* v. *Moessard*, 1 Moo. & P. 8, 11; 6 L.J. (O.S.) C.P. 3; *Peate* v. *Dicken*, 1 C. M. & R. 430; 4 L.J. Ex. 28; *Lacy* v. *M'Neile*, 4 Dowl. & Ry. 9; *Dickinson* v. *Marrow*, 14 M. & W. 719.

plaintiff then advanced 70*l.* to D. Subsequently the defendants refused to pay the amount of the debt to the plaintiff, and, an action having been brought against them by the latter in his own name, it was held that he was entitled to recover it (*m*).

A sum of money being due from the defendant to a Mr. Streather upon a balance of account, the exact amount of which had not been ascertained, Streather gave to Messrs. Solly and Sons, to whom he was largely indebted, a letter addressed to the defendant, saying, "I shall be obliged by your paying to Messrs. Isaac Solly and Sons the balance due to me for building; and their receipt shall be a sufficient discharge to you." This letter was forwarded by Solly and Sons to the defendant, inclosed in a letter from themselves, requesting "his due attention to the order." The defendant replied, "I received your letter, inclosing Mr. Streather's, and shall be happy to make the payment to you, instead of to him, as requested;" and it was held that the defendant, after his receipt and acceptance of the order, held the money mentioned therein at the disposal of Messrs. Solly and was accountable to them, and to no one else, for the amount deposited in his hands (*n*).

In these cases, when, by the accession and agreement of all the parties interested, the original or intermediate debt is extinguished, the promise to pay the amount thereof to a third party is not a promise to answer for the debt of another within the Statute of Frauds, as no such debt exists: it is a new, original, and independent engagement, founded upon the merger and extinguishment of the pre-existing debt or demand (*o*). If, however, a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him (*p*). An order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding, equitable assignment of so much of the fund (*q*).

Novation in case of Life Assurance Companies.—By 35 & 36 Vict. c. 41, s. 7, where a company either before or after the passing of that Act has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy, is by reason of any such payment made after the passing of that Act, or by reason of

(*m*) *Israel* v. *Douglas*, 1 H. Bl. 239.

(*n*) *Crowfoot* v. *Gurney*, 2 M. & Sc. 473; 2 L.J. C.P. 21; *Hutchinson* v. *Heyworth*, 9 Ad. & E. 375; 8 L.J. Q.B. 17.

(*o*) *Anstey* v. *Marden*, 1 B. & P. N.R. 131.

(*p*) *South, Ex parte*, 3 Swans. 392.

(*q*) *Burn* v. *Carvalho*, 4 My. & Cr. 690, 702; 9 L.J. Ch. 65; *Addison* v. *Cox*, L.R. 8 Ch. 76; 42 L.J. Ch. 291.

any other act done after the passing of that Act, to be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorised.

Substituted performance of something different from what was stipulated to be done.—If the obligor of a bond has bound himself to pay 20,000*l.* by a day named, it has been held not to be essential to the defeasance of the bond, to show that the money was paid; but that it is enough for the obligor to show that, before or upon the day appointed for payment of the money, he gave to the obligee "a horse, or a cup of silver, or a ring of gold, or any such other thing, in full satisfaction of the money, and that the latter received it in satisfaction, though the horse or the other thing were not of the twentieth part of the value of the money" (*r*). Where a defendant has covenanted to pay a sum of money to the plaintiff, it is competent to the defendant to show that, at the time appointed for the payment of the money, the defendant tendered to the plaintiff, and the plaintiff accepted and received, part payment in goods in lieu of money (*s*).

Discharge by accord and satisfaction.—If, before action, the defendant delivers to the plaintiff, and the plaintiff accepts from the defendant either money or chattels, or securities for money, in satisfaction and discharge of the debt or cause of action, that is a good answer to an action for a debt or for damages for a breach of contract, whether the contract be under seal, or whether it be a simple contract, and whether the action be founded on a deed, or on a parol agreement (*t*). If a creditor tells his debtor that he will make him a present of the debt, and desires him to purchase a stamped receipt for the amount of the debt in full of all demands, and the debtor purchases the receipt, fills it up, and takes it to the creditor, who signs it, the purchase of the paper and stamp, and the filling up of the receipt at the request of the creditor, do not amount to an accord and satisfaction of the debt (*u*). To constitute acceptance there must be an act of the will; but, if the party accepts the thing, though but for a moment, in satisfaction, he cannot afterwards, by his subsequent dissatisfaction, get rid of the effect of it (*x*). But, where the defendant sent to the plaintiff a

(*r*) Litt. s. 344; and see Co. Litt. 213, a; *Anon.*, Dyer, 56, b, pl. 18.

(*s*) *Smith* v. *Battams*, 26 L.J. Ex. 232.

(*t*) *Blake's case*, 6 Co. 43, b; 44, a; Bro. Abr. ACCORD, pl. 11; *Andrew* v. *Boughey*, Dyer, 75, b; *Lavery* v. *Turley*, 6 H. & N. 239; 30 L.J. Ex. 49.

(*u*) *Foster* v. *Dawber*, 20 L.J. Ex. 385; 6 Exch. 839.

(*x*) *Hardman* v. *Bellhouse*, 9 M. & W. 600; 11 L.J. Ex. 135.

cheque for a less amount than the plaintiff claimed, stating that it was in full of all demands, and the plaintiff kept the cheque, but declared that he did so on account, it was held that this was not conclusive evidence of an accord and satisfaction of the claim (*y*).

An accord executory, or a contract to do what the party has already bound himself to perform, and has left unperformed, has been held to be no bar to an action (*z*), as where an agreement had been made between the plaintiff and defendant to submit the plaintiff's claim to arbitration, and to abide by the award, and arbitrators had been appointed, who had taken upon themselves the burthen of the reference, and a reasonable time for making their award had not elapsed (*a*); or where it was agreed between the plaintiff and defendant that the defendant should pay the plaintiff 3*l.*, and his solicitor's bill, and he paid the 3*l.*, and was always ready to pay the bill, but the plaintiff never showed him the bill (*b*); or where the defendant irrevocably constituted the plaintiff his agent to receive money due to the defendant to an amount exceeding the debt, and authorized the plaintiff to retain the debt out of such money when received, and the plaintiff might and ought to have received such money pursuant to the authority confided to him by the defendant, but did not receive it in consequence of his own default, whereby the money became wholly lost to the defendant (*c*); or where the defendant gave, and the plaintiff accepted, an order from the defendant on some third party for the delivery of certain securities for money, to be received by the plaintiff in satisfaction and discharge of the cause of action, and the securities would have been delivered to the plaintiff if he had presented the order, but the plaintiff kept the order in his hands an unreasonable time without presenting it, whereby the securities became wholly lost to the defendant (*d*). But, if, by a subsequent executory simple contract, made and accepted in satisfaction of a simple contract debt or cause of action, increased liabilities are undertaken by the defendant, if an additional sum of money is agreed to be paid, or additional acts and duties are agreed to be performed, for the non-performance of which an action will lie against the defendant, or if a surrender or exchange of securities has been agreed upon, or an apportionment of property and debts, this new contract, with the remedies thereupon, will constitute a

(*y*) *Day* v. *McLea*, 22 Q.B.D. 610; 58 L.J. Q.B. 293.

(*z*) *Bayley* v. *Homan*, 3 Bing. N.C. 915; 6 L.J. C.P. 309.

(*a*) *Harris* v. *Reynolds*, 7 Q.B. 71; 14 L.J. Q.B. 241.

(*b*) *Cock* v. *Honychurch*, T. Raym. 203; *Carter* v. *Wormald*, 1 Exch. 86; 16 L.J. Ex. 231.

(*c*) *Gifford* v. *Whittaker*, 6 Q.B. 249; 13 L.J. Q.B. 325.

(*d*) *Griffiths* v. *Owen*, 13 M. & W. 58; 13 L.J. Ex. 345.

good accord and satisfaction (*e*). The substitution, by agreement of all parties, of the separate liability of one of several persons jointly liable, may be a good satisfaction and discharge of the joint liability of the others (*f*).

Delivery and acceptance of specialty securities, or of additional simple contract securities, in satisfaction and discharge of simple contract debts and causes of action, pursuant to the parol agreement of the parties in that behalf, constitute a good accord and satisfaction of the simple contract debt or cause of action, by reason of the superiority of the specialty security to the simple contract, provided the specialty security is co-extensive in its operation with the antecedent simple contract, and was given and accepted in lieu thereof, and not as a collateral security (*g*). But, if the securities are accepted on the faith of a representation by the other party that they are binding, and they turn out not to be so, the transaction may be repudiated in equity by the party who has been deceived (*h*). Where a debtor by simple contract executed a deed in which he admitted the amount of his debt and secured it by an assignment of property to his creditor, but the deed contained no agreement to pay the debt, it was held that the deed did not make the debt a specialty (*i*). The delivery and acceptance of a negotiable security, in satisfaction and discharge of an existing debt, is a good accord and satisfaction, although such acceptance is for a less amount than the debt (*k*). But, in the absence of any agreement to the contrary, the acceptance of a bill of exchange only suspends the remedy for a debt (*l*). A bill of exchange received by one of two joint creditors will be a good satisfaction and discharge of the debt due to both, if the one creditor agrees to receive, and does receive, the bill in satisfaction and discharge of the joint debt (*m*).

Composition deeds and agreements.—When creditors covenant or agree by deed to take a certain specified composition of so much in the pound on the amount of their debts, the operation of the deed as a satisfaction and discharge of the debt is in general made

(*e*) Com. Dig. ACCORD, B. 4; as to pleading an agreement by way of accord and satisfaction, see *Barclay* v. *Bank of New South Wales*, 5 App.Cas. 374.

(*f*) *Lyth* v. *Ault*, 21 L.J. Ex. 217; 7 Exch. 669.

(*g*) *Price* v. *Moulton*, 10 C.B. 561; 20 L.J. C.P. 102; *Yates* v. *Aston*, 4 Q.B. 196; 12 L.J. Q.B. 160; *Commissioners of Stamps* v. *Hope*, (1891) A.C. 476; 60 L.J. P.C. 44.

(*h*) *Stears* v. *South Essex Gas Co.*, 9 C.B. N.S. 180; 30 L.J. C.P. 49.

(*i*) *Marryat* v. *Marryat*, 28 Beav. 224; 29 L.J. Ch. 665; *Jackson* v. *N. E. Ry.*, 7 Ch.D. 573; 47 L.J. Ch. 303.

(*k*) *Sibree* v. *Tripp*, 15 M. & W. 35; 15 L.J. Ex. 318; *Curlewis* v. *Clark*, 3 Exch. 375; 18 L.J. Ex. 144; *Soward* v. *Palmer*, 2 Moore, 274; *Goddard* v. *O'Brien*, 9 Q.B.D. 37; *Bidder* v. *Bridges*, 37 Ch.D. 406; 57 L.J. Ch. 300.

(*l*) *London, Birmingham, and South Staffordshire Bank, In re*, 34 L.J. Ch. 418; 34 Beav. 332.

(*m*) *Thompson* v. *Percival*, 5 B. & Ad. 925; 3 L.J. K.B. 98.

dependent upon the composition being paid at the time appointed, so that, if the debtor makes default in carrying into effect his part of the contract, the deed will not operate as a satisfaction and discharge, but the creditors will be remitted to their original rights. An agreement by simple contract on the part of a creditor, to accept a composition of so much in the pound on the amount of his debt, cannot be set up against an action of debt upon a bond or covenant (*n*); for a bond or covenant, or a specialty debt, cannot be satisfied and discharged by parol agreement; and in the case of a simple contract debt, if the agreement for the composition is only between the debtor and a single creditor, it is inoperative as a discharge of the debt, as there is no consideration for the agreement by the creditor, on receiving part of the debt, to give up the residue (*o*); but, if some additional security is taken, or the liability of some new party is introduced into the agreement, the case is different (*p*). When some or all the creditors join together and agree to take a portion of the debts due to them, in satisfaction and discharge of such debts, and not to sue the debtor, the joint agreement to accept the composition and relieve the debtor from his embarrassments is a sufficient consideration to each of them for the agreement of each to accept the composition and discharge the debtor (*q*); and, if the agreement is carried into effect by the receipt of the composition, there is a good accord executed, which is pleadable in discharge of any action brought by a creditor who is a party to the composition agreement for the recovery of the residue of his debt. If, however, the composition is not paid, the agreement will be a mere accord executory, producing no satisfaction of the debt, and the creditors will be remitted to their original rights (*r*): and, when the agreement is founded on the joint assent of all the creditors, all must sign, or none will be bound thereby (*s*).

If a debtor makes an assignment of all his property to a trustee for the benefit of such of his creditors as shall come in and execute the deed, and any one of the creditors communicates with the trustee, and assents by word of mouth to the transaction, so as to create the relationship of trustee and *cestui que trust* between himself and the trustee, the assignment cannot afterwards be revoked (*t*). And, where the party taking the legal interest under the deed has also a beneficial interest, the property will pass to him, unless he

(*n*) *Lowe* v. *Eginton*, 7 Pr. 604.
(*o*) *Lynn* v. *Bruce*, 2 H. Bl. 319.
(*p*) *Steinman* v. *Magnus*, 11 East, 393.
(*q*) *Norman* v. *Thompson*, 4 Exch. 755; 19 L.J. Ex. 193.
(*r*) *Heathcote* v. *Crookshanks*, 2 T.R. 24; *Garrard* v. *Woolmer*, 8 Bing. 264; 1 M. & Sc. 336; *Shipton* v. *Casson*, 5 B. & C. 378; 4 L.J. (O.S.) K.B. 199; and see 46 & 47 Vict. c. 52, s. 18, *post*, p. 182.
(*s*) *Boyd* v. *Hind*, 25 L.J. Ex. 246; in err., 1 H. & N. 938; 26 L.J. Ex. 164.
(*t*) *Harland* v. *Binks*, 15 Q.B. 720; 20 L.J. Q.B. 126.

expressly disclaims (*u*). When the composition agreement provides additional security for the payment of the composition, beyond what the creditors previously possessed for the payment of the entire debt—if, for instance, a surety comes forward and pledges himself to the payment of the composition, or if the debtor assigns all his property to trustees, to be divided amongst his creditors (*x*)—it is for a jury to determine whether the agreement itself, with the additional security thereby provided for the payment of the composition, was accepted as a substitution for, or in satisfaction and discharge of, the original debts, or whether it was the performance of the agreement by the actual payment and acceptance of the composition itself, which was offered on the one side, and accepted on the other, in satisfaction and discharge. In the former case, the right to sue for the original debts would be extinguished from the time of the making of the agreement; and the remedy would be upon the agreement for the recovery of the instalment. In the latter case, there would be no satisfaction or discharge of the debts until the composition was actually paid and received (*y*).

Where, by an agreement between a debtor and his creditors, the debtor was to give, and the creditors to accept, certain securities for the payment of a certain portion of the debts due to each, and the creditors were to forbear from enforcing their original demands, it was held that this was a new agreement substituted in the place of the original contracts between the debtor and his creditors, which were extinguished, and that the creditors consequently could no longer sue for their original debt (*z*). And, where a creditor signed an agreement to accept a composition of five shillings in the pound on the amount of his debt, payment of such composition to be secured by the joint note of hand of the debtor and his father, and the joint note of hand was accordingly delivered to him, it was held that this amounted to an accord and satisfaction of the original debt, and was a complete discharge of the debtor's liability in respect thereof (*a*). If a third party comes forward and guarantees the payment of a certain sum to creditors who execute the deed by a day named, time is of the essence of the contract, and the benefit of the deed is confined to those who execute it by the day named (*b*). Where the plaintiff by his own act has prevented the satisfaction from being made pursuant to the terms of the accord or agreement, the accord will, as to him, be

(*u*) *Siggers* v. *Evans*, 5 E. & B. 377; 24 L.J. Q.B. 305. See also *Standing* v. *Bowring*, 31 Ch.D. 282; 55 L.J. Ch. 218.

(*x*) *Tatlock* v. *Smith*, 3 Moo. & P. 688; 8 L.J. (O.S.) C.P. 54.

(*y*) *Cork* v. *Saunders*, 1 B. & Ald. 50.

(*z*) *Good* v. *Cheesman*, 2 B. & Ad. 334; 9 L.J. (O.S.) K.B. 234.

(*a*) *Lewis* v. *Jones*, 4 B. & C. 506; 3 L.J. (O.S.) K.B. 270.

(*b*) *Williams* v. *Mostyn*, 33 L.J. Ch. 54; *Crowe* v. *Lysaght*, 12 Ir. C.L.R. 481.

deemed to be accomplished, and that which was agreed to be done will be taken as done (*c*). If the amount of the debt is not specified, the creditor will be bound for his actually existing debt which is capable of proof (*d*).

Transfer of property by way of accord and satisfaction.—Where property, real or personal, is accepted in satisfaction of a debt, care should be taken so to assign the property that the transaction may not be avoided either as a fraud on the other creditors of the assignor or as an act of bankruptcy. Every transfer which is fraudulent as against creditors is also void as against the trustee in bankruptcy (*e*).

Accord and satisfaction with one of several joint plaintiffs.—Where several persons are joined together in suing upon a joint cause of action, all are bound by the act of one; and therefore a satisfaction to one of several joint plaintiffs of the joint cause of action in respect of which they sue is in general a satisfaction to all, whether made before or after the commencement of the action (*f*). So, a man may discharge a debt by payment to one of several persons with whom he has contracted jointly; and the inability of bankers so to discharge themselves arises from the peculiar contract and relation which exists between them and their customers (*g*).

SECTION III.

DISCHARGE BY OPERATION OF LAW.

Alterations of contracts in writing (*h*).—If a deed, after it has been signed, sealed, and delivered, or a simple contract in writing, after it has been finally signed, is altered in any material part, with the assent of the parties to it, a fresh contract is created, which puts an end to the first contract (*i*). If, after a party has signed his name to a contract, he makes an interlineation to correct a mistake, or add a new term, it is not necessary for him to re-sign

(*c*) *Reay* v. *White*, 1 Cr. & M. 748; 2 L.J. Ex. 229; *Bradley* v. *Gregory*, 2 Campb. 383.

(*d*) *Harrhy* v. *Wall*, 1 B. & Ald. 103.

(*e*) *Doe* v. *Ball*, 11 M. & W. 531; 12 L.J. Ex. 328.

(*f*) *Wallace* v. *Kelsall*, 7 M. & W. 264; 10 L.J. Ex. 12. See, however, *Steeds* v. *Steeds*, 22 Q.B.D. 537; 58 L.J. Q.B. 302.

(*g*) *Husband* v. *Davis*, 10 C.B. 645; 20 L.J. C.P. 118; *Foley* v. *Hill*, 2 H.L. Cas. 28.

(*h*) As to alterations in bills and notes, see 45 & 46 Vict. c. 61, s. 64, *post*, p. 1158.

(*i*) *Pigot's case*, 11 Co. 27, a.

the contract (*k*). And a contract in writing, which is sufficient within the Statute of Frauds, cannot be affected by a subsequent abortive attempt to put it into a more formal shape (*l*). If the alteration, whether it be by interlineation, addition, drawing a line through the words, or writing new letters on the old, has been made without the consent of the parties against whom the contract is sought to be enforced, either by the plaintiff who sues upon the contract, or by some other person whilst the contract was in the custody or possession of the plaintiff, the alteration will discharge the original contract without substituting any fresh contract in its place. But, if the alteration has been made by the defendant, or some third party, without the plaintiff's consent, whilst the contract was out of the plaintiff's hands, the alteration will have no effect; and the contract will remain as it originally stood, provided the nature of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed (*m*). If the alteration is of such a nature as to render this a matter of doubt, the contract is extinguished as effectually as if the writing had been obliterated (*n*). But it is not every alteration of a contract in a material particular that will avoid it. The erasure, for example, of the name of a shareholder from a deed of settlement of a joint-stock company does not prevent the deed from being evidence that another person, whose name is not erased, is a shareholder of the company (*o*). Where the obligation is by reason of the instrument, and there is a material alteration in the instrument, the instrument is void; but where the obligation is by reason of the parol contract of the parties, the writing may be used as evidence of the terms of the contract notwithstanding the alteration (*p*).

The following alterations and additions to simple contracts, made without the privity and assent of the parties sued thereon, have been held to discharge the contract:—viz., the affixing of a seal to the defendant's signature of a simple contract, whilst the contract is in the possession or under the control of the plaintiff, so as to give the contract the character of a deed (*q*); the striking out of the body of a policy of insurance the time of the warranty of sailing and inserting in the margin of the policy a different time of sailing without the sanction of the underwriter, after the policy

(*k*) *Bluck* v. *Gompertz*, 7 Exch. 862; 21 L.J. Ex. 278.

(*l*) *Heyworth* v. *Knight*, 17 C.B. N.S. 298; 33 L.J. C.P. 298.

(*m*) *Waugh* v. *Bussell*, 5 Taunt. 710; *Hemming* v. *Trenery*, 9 Ad. & E. 934; 8 L.J. Q.B. 160; *Henfree* v. *Bromley*, 6 East, 310; *Raper* v. *Birkbeck*, 15 East, 17.

(*n*) *Davidson* v. *Cooper*, 13 M. & W. 352; 13 L.J. Ex. 276; *Crookewit* v. *Fletcher*, 1 H. & N. 913; 26 L.J. Ex. 153.

(*o*) *Agricult. Cattle Ins. Co.* v. *Fitzgerald*, 16 Q.B. 432; 20 L.J. Q.B. 244.

(*p*) *Pattinson* v. *Luckley*, L.R. 10 Ex. 330; 44 L.J. Ex. 180.

(*q*) *Davidson* v. *Cooper*, *supra*.

has been subscribed by him (*r*); the insertion in a broker's bought and sold note, either by the vendor himself, or by the broker at his request, after the notes have been exchanged, of a stipulation to the effect that damaged articles are to be taken at a valuation (*s*), or that the things sold are to be of the vendor's own manufacture (*t*).

Immaterial alterations.—But, whenever the alteration is immaterial, the contract is not vitiated (*u*). Thus, where a house was by mistake described in a lease as No. 38, whereas it was in fact No. 35, and the 8 was altered into a 5 whilst the lease was in the plaintiff's hands, it was held that the contract was not avoided by the alteration (*x*). A bond remaining in the hands of the agent of the obligor as an escrow, is not avoided by the addition of another obligor, with the assent of the agent, before the delivery of the instrument to the obligee (*y*). And, when a deed *inter partes* is in progress of execution, and an alteration is made to meet the wishes of the parties who are about to execute it, such alteration, if it does not alter the operation of the deed with respect to the parties who have previously executed it, will not avoid the deed (*z*).

Evidence to explain alterations.—It lies upon the party suing upon an altered contract to account for any material alteration that appears upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument.

Cancellation of contracts.—If a contract is cancelled by mistake, the cancellation will be of no effect if the writing is legible. Where the seals of a deed were torn off by a little boy in sport, it was held that the operation of the deed was not affected thereby (*a*). But it is otherwise, if the seals are torn off by the agreement of all the parties to a deed, with intent to cancel the instrument (*b*). If the drawer of a cheque or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces can be pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a

(*r*) *Fairlie* v. *Christie*, 7 Taunt. 416.
(*s*) *Powell* v. *Divett*, 15 East, 29.
(*t*) *Mollet* v. *Wackerbath*, 5 C.B. 191; 17 L.J. C.P. 47. As to alterations in bills and notes discharging the contract, see 45 & 46 Vict. c. 61, s. 64, *post*, p. 1158.
(*u*) *Aldous* v. *Cornwell*, L.R. 3 Q.B. 573; 37 L.J. Q.B. 201; *Suffell* v. *Bank of England*, 9 Q.B.D. 555; 51 L.J. Q.B. 401. As to this case, see *Leeds and County Bank* v. *Walker*, 11 Q.B.D. 84; 52 L.J. Q.B. 590; *post*, p. 1162; *Howgate's Contract, In re*, (1902) 1 Ch. 451; 71 L.J. Ch. 279.
(*x*) *Hutchins* v. *Scott*, 2 M. & W. 816; 6 L.J. Ex. 186; *Sanderson* v. *Symonds*, 4 Moore, 46.
(*y*) *Matson* v. *Booth*, 5 M. & S. 226; *Hudson* v. *Revett*, 5 Bing. 368; 7 L.J. (O.S.) C.P. 145.
(*z*) *Doe* v. *Bingham*, 4 B. & Ald. 676; *Hall* v. *Chandless*, 12 Moore, 316; 4 Bing. 123.
(*a*) *Argoll* v. *Cheney*, Palm. 403.
(*b*) 1 Shep. Touch. 70.

holder for value who has taken it in ignorance of its having been cancelled (*c*).

Alteration of deeds.—If, after a deed is executed, material blanks purposely left in it are filled up with the assent of all the parties to the instrument, or if a schedule is added to the deed describing certain property upon which the deed is to operate, and the deed is insensible and inoperative without the schedule (*d*), or if a new covenantor is added (*e*), the deed must be re-delivered (*f*), and must have a fresh stamp (*g*); but blanks left for filling in dates previously agreed upon, or the names of persons not being parties to the deed, may be filled up after the execution of the instrument (*h*).

Merger of simple contract in contract under seal.—If, after a simple contract or promise has been entered into or made, a contract under seal is executed for the performance of the same act or duty as that stipulated for by the simple contract, the simple contract becomes merged in the higher security, and can no longer be enforced (*i*), provided the contracts are between the same parties and the remedies upon them are co-extensive (*k*); but a contract under seal from some third party, given as a collateral security, will not merge a simple contract or promise (*l*); nor will a bond or a deed for a debt different from the debt secured by the simple contract (*m*). A debt secured by a specialty may be further secured by a promissory note, provided such note be given after the execution of the deed.

Judgment recovered—County Court judgments.—If there be a breach of contract by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, which is changed into matter of record, and the inferior remedy is merged in the superior (*n*), provided the

(*c*) *Ingham* v. *Primrose*, 28 L.J. C.P. 295; 7 C.B. N.S. 82; see 45 & 46 Vict. c. 61, s. 63, *post*, p. 1158. As to meaning of "cancel," see *Jamieson*, *In re*, (1895) 2 Q.B. 90; 64 L.J. Q.B. 560.

(*d*) *Weekes* v. *Maillard*, 14 East, 572.

(*e*) *Gardner* v. *Walsh*, 5 E. & B. 83; 24 L.J. Q.B. 285.

(*f*) *Markham* v. *Gonaston*, 9 East, 354, n.; *Hudson* v. *Revett*, 5 Bing. 368; 7 L.J. (O.S.) C.P. 145; *Hall* v. *Chandless*, *supra*; *Keele* v. *Wheeler*, 13 L.J. C.P. 170; 8 Sc. N.R. 323; *Enthoven* v. *Hoyle*, 21 L.J. C.P. 100; 13 C.B. 373.

(*g*) *French* v. *Patton*, 9 East, 351.

(*h*) *Adsetts* v. *Hives*, 33 Beav. 56.

(*i*) *Schack* v. *Anthony*, 1 M. & S. 573; *Price* v. *Moulton*, 10 C.B. 561; 20 L.J. C.P. 102; *Saunders* v. *Milsome*, L.R. 2 Eq. 573; *Commissioners of Stamps* v. *Hope*, (1891) A.C. 476; 60 L.J. P.C. 44. See *Marryat* v. *Marryat*, 28 Beav. 224; 29 L.J. Ch. 665, *ante*, p. 170.

(*k*) *Ansell* v. *Baker*, 15 Q.B. 20; *Sharpe* v. *Gibbs*, 16 C.B. N.S. 527; *Boaler* v. *Mayor*, 19 C.B. N.S. 76; 34 L.J. C.P. 230.

(*l*) *Twopenny* v. *Young*, 3 B. & C. 211; 5 D. & R. 261; *Holmes* v. *Bell*, 3 Sc. N.R. 479.

(*m*) *Norfolk Ry.* v. *M'Namara*, 3 Exch. 630.

(*n*) *King* v. *Hoare*, 13 M. & W. 504, 506; 14 L.J. Ex. 29; *Buckland* v. *Johnson*, 15 C.B. 163; 23 L.J. C.P. 264; *Kitchen* v. *Campbell*, 3 Wils. 308; 2 W. Bl. 827; *Stewart* v. *Todd*, 16 L.J. Q.B. 327; 9 Q.B. 767. It does not extinguish the debt for the purpose of bankruptcy proceedings: *King and Beesley*, *In re*, (1895) 1 Q.B. 189.

cause of action in the two suits is identical (*o*). If judgment is given for the defendant, such judgment operates as an estoppel against the plaintiff, and precludes him from maintaining a second action for the same cause (*p*). A judgment, therefore, in the county court is a bar to an action on the same subject-matter in any other court (*q*).

A judgment recovered against one of two or more joint debtors or joint contractors may (though unsatisfied) be pleaded in bar to any action brought against the others upon the joint contract, or for the recovery of the joint debt (*r*), even when one of the contractors is a married woman contracting in respect of her separate property (*s*); and even where the judgment against one of the debtors has been obtained by consent in the same action (*t*). But where there are joint and several contracts, or joint and several debts, or where the several parties are independently and collaterally bound by the same obligation, the recovery of judgment against one of such separate contractors or separate debtors is no bar to an action against the others, until the judgment has been satisfied (*u*). And, if one of such joint debtors was beyond seas at the time the cause of action arose, the recovery of judgment against those who were not beyond seas will not prevent an action being brought against him on his return (*x*). A judgment against one of two joint guarantors upon a negotiable instrument given by him for the amount jointly due under the guarantee is, if unsatisfied, no bar to an action against the joint guarantors, or either of them, upon the guarantee (*y*).

Where the plaintiff had two demands against the defendant, one on a promissory note and the other for the price of goods sold, and the defendant suffered judgment by default, and, on executing a writ of inquiry, evidence was only given on the first demand, and the plaintiff recovered damages adapted to that amount, the other demand for the goods remaining unsatisfied, it was held that, as there were two distinct demands not in the least blended together,

(*o*) *Slade's case*, 4 Co. 94, b; *Phillips* v. *Berryman*, 3 Doug. 288; *Nelson* v. *Couch*, 33 L.J. C.P. 46; 15 C.B. N.S. 99.

(*p*) *Vooght* v. *Winch*, 2 B. & Ald. 662; *Overton* v. *Harvey*, 9 C.B. 324; 19 L.J. C.P. 256; *Greathead* v. *Bromley*, 7 T.R. 456; *Langmead* v. *Maple*, 18 C.B. N.S. 255; *Newington* v. *Levy*, L.R. 6 C.P. 180; 40 L.J. C.P. 29.

(*q*) *Austin* v. *Mills*, 9 Exch. 288; 23 L.J. Ex. 42.

(*r*) *King* v. *Hoare*, 13 M. & W. 494; 14 L.J. Ex. 29; *Kendall* v. *Hamilton*, 4 App.Cas. 504; 48 L.J. C.P. 705; *Hammond* v. *Schofield*, (1891) 1 Q.B. 453; 60 L.J. Q.B. 539.

(*s*) *Hoare* v. *Niblett*, (1891) 1 Q.B. 781; 60 L.J. Q.B. 565.

(*t*) *McLeod* v. *Power*, (1898) 2 Ch. 295; 67 L.J. Ch. 551; following Bowen, L.J., in *Hodgson*, *In re*, 31 Ch.D. 177; 55 L.J. Ch. 241.

(*u*) *King* v. *Hoare*, *supra*; *Bermondsey* (*Vestry*) v. *Ramsay*, L.R. 6 C.P. 247; 40 L.J. C.P. 206.

(*x*) 19 & 20 Vict. c. 97, s. 11.

(*y*) *Wegg-Prosser* v. *Evans*, (1895) 1 Q.B. 108; 64 L.J. Q.B. 1; following *Drake* v. *Mitchell*, 3 East, 251; and overruling *Cambefort* v. *Chapman*, 19 Q.B.D. 229; 56 L.J. Q.B. 639.

and the plaintiff had failed through inadvertence in proving one of them, he might maintain a second action for it (*z*). "If a plaintiff offers no evidence in the first action on a particular part of his claim, then a new action may be brought for such part; but, if he does offer evidence and fails, he is prevented from bringing a fresh action" (*a*). Where a landlord sued his tenant for rent, and included in his declaration the ordinary money counts, and gave particulars of the value of a quantity of stone which had been carried away by the defendant, but at the trial took a verdict for the rent only, and then brought an action on the case, and delivered particulars in the second action for the same stone exactly corresponding with the particulars in the former action, it was held that the recovery in the first action was no bar to the second action (*b*). Whenever the same point was not in issue in the prior action, the judgment in such prior action can have no effect upon the second action (*c*).

If all matters in difference between a plaintiff and defendant are referred to an arbitrator, the award is no bar to any cause of action that was not inquired into before the arbitrator (*d*); but it is conclusive as to all matters which it professes to decide (*e*). An award, however, does not, like a judgment, change the nature of a debt; and, consequently, an action may, notwithstanding an award fixing the amount of the debt, be maintained, on the original consideration, to recover the amount awarded (*f*). Where, however, a claim for unliquidated damage has been referred to arbitration, an award fixing the amount and creating a debt between the parties extinguishes the original demand for unliquidated damage (*g*).

Foreign and colonial judgments.—Judgments in foreign courts are not upon the same footing as judgments in our own courts of record. They do not bar or stay an action *ex contractu* (*h*). But judgment recovered in a foreign court and payment of the sum recovered is a good bar to the same cause of action (*i*). A judgment of a foreign or colonial court is conclusive *inter partes* (*k*), unless it can be shown that the court had no jurisdiction, or that it

(*z*) *Seddon* v. *Tutop*, 6 T.R. 609.
(*a*) *Stafford* v. *Clark*, 9 Moore, 738; 3 L.J. (O.S.) C.P. 48.
(*b*) *Hadley* v. *Green*, 2 Cr. & J. 376; 1 L.J. Ex. 137.
(*c*) *Carter* v. *James*, 13 M. & W. 137; 13 L.J. Ex. 373.
(*d*) *Ravee* v. *Farmer*, 4 T.R. 146.
(*e*) *Commings* v. *Heard*, L.R. 4 Q.B. 669; 39 L.J. Q.B. 9.
(*f*) *Allen* v. *Milner*, 2 Cr. & J. 47; 1 L.J. Ex. 7.
(*g*) *Gascoyne* v. *Edwards*, 1 Y. & J. 19.
(*h*) *Hall* v. *Odber*, 11 East, 124; *Smith* v. *Nicolls*, 5 Bing. N.C. 208; 8 L.J. C.P. 92; 2 Smith's L. C., pp. 765—800 (ed.10); *Plummer* v. *Woodburne*, 4 B. & C. 625; 4 L.J. (O.S.) K.B. 6; *Vanquelin* v. *Bouard*, 33 L.J. C.P. 78; 15 C.B. N.S. 341; *Scott* v. *Pilkington*, 2 B. & S. 11, 41; 31 L.J. Q.B. 81, 89.
(*i*) *Barber* v. *Lamb*, 8 C.B. N.S. 95; 29 L.J. C.P. 234.
(*k*) *Post*, p. 420.

was obtained by fraud, or perhaps that it was given against good faith and natural justice (*l*).

Discharge by death.—Contracts for personal services and contracts founded exclusively on the personal skill of the parties die with them, and do not give rise to any liability on the part of their personal representatives, such as contracts by authors to write a book for a publisher, contracts by physicians to cure a patient of a particular disease, contracts by teachers and masters to instruct their pupils or apprentices, promises of marriage, &c. (*m*). These contracts are strictly personal to the deceased, and the executors cannot be called on to perform them. A contract made by a firm consisting of two partners, for the employment of an agent in their business for a term of years, was held to be discharged by the death of one of the partners before the expiration of the term, that appearing to have been the intention of the parties (*n*). And, where A. was hired by P. to serve as farm-bailiff at weekly wages, with other advantages, the service to be determinable by a six months' notice, or payment of six months' wages, and P. died during the service, it was held that P.'s personal representative was not bound to continue A. in her service or to pay him six months' wages (*o*). So, where an intestate had authorised the plaintiff to sell a picture of the intestate, and promised him 100*l.* for his trouble in case he succeeded in selling it, but before any sale had been effected the intestate died, and after his death the plaintiff sold the picture and claimed the 100*l.*, it was held that the authority to sell was revoked by the death of the intestate, and that his administrator was not bound to pay the 100*l.* (*p*). But the death of the surety does not operate as a revocation of a continuing guarantee (*q*).

Discharge by bankruptcy.—An order of discharge in bankruptcy discharges the bankrupt from all debts provable in bankruptcy except any debt on a recognizance, or any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person, for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence, or any debt or liability incurred by

(*l*) *Post*, p. 420.

(*m*) *Baxter* v. *Burfield*, 2 Str. 1266; *Chamberlain* v. *Williamson*, 2 M. & S. 408; *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L.J. Q.B. 164; *Finlay* v. *Chirney*, 20 Q.B.D. 494; 57 L.J. Q.B. 247.

(*n*) *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L.J. Ex. 207. See *Phillips* v. *Hull Alhambra Palace Co.*, (1901) 1 K.B. 59; 70 L.J. K.B. 26.

(*o*) *Farrow* v. *Wilson*, L.R. 4 C.P. 744; 38 L.J. C.P. 326; and see *Whincup* v. *Hughes*, L.R. 6 C.P. 78; 40 L.J. C.P. 104; *Robinson* v. *Davison*, L.R. 6 Ex. 269; 40 L.J. Ex. 172.

(*p*) *Campanari* v. *Woodburn*, 15 C.B. 400; 24 L.J. C.P. 15.

(*q*) *Bradbury* v. *Morgan*, 31 L.J. Ex. 462; 1 H. & C. 249.

means of any fraud or fraudulent breach of trust to which he was a party, or any debt or liability whereof he has obtained forbearance by any fraud to which he was a party. An order of discharge does not release a person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of surety for him. The order of discharge is conclusive evidence of the bankruptcy, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by that order he may plead that the cause of action occurred before his discharge (*r*).

The word "liability" is for the purposes of the Act to include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as respects mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion. But the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and such debt or liability will not then be provable, and will not be barred by the order of discharge (*s*). It is the duty of the court to bring within the Act all possible contracts that have been broken, so as to discharge the bankrupt (*t*); but the order of discharge will not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust (*u*), nor from any debt or liability incurred by means of any fraud or breach of trust committed by his partner (*x*). An order of discharge granted to a debtor, who is one of a partnership firm, in his separate bankruptcy or liquidation, releases him from his joint as well as from his separate debts (*y*). The landlord's remedy, by way of distress, for the

(*r*) 46 & 47 Vict. c. 52, s. 30.

(*s*) Sect. 37 (6). See *Robinson* v. *Ommaney*, 23 Ch.D. 285; 52 L.J. Ch. 440.

(*t*) *Waters, Ex parte*, L.R. 8 Ch. 562; see also *Peacock, Ex parte*, L.R. 8 Ch. 682; 42 L.J. Bankr. 78.

(*u*) As to the meaning of these words, see *Emma Mining Co.* v. *Grant*, 17 Ch.D. 122; 50 L.J. Ch. 449; *Hemming, Ex parte*, 13 Ch.D. 163; 49 L.J. Bankr. 17; *Hale* v. *Boustead*, 8 Q.B.D. 453; 51 L.J. Q.B. 255; *Ramskill* v. *Edwards*, 31 Ch.D. 100; 55 L.J. Ch. 81.

(*x*) *Cooper* v. *Prichard*, 11 Q.B.D. 351; 52 L.J. Q.B. 526.

(*y*) *Hammond, Ex parte*, L.R. 16 Eq. 614.

recovery of rent due to him at the time of the bankruptcy, appears to remain unaffected by the order of discharge, although he has proved for the rent (*z*). But no distress is to be available for more than a year's rent accrued due prior to the order of adjudication (*a*). The landlord cannot, of course, prove and distrain for the same rent; but he may distrain for the year's rent and prove for the balance (*b*). A covenant that a creditor shall be at liberty to seize after-acquired property of the debtor if he fails to pay the debt, is at an end if the debtor afterwards becomes bankrupt and is discharged from the debt (*c*), and so is a covenant to indemnify the assignors of a lease from their liability to repair (*d*). Proof of a debt under an adjudication in bankruptcy is no answer to an action for the debt (*e*).

In the case of an executory contract insolvency does not *per se* put an end to or alter the contract, but when one contracting party gives notice to the other that he is insolvent, and does nothing more, the other party has a right to assume that he intends to abandon the contract and may treat it as rescinded (*f*). By sect. 41, sub-sect. 1, of the Sale of Goods Act, 1893, subject to the provisions of the Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price, where the buyer becomes insolvent (*g*).

A discharge is good although the plaintiff relies upon a subsequent promise to pay (*h*); but if the subsequent promise is founded on a good consideration arising after the discharge, the promise may be sued upon (*i*).

Operation of payment of dividend.—Payment of a dividend in bankruptcy is not payment of the debt, except as against the debtor himself, and confers no right on the bankrupt or his trustee to call upon the creditor to surrender any collateral security (*k*).

Composition with creditors.—The provisions of a composition under the Bankruptcy Act, 1883, accepted by resolution and approved by the court, will be binding on all the creditors, so far as relates to any debts due to them from the debtor and provable

(*z*) *Newton* v. *Scott*, 10 M. & W. 471; 11 L.J. Ex. 121; *Phillips* v. *Shervill*, 6 Q.B. 952; 14 L.J. Q.B. 144.

(*a*) 46 & 47 Vict. c. 52, s. 42.

(*b*) *Grove, Ex parte*, 1 Atk. 105.

(*c*) *Thompson* v. *Cohen*, L.R. 7 Q.B. 527; 41 L.J. Q.B. 221.

(*d*) *Hardy* v. *Fothergill*, 13 App.Cas. 351; 58 L.J. Q.B. 44.

(*e*) *Spencer* v. *Demett*, L.R. 1 Ex. 123; 35 L.J. Ex. 73. In such a case the proper course would seem to be to apply to stay the action. See Bankruptcy Act, 1883, s. 10.

(*f*) *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47.

(*g*) 55 & 56 Vict. c. 71, s. 41, sub-s. 1 (c).

(*h*) *Heather* v. *Webb*, 2 C.P.D. 1; 46 L.J. C.P. 89. See *Elmslie* v. *Corrie*, 4 Q.B.D. 295; 48 L.J. Q.B. 462.

(*i*) *Jakeman* v. *Cook*, 4 Ex.D. 26; 48 L.J. Ex. 165; but this does not apply to a debtor in bankruptcy who has not paid his composition. See *Barrow, Ex parte*, 6 Ch.D. 783; 46 L.J. Bankr. 71.

(*k*) *Ewart* v. *Latta*, 4 Macq. 983.

in bankruptcy (*l*). Under the Act of 1869, if the composition was not paid, the creditors might bring actions for their original debts (*m*); and if the composition was payable by instalments, and any instalment was unpaid, they might sue for the balance of the original debt remaining unpaid (*n*); but under the Act of 1883, if there be default of payment, the creditor cannot sue the debtor for the original debt, but must apply to the court (*o*). The court has power, however, in case of default in payment, to adjudge the debtor bankrupt and annul the composition (*p*).

The acceptance of a composition under the Act has the same effect as an order of discharge (*q*), and does not operate as a release of a co-debtor or surety (*r*). Where a joint and several promissory note was given by two partners to secure a debt of the firm, it was held that the acceptance of a composition on the joint debt was not a satisfaction of the separate liability (*s*); so where bankers were joint creditors of two persons in co-partnership, with a security by deposit of deeds upon the separate property of one, it was held that the acceptance of a composition by the bank did not discharge the separate security (*t*). It has been held that resolutions for a composition gave an implied authority to the debtor to carry on business in the ordinary way, and to pledge the assets to raise money for that purpose (*u*).

The debtor has complete dominion over his property and full power to dispose of it, and a purchaser from him is not bound to inquire as to the payment of instalments (*x*).

Effect of discharge in bankruptcy on debts contracted abroad.—The English bankruptcy law is binding upon the colonies, and the English courts are bound by its provisions in actions on foreign and colonial as well as on English debts (*y*). Thus, an English certificate in bankruptcy has been held to be a good answer to a debt arising in Calcutta, and sued for in the Supreme Court there (*z*); and the same has been held in Scotland with reference to a debt contracted there (*a*). So, also, an English certificate has been held

(*l*) 46 & 47 Vict. c. 52, s. 18, *ante*, p. 171.

(*m*) *Edwards* v. *Coombe*, L.R. 7 C.P. 519; 41 L.J. C.P. 202; *Edwards* v. *Hancher*, 1 C.P.D. 111.

(*n*) *Hatton, In re*, L.R. 7 Ch. 723; 42 L.J. Bankr. 12; *Goldney* v. *Lording*, L.R. 8 Q.B. 182; 42 L.J. Q.B. 103.

(*o*) See Rule 211 of Bankruptcy Rules, 1886.

(*p*) Sect. 18 (11).

(*q*) Sect. 18 (15).

(*r*) *Megrath* v. *Gray*, L.R. 9 C.P. 216; 43 L.J. C.P. 63; *Jacobs, Ex parte*, L.R. 10 Ch. 211; 44 L.J. Bankr. 34.

(*s*) *Simpson* v. *Henning*, L.R. 10 Q.B. 406; 44 L.J. Q.B. 143.

(*t*) *Manchester and Liverpool District Bank, Ex parte*, L.R. 18 Eq. 249; 43 L.J. Bankr. 73. See, however, *Couldery* v. *Bartrum*, 19 Ch.D. 394; 51 L.J. Ch. 265.

(*u*) *Allard, Ex parte*, 16 Ch.D. 505.

(*x*) *Kearley's Contract, In re*, 7 Ch.D. 615; 47 L.J. Ch. 474.

(*y*) *Ellis* v. *M'Henry*, L.R. 6 C.P. 228; 40 L.J. C.P. 109.

(*z*) *Edwards* v. *Ronald*, 1 Knapp, P.C. 259.

(*a*) *Royal Bank of Scotland* v. *Cuthbert*, 1 Rose, 462, 486.

in the English courts to discharge a debt contracted in Ireland (*b*); and a debt contracted in England, and sued for there, has been held to be discharged by a discharge under a Scotch sequestration (*c*), or by an Irish certificate (*d*), or a discharge in Newfoundland (*e*). But a foreign bankruptcy does not discharge the bankrupt from a contract made and to be performed in England (*f*).

The Statutes of Limitation—Limitation of actions for the recovery of fee-farm rents and money charged on land.—By 3 & 4 Will. 4, c. 27 (*g*), and 37 & 38 Vict. c. 57, ss. 1, 9, it is enacted that all actions and suits brought for the recovery of rent by persons not being ecclesiastical or eleemosynary corporations (sect. 29 of 3 & 4 Will. 4, c. 27) shall be brought within twelve years after the right thereto has accrued (see 3 & 4 Will. 4, c. 27, ss. 3, 5, and 37 & 38 Vict. c. 57, s. 2) to the plaintiff or to the person through whom he claims (*h*). As regards money secured by mortgage, judgment (*i*), or lien, or otherwise charged upon or payable out of land, it is enacted that no action or suit shall be brought for the recovery thereof but within twelve years (*k*) next after a present right to receive such money (*l*) shall have accrued to some person capable of giving a discharge for, or a release of, the same; unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (*m*), or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent (*n*), to the person entitled thereto, or his agent, in which case the action or suit is to be brought within twelve years (*o*) after the payment or acknowledgment; and no arrears of rent, or of interest in respect of

(*b*) *Lynch* v. *M'Kenny*, cited 2 H. Bl. 554.

(*c*) *Sidaway* v. *Hay*, 8 B. & C. 477, 481; 2 L.J. (O.S.) K.B. 215.

(*d*) *Ferguson* v. *Spencer*, 1 Man. & G. 987; 10 L.J. C.P. 20.

(*e*) *Philpotts* v. *Reed*, 1 B. & B. 294.

(*f*) *Gibbs* v. *Société des Métaux*, 25 Q.B.D. 399; 59 L.J. Q.B. 510.

(*g*) Sects. 2, 5, 16, 17, 23, 28, 40, are repealed by 37 & 38 Vict. c. 57, s. 9, and similar provisions substituted; the rest of the Act remains in force, except that in sect. 18 six years is to be read instead of ten years, and twelve instead of twenty.

(*h*) This does not apply to an action on a covenant to pay a rent charged on land: *Manning* v. *Phelps*, 10 Exch. 59; 24 L.J. Ex. 62; nor to rents reserved on leases for years, but to ancient rent service, fee-farm rent, and the like: *Grant* v. *Ellis*, 9 M. & W. 113; 11 L.J. Ex. 228; *Archbold* v. *Scully*, 9 H.L. Cas. 360. As to tithes, see *Ely* (*Dean*) v. *Cash*, 15 M. & W. 617; 15 L.J. Ex. 341.

(*i*) The expression "judgment" is not restricted to judgments operating as charges upon land: *Hebblethwaite* v. *Peever*, (1892) 1 Q.B. 124.

(*k*) 37 & 38 Vict. c. 57, s. 8. This limitation applies to the personal remedy on the covenant as well as to the remedy against the land: *Sutton* v. *Sutton*, 22 Ch.D. 511; 52 L.J. Ch. 333; but see *Frisby*, *In re*, 43 Ch.D. 106; 59 L.J. Ch. 94.

(*l*) *Sheppard* v. *Duke*, 9 Sim. 567; 8 L.J. Ch. 228.

(*m*) *I.e.*, by the person himself liable to pay. See *Harlock* v. *Ashberry*, 19 Ch.D. 539; 51 L.J. Ch. 394; *Bradshaw* v. *Widdrington*, (1902) 2 Ch. 430; *Hugill* v. *Wilkinson*, 38 Ch.D. 480; 57 L.J. Ch. 1019.

(*n*) *Forsyth* v. *Bristowe*, 8 Exch. 720; 22 L.J. Ex. 255; *Staley* v. *Barrett*, 26 L.J. Ch. 321.

(*o*) 37 & 38 Vict. c. 57, s. 8.

money charged on land, and no damages in respect of such arrears of rent or interest, are by sect. 42 of 3 & 4 Will. 4, c. 27, to be recovered by any private person by distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (*p*). So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under sect. 42 of the 3 & 4 Will. 4, c. 27, the amount to be recovered is limited to six years (*q*). Where, under a power of sale in a mortgage deed, the property mortgaged was sold, and the proceeds paid into court to the general credit of an account in an administration suit of the estate of the mortgagee, upon a petition by trustees of the parties beneficially entitled to the fund in court, it was held that they were entitled to the full arrears of interest on the mortgage, the fund after sale having been in their possession, and no recovery by distress, suit, or action being requisite (*r*). In a suit to foreclose, a mortgagee can only recover arrears of interest for six years next preceding the suit, though the principal and interest are secured by the covenant and bond of the mortgagor (*s*). The words in sect. 8, "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment and the signing an acknowledgment (*t*). Where a title has been extinguished by the statute, no mere acknowledgment by the person who has acquired as good a title under the statute as if a conveyance had been made to him can restore the old title (*u*).

Where any prior mortgagee or incumbrancer shall have been in possession of land, or the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt, although such time may have exceeded the said term of six years. The effect of 3 & 4

(*p*) An acknowledgment contained in a deed speaks of the time of the execution of the deed: *Jaynes* v. *Hughes*, 24 L.J. Ex. 116; 10 Exch. 430. An answer to a bill in equity may be an acknowledgment: *Goode* v. *Job*, 28 L.J. Q.B. 1; 1 E. & E. 6. As to the meaning of the words, see *infra*.

(*q*) *Archbold* v. *Scully*, 9 H.L. Cas. 360.

(*r*) *Edmunds* v. *Waugh*, L.R. 1 Eq. 418; 35 L.J. Ch. 234; but see *Mason* v. *Broadbent*, 33 Beav. 296; and *Stead's Estates, In re*, 2 Ch.D. 713; 45 L.J. Ch. 634.

(*s*) *Round* v. *Bell*, 31 L.J. Ch. 127; 30 Beav. 221.

(*t*) *Chinnery* v. *Evans*, 11 H.L.C. 115.

(*u*) *Alison, In re*, 11 Ch.D. 284; *Sanders* v. *Sanders*, 19 Ch.D. 373; 51 L.J. Ch. 276.

Will. 4, c. 27, s. 42, is qualified by 3 & 4 Will. 4, c. 42, s. 3, which enacts that actions for rent on an indenture of demise, and actions of covenant or debt on any bond or specialty, must be brought within twenty years after the accrual of the cause of action; so that, although the land cannot be charged with more than six years' arrears of rent or interest (*x*), yet, if there be a covenant for the payment thereof, twenty years' arrears may be recovered by action on the covenant (*y*).

Where a mortgage deed had been executed in 1830, to secure a principal sum and interest, with a covenant therein for the payment of the interest, and the mortgagor died, and his co-heirs sought to redeem, and there was a long arrear of interest unpaid, it was held that six years' arrears only were a charge upon the land under the 3 & 4 Will. 4, c. 27, s. 42, but that twenty years' arrears might be recovered by action on the covenant under the 3 & 4 Will. 4, c. 42, s. 3, and that, if the heir of the mortgagor comes to redeem, the personal liability upon the covenant may be tacked on to the mortgage, and payment of all the arrears for twenty years be exacted as the price of the redemption (*z*). To bring a person rightfully entitled to a rent within the section so as to divest him of his rights, there must be a discontinuance of the receipt by him, either by not applying for payment, or by omitting to enforce his remedies with knowledge that the payment has not been made (*a*). An order of absolute foreclosure vests the *beneficial* title for the first time in the mortgagee, so that an action brought within twenty years was held to be in time, although more than twenty years had elapsed since the *legal* title was conveyed (*b*).

Limitation of actions for recovery of rent, and specialty and simple contract debts.—By 3 & 4 Will. 4, c. 42, s. 3, it is enacted that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, shall be commenced and sued within TWENTY years after the cause of such actions or suits, but not after, except where the time for bringing the action is specially limited by statute; and by 21 Jac. 1, c. 16, s. 3, and 19 & 20 Vict. c. 97, s. 9, all actions of detinue, trover, and replevin, for taking away of goods or cattle; all actions of account and for not accounting, and suits for such accounts as concern the trade of

(*x*) As to arrears of fee-farm rent or of rent-charge being recoverable only for six years, see *Humfrey* v. *Gery*, 7 C.B. 567; *Francis* v. *Grover*, 5 Hare, 39; 15 L.J. Ch. 99.

(*y*) *Paget* v. *Foley*, 3 Sc. 120; 5 L.J. C.P. 258; *Strachan* v. *Thomas*, 12 Ad. & E. 556; 9 L.J. Q.B. 397; *Hunter* v. *Nockolds*, 19 L.J. Ch. 177; 1 Mac. & G. 640.

(*z*) *Elvy* v. *Norwood*, 21 L.J. Ch. 716; 5 De G. & S. 240.

(*a*) *Adnam* v. *Sandwich* (*Earl*), 2 Q.B.D. 485; 46 L.J. Q.B. 612.

(*b*) *Heath* v. *Pugh*, 6 Q.B.D. 345; 50 L.J. Q.B. 473; affirmed 7 App.Cas. 235; 51 L.J. Q.B. 367.

merchandise between merchant and merchant, their factors or servants; all actions upon the case; all actions of debt grounded upon any lending or contract without specialty; and all actions of debt for arrearages of rent (*c*), and upon an award, where the submission is not by deed (*d*), must be commenced and sued within six years next after the cause of such action or suit, and not afterwards; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit is enforceable by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit. A simple contract debt, though secured by a charge on land, is also barred in six years by the statute (*e*).

What are specialty debts.—An action founded on the provisions of an Act of Parliament, such as an action for calls, is an action on a specialty (*f*). But an action of debt for a penalty due under a bye-law founded on the charter of a chartered company is an action of debt grounded upon a contract without specialty, and is barred by the statute if not commenced within six years after the penalty becomes due, although the charter is under the great seal and is matter of record; for the liability springs out of the consent of the party to become a member of the company and obey the bye-laws, which is in effect a contract without specialty (*g*). If one party is indebted to another by simple contract, and the simple contract debt is recited or acknowledged in a deed, the debt does not become a specialty debt, unless the terms of the deed are such as to raise between the parties an implied covenant for the payment of the money (*h*). A bond executed in India cannot be treated as a simple contract (*i*).

Exception in favour of persons labouring under temporary disabilities.—If the person entitled to any such action is at the time the action accrues within the age of twenty-one years, or *feme covert*, or *non compos mentis*, such person is at liberty to bring the same actions so as they are commenced within the time of limitation prescribed by the respective Acts, after the coming to, or being of, full age, discovert, or of sound mind (*k*). By sect. 5 of

(*c*) *Leigh* v. *Thornton*, 1 B. & Ald. 627. This applies only to rent reserved on a demise without deed: *Freeman* v. *Stacey*, Hutt. 109. Rents reserved upon a lease under seal, rent-charges founded upon a deed, or a reservation of rent upon a fee simple by deed, are not touched by this statute.

(*d*) 3 & 4 Will. 4, c. 42, s. 3.

(*e*) *Barnes* v. *Glenton*, (1899) 1 Q.B. 885; 68 L.J. Q.B. 502.

(*f*) *Cork & Bandon Ry.* v. *Goode*, 13 C.B. 826; 22 L.J. C.P. 198; *Shepherd* v. *Hills*, 11 Exch. 67; 25 L.J. Ex. 6.

(*g*) *Tobacco Pipe Makers* v. *Loder*, 20 L.J. Q.B. 414; 16 Q.B. 765.

(*h*) *Ivens* v. *Elwes*, 3 Drew. 25; 24 L.J. Ch. 249.

(*i*) *Alliance Bank of Simla* v. *Carey*, 5 C.P.D. 429; 49 L.J. C.P. 781.

(*k*) 21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 42, s. 4.

the Real Property Limitation Act, 1874 (*l*), no person who at the time the right of action accrued was under disabilities, can bring an action except within thirty years, although he has remained under such disabilities, or although six years have not expired since he had ceased to be under disabilities (*ll*).

With reference to married women, it should be observed that their separate property vested in trustees may be bound by their contracts, and the debts so created may be barred by analogy to the statute (*m*). But, on the other hand, it should seem that if a married woman having separate property acquires a right of action with respect to it under the Married Women's Property Act, 1882, the Statute of Limitations begins to run against her just as if she were a *feme sole* (*n*). Formerly, imprisonment or absence beyond sea had the effect of extending the period of limitation; but by 19 & 20 Vict. c. 97, s. 10, and 37 & 38 Vict. c. 57, s. 4, no person shall be entitled to any time within which to commence an action or suit beyond the periods fixed by the statutes, by reason only of his being absent beyond seas or in imprisonment at the time the cause of action or suit accrued (*o*). And now by sect. 4 of the Real Property Limitation Act, 1874 (*p*), "The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims." Formerly, the absence beyond sea of any of several joint defendants prevented the statute from running as against those who were resident in England (*q*). But this has been altered by 19 & 20 Vict. c. 97, s. 11. Where a cause of action has once accrued, and the statute has begun to run, there being then a capacity of suing and of being sued, the time of limitation continues to run, and is not stopped by the circumstance of the death of one of the parties, and delay in taking out administration (*r*). Any portion of time in which the parties are under disabilities occurring after the time has begun to run must nevertheless form part of the period of limitation (*s*).

(*l*) 37 & 38 Vict. c. 57.

(*ll*) *Hounsell* v. *Dunning*, (1902) 1 Ch. 512; 71 L.J. Ch. 259.

(*m*) *Hastings* (*Lady*), *In re*, 35 Ch.D. 94; 55 L.J. Ch. 278; *Beck* v. *Pain*, 23 Q.B.D. 316; 58 L.J. Q.B. 516.

(*n*) 45 & 46 Vict. c. 75, s. 5. See *Lowe* v. *Fox*, 15 Q.B.D. 667; 54 L.J. Q.B. 561.

(*o*) This section is retrospective: *Pardo* v. *Bingham*, L.R. 4 Ch. 735; 39 L.J. Ch. 170, following *Cornill* v. *Hudson*, 8 E. & B. 429; 27 L.J. Q.B. 8. Absence beyond the seas does not affect mortgagor redeeming: see *Kinsman* v. *Rouse*, 17 Ch.D. 104; 50 L.J. Ch. 486; nor do any of the other exceptions: see *Forster* v. *Patterson*, 17 Ch.D. 132; 50 L.J. Ch. 603.

(*p*) 37 & 38 Vict. c. 57.

(*q*) *Fannin* v. *Anderson*, 7 Q.B. 811; 14 L.J. Q.B. 282; *Towns* v. *Mead*, 16 C.B. 134; 24 L.J. C.P. 89. But see 15 & 16 Vict. c. 76, s. 18.

(*r*) *Penny* v. *Brice*, 18 C.B. N.S. 393.

(*s*) *Rhodes* v. *Smethurst*, 4 M. & W. 61;

Commencement of time of limitation.—The time of limitation begins to run from the period of the breach of contract and the accrual of the cause of action, and not from the time of the making of the contract. If, therefore, a thing is to be done on the happening of a contingent or uncertain event, there can be no cause of action and no limitation of time until the event has happened (*t*). Where a bond is conditioned for the performance of acts to be done successively in a series of years, a new cause of action arises with each omission to do the act at the proper time; and, if the plaintiff can show any breach within twenty years, he is entitled to recover (*u*). In the case of a solicitor's bill for the costs of an action, the statute does not begin to run so long as the action is pending (*x*); and, although *primâ facie* the termination of a suit is when judgment is given in the court in which the action is commenced, yet, when an appeal is brought, and the same solicitor continues to conduct the suit on appeal, that is a continuation of the original suit, and what *primâ facie* was a termination of the contract ceases to be so (*y*). If a contract has been broken, and has given rise to a cause of action, and this cause of action is suspended by a subsequent agreement between the parties, which is also broken, and the creditor is remitted to his original right of action, the time of limitation will run from the breach of the second agreement, and not from the breach of the original contract (*z*). When a debt has been contracted on credit, no cause of action arises until the period of credit has expired (*a*). If a debt is to be paid by instalments, and it is provided that, in case default is made in payment of any one instalment when due, the whole debt shall be immediately recoverable, the entire cause of action accrues upon the first default, and the period of limitation begins to run therefrom (*b*). If an action is brought for the recovery of the consideration paid for a void annuity, the time of limitation runs from the period when the grantee elected to treat the annuity as void, and not from the time of the payment of the consideration and the making of the grant (*c*). The cause of action in respect of work done by a solicitor arises upon the completion of the work,

7 L.J. Ex. 273; *Freake* v. *Cranefeldt*, 3 Myl. & Cr. 499; 8 L.J. Ch. 61.

(*t*) *Savage* v. *Aldren*, 2 Stark. 232; *Fenton* v. *Emblers*, 1 W. Bl. 353; *Bill* v. *Lake*, Hetley, 138; *Shutford* v. *Borough*, Godb. 437; *Tuckey* v. *Hawkins*, 4 C.B. 664; 16 L.J. C.P. 201.

(*u*) *Arnott* v. *Holden*, 22 L.J. Q.B. 19; 18 Q.B. 593; *Blair* v. *Ormond*, 20 L.J. Q.B. 444; 17 Q.B. 423; *White* v. *Corbett*, 1 E. & E. 692; 28 L.J. Q.B. 228.

(*x*) *Whitehead* v. *Lord*, 21 L.J. Ex. 239; 7 Exch. 691.

(*y*) *Harris* v. *Quine*, L.R. 4 Q.B. 653; 38 L.J. Q.B. 331.

(*z*) *Irving* v. *Veitch*, 3 M. & W. 110; 7 L.J. Ex. 25; *Stock, In re*, 66 L.J. Q.B. 146.

(*a*) *Helps* v. *Winterbottom*, 2 B. & Ad. 431; 9 L.J. (O.S.) K.B. 258.

(*b*) *Hemp* v. *Garland*, 4 Q.B. 524; 12 L.J. Q.B. 134; *Reeves* v. *Butcher*, (1891) 2 Q.B. 509; 60 L.J. Q.B. 619; *Parr's Banking Co.* v. *Yates*, (1898) 2 Q.B. 460; 67 L.J. Q.B. 851.

(*c*) *Cowper* v. *Godmond*, 9 Bing. 753; 2 L.J. C.P. 162.

and the statute therefore runs from that time and not from the expiration of a month from the delivery of the bill of costs (*d*).

It is a general rule that, where there has once been a complete cause of action, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded. As, for instance, in the case of a bill of exchange drawn at so many months after sight and refused acceptance, the cause of action is complete, and the statute begins to run, upon the refusal of acceptance, and no new cause of action arises upon the refusal of payment. This rule, however, is not universal; for, in cases where a man undertakes to do an act upon a future day, and, before the day arrives, disables himself from performing the act, or absolutely refuses to perform his contract, and, so to speak, absolves the opposite party, it is in the option of such party at his election to treat that conduct as of itself a breach of the contract, or to insist upon holding the repudiating party liable, and to sue him for non-performance when the day arrives. The misconduct of the party who acts in fraud of the bargain in such cases gives the other party thereto the option of suing either for the first violation or for non-performance at the day; and it does not furnish the wrong-doer with any answer to the latter action (*e*). It is, however, doubtful whether this doctrine is applicable to the case of a lease or other contract containing various stipulations, when the whole contract cannot be treated as concluded because of the wrongful repudiation by the promisor of one of the stipulations of the contract (*f*). So, if a person entrusted with a thing for safe custody wrongfully parts with it, the owner may at his election either sue for the wrongful parting with the property, or he may wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request; and, in the latter case, it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor, agreeably to the maxim, "*Qui dolo desiit possidere pro possidente damnatur*" (*g*).

Contingent and conditional liabilities.—Whenever the liability of the defendant is dependent upon some contingency, the cause of action does not arise until the contingency has happened. If a man has promised to pay a sum of money as soon as his circumstances enable him to do so, the time of limitation runs from the

(*d*) *Coburn* v. *Colledge*, (1897) 1 Q.B. 702; 66 L.J. Q.B. 462.

(*e*) *Hochster* v. *De la Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455; *Frost* v. *Knight*, L.R. 7 Ex. 111; 41 L.J. Ex. 78.

(*f*) *Johnstone* v. *Milling*, 16 Q.B.D. 460; 55 L.J. Q.B. 162.

(*g*) *Reeve* v. *Palmer*, 5 C.B. N.S. 84, 91; 27 L.J. C.P. 327; 28 *ib.* 168; *Wilkinson* v. *Verity*, L.R. 6 C.P. 206; 40 L.J. C.P. 141. See *Miller* v. *Dell*, (1891) 1 Q.B. 468; 60 L.J. Q.B. 404.

period of his being able to pay (*h*). If a surety guarantees the payment of a debt by his principal, the time of limitation runs from the period of the principal's making default in payment (*i*). If a surety sues his principal upon the implied contract of the principal to indemnify the surety, the time allowed for bringing the action runs from the time that the surety actually paid what the principal was bound to pay, and not from the time when he became liable to pay (*k*). If one man agrees to indemnify another against costs, the cause of action accrues at the time the costs are actually paid by the party who is to be indemnified, and not at the time that the costs are incurred (*l*). In the case of co-sureties suing each other for contribution, the time of limitation runs from the period when the co-surety was called upon to pay more than his own share of the common liability, and not from the time that the principal for whom they became responsible made default. If, therefore, the co-surety, more than six years before the action, has paid a portion of the debt, and the principal has paid the residue within six years, the time of limitation will not run from the original payment by the co-surety, but from the payment of the residue by the principal; for until the latter date it does not appear that the co-surety has paid more than his share, and has in consequence thereof a right of action for contribution (*m*).

When a demand of performance of a contract is a condition precedent to a right of action for non-performance, the time of limitation runs from the period of the making of the demand (*n*). But it is otherwise, if no demand is necessary to give rise to a right of action (*o*). When a bill of exchange or a promissory note has been made payable at sight, the time of limitation runs from the time when the bill or note is presented for payment (*p*). If a promissory note is made payable two years after demand of payment, the time of limitation begins to run two years after a demand has been proved to have been made (*q*). But, if the note is payable on demand simply, then, as no demand is necessary before bringing an action (the service of a writ upon the maker of the note being considered a sufficient demand), the time of limitation runs from

(*h*) *Waters* v. *Thanet* (*Earl*), 2 Q.B. 757; 11 L.J. Q.B. 87; *Hammond* v. *Smith*, 33 Beav. 452.

(*i*) *Humphreys* v. *Jones*, 14 M. & W. 1; 14 L.J. Ex. 254.

(*k*) *Reynolds* v. *Doyle*, 2 Sc. N.R. 46.

(*l*) *Collinge* v. *Heywood*, 9 Ad. & E. 633; 8 L.J. Q.B. 98.

(*m*) *Davies* v. *Humphreys*, 6 M. & W. 169; 9 L.J. Ex. 263; *Huntley* v. *Sanderson*, 1 Cr. & M. 480; 2 L.J. Ex. 204; see also *Snowdon*, *Ex parte*, 17 Ch.D. 44; 50 L.J. Ch. 540.

(*n*) *Buckler* v. *Moor*, 1 Mod. 89; *Topham* v. *Braddick*, 1 Taunt. 572; *Webb* v. *Martin*, 1 Lev. 48; *Mills* v. *Borthwick*, 35 L.J. Ch. 31.

(*o*) *Collins* v. *Benning*, 12 Mod. 444; *Emery* v. *Day*, 1 C. M. & R. 243; 3 L.J. Ex. 307.

(*p*) *Holmes* v. *Kerrison*, 2 Taunt. 323. See, however, sect. 43 (2) of 45 & 46 Vict. c. 61, *post*, p. 1127, as to right of action on non-acceptance.

(*q*) *Thorpe* v. *Booth*, Ry. & M. 388.

the period of the making of the note (*r*). The same rule prevails with regard to a loan of money payable on demand (*s*). But, where the plaintiff having agreed to lend the defendant a sum of money gave him a cheque for the amount, which the defendant paid into his bankers, receiving credit for it, and the cheque was not paid by the plaintiff's bankers till some days later, it was held that, in an action for the money so lent, the statute only ran from the time of the payment of the cheque by the plaintiff's bankers (*t*). And, where a promissory note payable on demand was given to a banker to secure future advances, it was held that the statute did not begin to run until the account was closed and the credit determined (*u*).

Unknown and undiscovered breaches of contract.—It is said to be a general rule of law that the time of limitation runs from the period when the contract was broken, and not from the time that knowledge of the breach of contract first came to the plaintiff, nor from the time that any particular or special damage may have accrued or been discovered (*x*), whether the breach of contract was patent and discoverable, or whether it was concealed and undiscoverable, and whether there had been laches or neglect on the part of the plaintiff in not finding out that the contract had been broken and that the cause of action had accrued (*y*), or whether it was physically impossible for the plaintiff to know of the breach until he had sustained the resulting damage.

It has also been held that, if a person professing to be skilled in the investment of money undertakes for hire to invest a sum of money on good security, and receives the money, and, acting with gross carelessness, invests it in bad security, but the worthlessness of the security is not known to the promisee for more than six years after the making of the promise, when the interest of the money ceases to be paid by some third party for the first time, the promisee is barred of all remedy by the statute (*z*). This construction of the Statute of Limitations, which deprives a man of redress after the expiration of six years, when the act causing the damage was unknown to him, may seem to be harsh and contrary to the

(*r*) *Norton* v. *Ellam*, 2 M. & W. 461; 6 L.J. Ex. 121; *Waters* v. *Thanet* (*Earl*), 2 Q.B. 769; 11 L.J. Q.B. 87; *Bethell, In re*, 34 Ch.D. 561; 56 L.J. Ch. 334; *Francis* v. *Bruce*, 44 Ch.D. 627; 59 L.J. Ch. 709.

(*s*) *Jackson* v. *Ogg*, 1 Johns. 397; 5 Jur. N.S. 976.

(*t*) *Garden* v. *Bruce*, L.R. 3 C.P. 300; 37 L.J. C.P. 112.

(*u*) *Hartland* v. *Jukes*, 1 H. & C. 673; 32 L.J. Ex. 162.

(*x*) *Battley* v. *Faulkner*, 3 B. & Ald. 288.

(*y*) *Granger* v. *George*, 5 B. & C. 152; 7 D. & R. 732; *Denys* v. *Shuckburgh*, 4 Y. & C. 42; 6 L.J. Ch. 330. See *Dalton* v. *Angus*, 6 App.Cas. 740; 50 L.J. Q.B. 689.

(*z*) *Howell* v. *Young*, 5 B. & C. 259; 4 L.J. (O.S.) K.B. 160; *Whitehead* v. *Howard*, 2 B. & B. 375; *Short* v. *McCarthy*, 3 B. & Ald. 626; *Sims* v. *Brutton*, 20 L.J. Ex. 41; 5 Exch. 802.

ordinary principles of law (*a*). Formerly the acceptance and receipt of money under the circumstances above mentioned, and its fraudulent misapplication, or its investment on bad security, through the gross carelessness of the receiver and undertaker of the duty, was, in most cases, held in equity to amount to a breach of trust (*b*). But it seemed open to doubt whether this construction would prevail (*c*). It has, however, now been held, following the decisions of the Court of Chancery for many years, that in an action for damages for false representation where the statute is set up as an answer, the plaintiff may reply that he did not discover and had not reasonable means of discovering the fraud within the six years (*d*).

Acknowledgments of deeds and specialties extending period of limitation.—By sect. 5 of 3 & 4 Will. 4, c. 42, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of an indenture, specialty, or recognizance, or his agent, or by part payment, or part satisfaction, on account of any principal sum or interest due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction, or in case the person entitled to such action shall at the time of such acknowledgment be under such disability (*e*), or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased, or the party shall have returned from beyond seas: and the plaintiff in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of the statute. Any acknowledgment amounting to a clear admission of the specialty debt will be a bar to the setting up of the statute (*f*). A recital in a deed of a prior mortgage deed assigning certain property as the security for the payment of a mortgage debt is not necessarily an acknowledgment of the mortgage debt within the meaning of the statute (*g*). But a recital in a mortgage deed of the payment of

(*a*) *Bonomi* v. *Backhouse*, E. B. & E. 659; 28 L.J. Q.B. 378.

(*b*) *Smith* v. *Pococke*, 2 Drew. 197; 23 L.J. Ch. 545; *Blair* v. *Bromley*, 5 Hare, 542; 16 L.J. Ch. 105, 495; *Moore* v. *Knight*, (1891) 1 Ch. 547.

(*c*) See the Judicature Act, 1873, s. 25 (2), by which the Statutes of Limitation are made inapplicable to an *express* trust. See *post*, p. 201.

(*d*) *Gibbs* v. *Guild*, 9 Q.B.D. 59; 51 L.J. Q.B. 313; overruling *Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39; 23 L.J. Ex. 303; see *Betjemann* v. *Betjemann*, (1895) 2 Ch. 474; 64 L.J. Ch. 641.

(*e*) See 19 & 20 Vict. c. 97, s. 10, as to the person entitled being beyond the seas.

(*f*) *Moodie* v. *Bannister*, 28 L.J. Ch. 881; 4 Drew. 432.

(*g*) *Howcutt* v. *Bonser*, 3 Exch. 491; 18 L.J. Ex. 262.

interest, up to the date thereof, made within twenty years of action brought, takes the case out of the statute (*h*).

Acknowledgments of, and promises to pay, simple contract debts.—By 9 Geo. 4, c. 14, s. 1, it is enacted that in actions of debt, or upon the case grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract, whereby to take any case out of the operation of the Statute of Limitations; and that no person shall be deprived of the benefit of the Act, unless the acknowledgment or promise shall be made by a writing signed by the party chargeable thereby, or by his duly authorized agent (*i*); but nothing contained in the Act is to alter, take away, or lessen the effect of any payment of any principal or interest by any person whatever. Since this statute, therefore, there must be either a written acknowledgment, signed as therein mentioned, or an act done which is equivalent, in contemplation of law, to part payment of any principal, or interest (*k*). An infant is of sufficient capacity to make an acknowledgment in writing, under this statute, of a debt due for necessaries; and the acknowledgment will be evidence against him for six years after it has been made (*l*).

Form and requisites of acknowledgment.—Any writing signed by a defendant or his authorized agent, admitting that a sum of money is due upon a bond, or deed, or simple contract, at the time of the making of the admission, will revive the remedy upon the contract, although it contains, upon the face of it, no express promise to pay or to make satisfaction. But, if there is no express promise to pay, the acknowledgment must be such that a promise to pay may be inferred in fact (*m*). In the case of simple contract debts, it was at one time held that a "positive refusal to pay was an acknowledgment. The tide of authorities, however, changed: and the courts began to require the acknowledgment to be such as to justify them in inferring therefrom a promise to pay" (*n*). The insertion of a debt, therefore, in a petition to the court of bankruptcy is no acknowledgment of the debt within the statute, as it rebuts the presumption of a promise to pay it (*o*). So the insertion of a debt in the schedule to a deed of inspectorship, executed for the purpose of administering the estate of a debtor, is not, although the schedule is verified by the affidavit of the debtor,

(*h*) *Forsyth* v. *Bristowe*, 8 Exch. 720, 721; 22 L.J. Ex. 255.
(*i*) 19 & 20 Vict. c. 97, s. 13.
(*k*) *Williams* v. *Griffiths*, 2 C. M. & R. 48; 4 L.J. Ex. 129.
(*l*) *Willins* v. *Smith*, 4 E. & B. 185; 24 L.J. Q.B. 62. See, however, 37 & 38 Vict. c. 62, *post*, p. 380.
(*m*) *Mitchell's case*, L.R. 6 Ch. 822, 828.
(*n*) *Linley* v. *Bonsor*, 2 Sc. 404; 5 L.J. C.P. 40; *Cornforth* v. *Smithard*, 5 H. & N. 13; 29 L.J. Ex. 228; *Bethell, In re*, 34 Ch.D. 561; 56 L.J. Ch. 334.
(*o*) *Everett* v. *Robertson*, 1 E. & E. 19; 28 L.J. Q.B. 24.

a sufficient acknowledgment to take the debt out of the operation of the Statute of Limitations, so as to entitle the creditor to prove for the debt under a subsequent administration of the debtor's estate in bankruptcy (*p*). If there is an acknowledgment of the debt, with a suggestion as to the most convenient mode of payment (*q*), or a mere acknowledgment without any accompanying observations, that will be sufficient; "because," observes Parke, B., "from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, you may infer a promise to pay on request" (*r*). But there must be an acknowledgment sufficiently clear to raise the implication of a promise to pay (*s*). An admission which stops short of being an admission of a debt being due will not suffice for the maintenance of an action (*t*): such as a letter saying, "Doubtless I did owe the money; but I have already paid it" (*u*); or, "I admit the debt; but I have got a set-off;" or, "the debt is barred by the Statute of Limitations" (*x*). Asking for an account is equivalent to a promise to pay (*y*). If a man admits that a signature to an accountable receipt is his signature, but at the same time says it was never worth anything, this is no admission or acknowledgment (*z*). Whenever the acknowledgment is accompanied by a repudiation of liability, though it may show clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails (*a*).

Where the defendant's promise to pay is conditional, the condition must be shown to be accomplished, and the promise to have become absolute (*b*). If the defendant has promised to pay as soon as he is able, or as soon as his circumstances will permit, his ability to pay must be shown before he can be made liable upon this promise (*c*). The amount of the debt may be shown by parol testimony, and need not appear upon the face of the writing (*d*); and, if the defendant admits the debt, but objects to the amount

(*p*) *Topping, Ex parte*, 34 L.J. Bk. 44; 4 De G. J. & S. 551; *Taylor* v. *Hollard*, (1902) 1 K.B. 676; 71 L.J. K.B. 278.

(*q*) *Evans* v. *Simon*, 9 Exch. 285; 23 L.J. Ex. 16.

(*r*) *Smith* v. *Thorne*, 18 Q.B. 143; 21 L.J. Q.B. 201; *Dabbs* v. *Humphries*, 10 Bing. 449; 3 L.J. C.P. 139; *Holmes* v. *Mackrell*, 3 C.B. N.S. 794.

(*s*) *Green* v. *Humphreys*, 26 Ch.D. 474; 53 L.J. Ch. 625.

(*t*) *Collinson* v. *Margesson*, 27 L.J. Ex. 305.

(*u*) *Bryan* v. *Horseman*, 5 Esp. 81; *Birk* v. *Guy*, 4 *ib.* 184.

(*x*) *Swan* v. *Sowell*, 2 B. & Ald. 761; *Boydell* v. *Drummond*, 2 Camp. 161; *Francis* v. *Hawkesley*, 28 L.J. Q.B. 370; 1 E. & E. 1052.

(*y*) *Quincey* v. *Sharpe*, 1 Ex.D. 72; 45 L.J. Ex. 347; *Skeet* v. *Lindsay*, 2 Ex.D. 314; 46 L.J. Ex. 249; *Curwen* v. *Milburn*, 42 Ch.D. 424.

(*z*) *Rowcroft* v. *Lomas*, 4 M. & S. 459.

(*a*) *Tanner* v. *Smart*, 6 B. & C. 606; 5 L.J. (O.S.) K.B. 218; *Brigstocke* v. *Smith*, 1 Cr. & M. 485; 2 L.J. Ex. 187; *A'Court* v. *Cross*, 3 Bing. 329; 4 L.J. (O.S.) C.P. 79; *Rackham* v. *Marriott*, 2 H. & N. 196; 26 L.J. Ex. 315.

(*b*) *Humphreys* v. *Jones*, 14 M. & W. 3; 14 L.J. Ex. 254; *Waters* v. *Thanet* (*Earl*), 2 Q.B. 759; 11 L.J. Q.B. 87.

(*c*) *Edmunds* v. *Downes*, 2 Cr. & M. 459; 3 L.J. Ex. 98; *Haydon* v. *Williams*, 7 Bing. 167; 9 L.J. (O.S.) C.P. 16; *Irving* v. *Veitch*, 3 M. & W. 112; 7 L.J. Ex. 25; *Meyerhoff* v. *Froehlich*, 4 C.P.D. 63; 48 L.J. C.P. 48.

(*d*) *Williams* v. *Griffith*, 3 Exch. 343; 18 L.J. Ex. 210.

claimed, the law will infer from the admission a promise to pay what, upon investigation, shall appear to be due; and the admission, consequently, will give rise to a cause of action, and be a bar to the statute (*e*). If, in an account rendered, there are two perfectly distinct items, not in any way connected together, a signed acknowledgment as to one of them will not take the other out of the operation of the statute (*f*).

Lost acknowledgments.—Where a written acknowledgment of the debt, signed by the debtor, had been lost, oral evidence of the contents of the writing and of the making of the acknowledgment, was permitted to be given (*g*).

Acknowledgment by one of several joint contractors, or by executors or administrators.—Some doubt seems to have been entertained whether an acknowledgment in writing, signed by the defendant, of his liability upon a bill of exchange or promissory note will enure to the benefit of a subsequent indorsee or holder. It is apprehended that it would do so (*h*). But it is clear that an admission by the debtor of his liability to a particular indorsee or holder of the bill may be made under circumstances which do not extend the benefit of the admission to any other party than the one to whom it is made (*i*). Formerly, an acknowledgment of a debt by one of several joint debtors operated as an acknowledgment by all, and was evidence of a promise on behalf of all; but such acknowledgments and promises do not now deprive the others, who are no parties to the acknowledgment or promise, of the benefit of the statute (*k*). If one of several joint debtors promises

(*e*) *Gardner* v. *M'Mahon*, 3 Q.B. 568; 11 L.J. Q.B. 297; *Cheslyn* v. *Dalby*, 4 Y. & C. 238. Instances of *insufficient* acknowledgments will be found in *Morrell* v. *Frith*, 3 M. & W. 403; 7 L.J. Ex. 172; *Poynder* v. *Bluck*, 5 Dowl. P.C. 570; *Hart* v. *Prendergast*, 14 M. & W. 741; 15 L.J. Ex. 223; *Edmonds* v. *Goater*, 21 L.J. Ch. 290; 15 Beav. 415; *Fearn* v. *Lewis*, 6 Bing. 349; 8 L.J. (O.S.) C.P. 95; *Routledge* v. *Ramsay*, 8 Ad. & E. 221; 7 L.J. Q.B. 156; *Whippy* v. *Hillary*, 3 B. & Ad. 400; 4 L.J. K.B. 178; *Spong* v. *Wright*, 9 M. & W. 629; 12 L.J. Ex. 144; *Martin* v. *Knowles*, 1 N. & M. 422; 2 L.J. K.B. 100; *Cawley* v. *Furnell*, 20 L.J. C.P. 197; 12 C.B. 291; *Parmiter* v. *Parmiter*, 3 De G. F. & J. 461; 30 L.J. Ch. 508; *Richardson* v. *Barry*, 29 Beav. 22; *Hindmarsh, In re*, 1 Dr. & Sm. 129; *Buckmaster* v. *Russell*, 10 C.B. N.S. 745; *Cockrill* v. *Sparke*, 1 H. & C. 699; 32 L.J. Ex. 118; *Bush* v. *Martin*, 2 H. & C. 311; 33 L.J. Ex. 17; *Lowndes* v. *Garnett and Moseley Gold Mining Co.*, 33 L.J. Ch. 418; *Newbould* v. *Smith*, 33 Ch.D. 127; 55 L.J. Ch. 788; affirmed on different grounds, 14 App.Cas. 423. Instances of *sufficient* acknowledgments will be found in *Collis* v. *Stack*, 1 H. & N. 605; 26 L.J. Ex. 138; *Bird* v. *Gammon*, 3 Bing. N.C. 883; 6 L.J. C.P. 258; *Sidwell* v. *Mason*, 2 H. & N. 306; 26 L.J. Ex. 407; *Colledge* v. *Horne*, 3 Bing. 119; 3 L.J. (O.S.) C.P. 184; *Gardner* v. *M'Mahon*, *supra*; *Dodson* v. *Mackey*, 8 Ad. & E. 225; *Lee* v. *Wilmot*, L.R. 1 Ex. 364; 35 L.J. Ex. 175; *Chasemore* v. *Turner*, 45 L.J. Q.B. 66; *Wilby* v. *Elgee*, L.R. 10 C.P. 497; 44 L.J. C.P. 254; *Powers, In re*, 30 Ch.D. 291.

(*f*) *Robarts* v. *Robarts*, 1 Moo. & P. 489; 6 L.J. (O.S.) C.P. 117; *Rothery* v. *Munnings*, 1 B. & Ad. 15; 8 L.J. (O.S.) K.B. 386; *Phillips* v. *Broadley*, 9 Q.B. 744; 16 L.J. Q.B. 72.

(*g*) *Haydon* v. *Williams*, 7 Bing. 163; 9 L.J. (O.S.) C.P. 16.

(*h*) *Gale* v. *Capern*, 1 Ad. & E. 104; 3 L.J. Q.B. 140; *Cripps* v. *Davis*, 12 M. & W. 165; 13 L.J. Ex. 217; *Bourdin* v. *Greenwood*, L.R. 13 Eq. 281; 41 L.J. Ch. 73.

(*i*) *Easterly* v. *Pullen*, 3 Stark. 186.

(*k*) 9 Geo. 4, c. 14, s. 1.

by writing, signed by him, to pay his proportion of the joint debt, this is an additional new contract; and, if the creditor sues him upon the original joint contract for the entire debt, and that action is defeated by a plea of the Statute of Limitations, he may then resort to the new contract for the recovery of the defendant's proportion of the joint debt (*l*).

Acknowledgment by devisee for life or executor.—Payment by a devisee for life or executor of interest on a simple contract debt of his testator is a sufficient acknowledgment against all parties interested in remainder (*m*).

Party to whom acknowledgment is to be made.—It has been held that it is not necessary, except in the case of actions on mortgage deeds or mortgage bonds (*n*), that the acknowledgment should be made to the creditor himself, or to his agent, but that a letter acknowledging the debt, addressed to a third party, or a signed acknowledgment in writing, not addressed to any one, will be sufficient (*o*). The acknowledgment must be shown to have been written or signed before the commencement of the action. Where it is not made until after the action is brought, it cannot prevent the operation of the statute (*p*). If there is no date to the writing, the date may be supplied by oral testimony (*q*).

Exemption of promise or acknowledgment from stamp duty.—Promises to pay debts barred by the Statute of Limitations may, by 9 Geo. 4, c. 14, s. 8, be given in evidence, unstamped, for the mere purpose of proving an acknowledgment of the debt, but not for the purpose of proving the debt itself, or the contract or promise which gives rise to the cause of action (*r*). The exemption extends only to those written instruments which, but for the exemption, would require an agreement stamp. An unstamped or wrongly stamped promissory note cannot, consequently, be given in evidence to establish the promise or acknowledgment (*s*).

Part payment of principal debt, or payment of interest thereon.—The proviso in 9 Geo. 4, c. 14, s. 1, declaring that nothing contained in the Act is to alter, take away, or lessen the effect of any payment of principal or interest, takes the case of payment of principal or interest altogether out of the operation of that statute, so as to enable payment to be proved as before the statute was

(*l*) *Lechmere* v. *Fletcher*, 1 Cr. & M. 636.

(*m*) *Hollingshead, In re*, 37 Ch.D. 651; 57 L.J. Ch. 400; *Macdonald, In re*, (1897) 2 Ch. 181; 66 L.J. Ch. 630.

(*n*) *Forsyth* v. *Bristowe*, 8 Exch. 721; 22 L.J. Ex. 255.

(*o*) *Mountstephen* v. *Brooke*, 3 B. & Ald. 141; *Clark* v. *Hougham*, 2 B. & C. 149; 1 L.J. (O.S.) K.B. 249; *Halliday* v. *Ward*, 3 Campb. 32; *Clarke* v. *Hooper*, 4 Moo. & Sc. 353; 3 L.J. C.P. 159.

(*p*) *Bateman* v. *Pinder*, 3 Q.B. 576; 11 L.J. Q.B. 281.

(*q*) *Edmunds* v. *Downes*, 2 Cr. & M. 459; 3 L.J. Ex. 98.

(*r*) *Morris* v. *Dixon*, 4 Ad. & E. 845.

(*s*) *Jones* v. *Ryder*, 4 M. & W. 35; 7 L.J. Ex. 216; *Ashling* v. *Boon*, (1891) 1 Ch. 568; 60 L.J. Ch. 306.

passed (*t*). In order to make a money payment a part payment within the statute, it must be shown to be a payment of a portion of an admitted debt. If the payment was intended by the debtor to be a payment of all that was due, the circumstance of the creditor's having received it and treated it as a part payment only will not bring it within the statute (*u*). If it stands ambiguous whether the payment be a part payment of an existing debt, more being admitted to be due, or whether it was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation (*x*). If the payment is accompanied by declarations, from some of which it is to be inferred that a further debt still remained due, and from others that all further liability was repudiated, it is for a jury to draw their own inferences from the statements made, and adopt or reject what portions of them they think fit (*y*). If there be two debts, one barred by the statute, and the other not barred, a general payment on account will not revive a debt barred by the statute, if it can be attributed to a debt that is not barred. *Primâ facie* it is to be taken as payment on account of the sum that is not barred (*z*). Part payment of a debt will not prevent the operation of the Statute of Limitations, unless made to the creditor or his agent (*a*).

Part payment by bill or note.—If a bill of exchange is delivered as a part payment under circumstances which show that more was admitted to be due, the Statute of Limitations as to the residue of the debt will run from the time of the delivery of the bill (*b*). If a debtor draws a bill of exchange and delivers it to the creditor to be applied in part payment of the debt, and the bill is paid, when due, by the drawee, the part payment operates from the time of the drawing and delivery of the bill, and not from the time of its payment (*c*).

Part payment by performance of service or by delivery of goods.—The performance of any duty or service which the parties may agree to treat as a part payment will operate as such (*d*). Where

(*t*) *Cleave* v. *Jones*, 6 Exch. 578; 20 L.J. Ex. 238.

(*u*) *Foster* v. *Dawber*, 6 Exch. 853; 20 L.J. Ex. 385; *Tippets* v. *Heane*, 1 C. M. & R. 252; 3 L.J. Ex. 281.

(*x*) *Waugh* v. *Cope*, 6 M. & W. 829; 10 L.J. Ex. 145; *Burkitt* v. *Blanshard*, 3 Exch. 89; 18 L.J. Ex. 34. See *Taylor* v. *Hollard*, (1902) 1 K.B. 676; 71 L.J. K.B. 278.

(*y*) *Wainman* v. *Kynman*, 1 Exch. 118; 16 L.J. Ex. 232; *Baildon* v. *Walton*, 1 Exch. 617; 17 L.J. Ex. 357.

(*z*) *Nash* v. *Hodgson*, 25 L.J. Ch. 188; 6 De G. M. & G. 474; *Walker* v. *Butler*, 6 E. & B. 506; 25 L.J. Q.B. 377; *Burn* v. *Boulton*, 2 C.B. 476; 15 L.J. C.P. 97; *Mills* v. *Fowkes*, 7 Sc. 444; 8 L.J. C.P. 276.

(*a*) *Stamford Banking Co.* v. *Smith*, (1892) 1 Q.B. 765; 61 L.J. Q.B. 405; *Topping, Ex parte*, 34 L.J. Bk. 44; 4 De G. J. & S. 551.

(*b*) *Turney* v. *Dodwell*, 3 E. & B. 136; 23 L.J. Q.B. 137.

(*c*) *Irving* v. *Veitch*, 3 M. & W. 90; 7 L.J. Ex. 25; *Gowan* v. *Forster*, 3 B. & Ad. 507.

(*d*) *Bodger* v. *Arch*, 10 Exch. 341; 24 L.J. Ex. 22.

goods were delivered and received by agreement of the parties in reduction of a debt, it was deemed to be a part payment within the proviso of the statute (*e*). But, if the delivery and acceptance are nothing more than the common case of two tradesmen, each selling goods to the other, without any agreement that the goods delivered on one side should be considered as payment for those delivered on the other, the transaction will not amount to a payment within the proviso (*f*).

Part payment by adjustment and settlement of accounts.—Where there are mutual accounts between parties, with items on both sides, and the parties go through such accounts, setting off one item due to one against another item due to another, and striking a balance, the party entitled to the balance will have six years from the period of the stating of the account for the recovery of such balance, the transaction amounting, as we have already seen, to a new contract between the parties, giving rise to a new cause of action, and not being a mere acknowledgment or admission of an existing debt. The plaintiff in such a case does not go upon the original debt at all (*g*). Entries made in a book, by direction of a deceased party, of payment of interest, are admissible in evidence for the purpose of repelling the operation of the Statute of Limitations, whenever the entries are against the interest of the party directing them to be made (*h*). A statement of account by a client to his attorney in his professional character, to enable the latter to lay a case before counsel, is a privileged communication, and cannot be used in evidence against the client (*i*).

Payment of interest on a debt operates as an admission of the debt, and an extension of the period of limitation; and oral evidence is admissible to show on what account the money was paid (*k*). But the payment of interest, like part payment, must be such that a promise to pay the principal may be inferred in fact. Thus, where the maker of a note was sued for the interest then due upon it, and, judgment having been recovered against him, he paid the amount sued for, it was held that this payment of interest did not take the principal debt out of the operation of the statute (*l*). If, however, the defendant admits the debt, and

(*e*) *Hart* v. *Nash*, 2 C. M. & R. 337; *Hooper* v. *Stephens*, 4 Ad. & E. 71; 5 L.J. K.B. 4.

(*f*) *Cottam* v. *Partridge*, 4 Sc. N.R. 834.

(*g*) *Ashby* v. *James*, 11 M. & W. 542; 12 L.J. Ex. 295; *Smith* v. *Forty*, 4 C. & P. 126; *Holmes* v. *Mackrell*, 3 C.B. N.S. 789; *Amos* v. *Smith*, 1 H. & C. 238; 31 L.J Ex. 423.

(*h*) *Bradley* v. *James*, 13 C.B. 822; 22 L.J. C.P. 193.

(*i*) *Cleave* v. *Jones*, 7 Ex. 421; 21 L.J. Ex. 105.

(*k*) *Waters* v. *Tompkins*, 2 C. M. & R. 727; *Bevan* v. *Gething*, 3 Q.B. 740; 12 L.J. Q.B. 297; *Burn* v. *Boulton*, 2 C.B. 484; 15 L.J. C.P. 97; *Evans* v. *Davies*, 4 Ad. & E. 840; 6 L.J. K.B. 268.

(*l*) *Morgan* v. *Rowlands*, L.R. 7 Q.B. 493; 41 L.J. Q.B. 187.

pays interest thereon, and at the same time declares that he will pay nothing further, the jury may give effect to the admission and payment, and disregard the declaration; it is for a jury to say, from what was said and done in connection with the payment, whether it was a payment of interest on an admitted debt, or whether the debt was repudiated, and had no existence, at the time of payment (*m*). If the debt is secured, partly by bills and notes and simple contracts, and partly by bonds or mortgage deeds, and specialty securities, and interest is paid on the whole debt generally, the time of limitation will be extended as to all the securities (*n*). If a debtor pays a principal debt barred by the statute, and expressly refuses to pay interest, the payment of the principal will not revive the claim to the interest (*o*). Payment of interest on bills or notes is an admission of continued liability down to the period of such payment of interest, and causes the time of limitation to run therefrom (*p*). It is also evidence of a demand of payment of the note having been made, *i.e.*, of the debt being due; for interest is paid for forbearance of a debt (*q*). If indorsements on a bill or note of payment of interest or principal are put in evidence as an admission of the debt, they must be signed by the debtor, or have been made in his presence, or by his direction, or by some party who was acting as his agent in the matter (*r*). It is not essential that money should actually pass between the debtor and creditor to constitute a payment of interest. Where the debtor was about to pay the creditor, his father, the interest due, but the father stopped him, and, writing a receipt for the money, gave it to the son's wife, saying that he would make her a present of the money, it was held that there was a sufficient payment (*s*).

Part payment by one of several joint and several debtors or co-contractors.—Formerly, if one of several joint debtors, or one of several joint and several debtors or co-contractors, paid part of the debt due, or paid interest thereon, the payment was a payment by all, and extended the period of limitation as to all, although the payment was made by the one without the concurrence, or in fraud of the others. But now, by 19 & 20 Vict. c. 97, s. 14, it is enacted that two or more co-contractors or co-debtors, whether jointly or

(*m*) *Wainman* v. *Kynman*, 1 Exch. 118; 26 L.J. Ex. 232; *Baildon* v. *Walton*, 1 Exch. 617; 17 L.J. Ex. 357.

(*n*) *Dowling* v. *Ford*, 11 M. & W. 329; 12 L.J. Ex. 342.

(*o*) *Collyer* v. *Willock*, 4 Bing. 313; 5 L.J. (O.S.) C.P. 181.

(*p*) *Bamfield* v. *Tupper*, 7 Exch. 27; 21 L.J. Ex. 6; *Bealy* v. *Greenslade*, 2 Cr. & J. 61.

(*q*) *Rutherford, In re*, 14 Ch.D. 687; 49 L.J. Ch. 654.

(*r*) 9 Geo. 4, c. 14, s. 3; *Briggs* v. *Wilson*, 17 Beav. 330; *Bradley* v. *James*, *ante*, p. 198.

(*s*) *Maber* v. *Maber*, L.R. 2 Ex. 153; 36 L.J. Ex. 70; *Amos* v. *Smith*, 1 H. & C. 238; 31 L.J. Ex. 423.

severally liable, or the executors or administrators of any contractor, shall not lose the benefit of the Statute of Limitations, and be rendered chargeable, by reason of payment of principal or interest, or other money, by another co-contractor or co-debtor, executor or administrator. A payment made before the passing of this statute was not operated upon by this section, which has no retrospective effect (*t*). The statute does not apply where the interest is paid by one co-debtor on behalf of the other at his request (*u*).

Payment by strangers and agents.—Where, before the Married Women's Property Act, 1882 (*v*), a married woman, after her marriage, paid interest without the knowledge of her husband on a promissory note given by her whilst she was a *feme sole*, it was held that the cause of action upon the note could not be kept alive by any act of the wife during coverture, done without the knowledge and sanction of the husband (*x*). Where a promissory note had been signed by the defendants as churchwardens or overseers of a parish, and interest had been regularly paid upon the note by the overseers of the parish for the time being, it was held that it was for a jury to say whether the defendants had not constituted the churchwardens and overseers for the time being their agents for the payment of the interest (*y*). An acknowledgment made by one of several executors as executor binds the testator's estate, and on the death of the executor who made the acknowledgment an order may be made for the payment of the debt out of assets remaining unadministered in the hands of the surviving executors (*z*). Payment of interest by the devisees in trust of the real estate of a deceased covenantor does not bind the equitable tenant for life (*a*).

Payment to strangers and agents.—A payment to a third person by direction of the creditor is a payment to the creditor himself (*b*); and, if money is lent by a trustee acting on behalf of the *cestui que trust*, a payment to the latter is equivalent to a payment to the trustee (*c*). Payment to a husband of interest which had accrued due upon the wife's *chose in action* was, before the Married Women's Property Act, 1882 (*d*), held to be equivalent to payment

(*t*) *Jackson* v. *Woolley*, 8 E. & B. 784; 27 L.J. Q.B. 448.

(*u*) *Tucker, In re*, (1894) 3 Ch. 429; 63 L.J. Ch. 737.

(*v*) 45 & 46 Vict. c. 75, ss. 13, 24.

(*x*) *Neve* v. *Holland*, 21 L.J. Q.B. 289; *Pittan* v. *Foster*, 1 B. & C. 250; 1 L.J. (O.S.) K.B. 81.

(*y*) *Jones* v. *Hughes*, 5 Exch. 104; 19 L.J. Ex. 200; *Rew* v. *Pettet*, 1 Ad. & E. 200.

(*z*) *Macdonald, In re*, (1897) 2 Ch. 181; 66 L.J. Ch. 630; *Scholey* v. *Walton*, 12 M. & W. 510; 13 L.J. Ex. 122.

(*a*) *Coope* v. *Cresswell*, L.R. 2 Ch. 112; 36 L.J. Ch. 114; and see *Pears* v. *Laing*, L.R. 12 Eq. 41; 40 L.J. Ch. 225.

(*b*) *Worthington* v. *Grimsditch*, 7 Q.B. 484; 15 L.J. Q.B. 52.

(*c*) *Megginson* v. *Harper*, 2 C. & M. 322; 3 L.J. Ex. 50.

(*d*) 45 & 46 Vict. c. 75.

to the wife (*e*); and a payment to a person supposed by the debtor to be duly authorized to receive the money, but who had no authority to receive it, may be made as good a payment and acknowledgment under the statute as if the money had been paid to the party rightfully entitled (*f*).

Limitation of actions in respect of contracts made abroad.—Where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim or title or cause of action itself, and declares it a nullity after the lapse of the prescribed period, such law may be set up in any other country to which the parties may remove, as an absolute bar, provided the parties have been resident within the foreign jurisdiction during the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy (*g*). A judgment of a foreign court in favour of the defendant upon a plea setting up a law of limitation, which bars the remedy, but not the debt, is no bar to an action for the debt in the courts of this country (*h*).

Suspension of statute.—When a debtor takes out administration to his creditor, the running of the statute is suspended during the administration (*i*).

No limitation in cases of express trust.—By sect. 25, sub-sect. 2, of the Judicature Act, 1873 (*k*), no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations (*l*).

(*e*) *Hart* v. *Stephens*, 6 Q.B. 937; 14 L.J. Q.B. 148.

(*f*) *Clark* v. *Hooper*, 10 Bing. 480; 3 L.J. C.P. 159; *Stamford Banking Co.* v. *Smith*, (1891) 1 Q.B. 765; 61 L.J. Q.B. 405.

(*g*) *Huber* v. *Steiner*, 2 Sc. 326; 2 Bing. N.C. 202; *British Linen Co.* v. *Drummond*, 10 B. & C. 903; 9 L.J. (O.S.) K.B. 213; *Leroux* v. *Brown*, 12 C.B. 801; 22 L.J. C.P. 1; *Ruckmaboye* v. *Mottichund*, 8 Moo. P.C. 4; *Gibson* v. *Holland*, L.R. 1 C.P. 1; 35 L.J. C.P. 5; *Harris* v. *Quine*, L.R. 4 Q.B. 653; 38 L.J. Q.B. 331.

(*h*) *Harris* v. *Quine*, *supra*.

(*i*) *Seagram* v. *Knight*, L.R. 2 Ch. 628; 36 L.J. Ch. 918.

(*k*) 36 & 37 Vict. c. 66.

(*l*) See *Burdick* v. *Garrick*, L.R. 5 Ch. 233; 39 L.J. Ch. 369; *Knox* v. *Gye*, L.R. 5 H.L. 656; 42 L.J. Ch. 234; *Stone* v. *Stone*, L.R. 5 Ch. 74; 39 L.J. Ch. 196; *Bell*, *In re*, 34 Ch.D. 462; 56 L.J. Ch. 307. But the statute will run where the trustee gets money not belonging to the *cestui que trust*, but which he can claim on the ground that the receipt of it by the trustee was a fraud upon him: *Metropolitan Bank* v. *Heiron*, 5 Ex.D. 319; *Lister* v. *Stubbs*, 45 Ch.D. 1; 59 L.J. Ch. 570; and see now, 51 & 52 Vict. c. 59, s. 8.

CHAPTER V.

THE TRANSFER OF CONTRACTS.

SECTION I.

TRANSFER BY ASSIGNMENT.

Assignment of personal contracts.—The common law in times past discountenanced the assignment of all rights and causes of action, as tending to increase maintenance and litigation, and would not, consequently, suffer the right to the fulfilment of a contract of a personal nature to be transferred from hand to hand. The performance of a contract for work might be delegated to a subordinate agent or servant, but not the right to sue upon the contract (*a*). But in equity an assignment of a *chose in action* after notice to the debtor had always been held to be perfectly valid, so as to pass the beneficial interest (*b*); and latterly the ancient rule of the common law had evaporated to a mere shadow. It no longer prevented the assignee from suing, but regulated merely the form of his action; he could not sue in his own name, but he was in general permitted to bring his action and to recover in the name of the original assignor, the party with whom the contract was entered into (*c*).

In modern times, too, the legislature had sanctioned the assignment of certain bonds and contracts, and authorised the assignees to sue upon them in their own names, such as bail bonds (*d*), replevin bonds (*e*), India bonds (*f*), railway bonds (*g*), Exchequer bonds (*g*), administration bonds (*h*), bills of lading (*i*), and policies

(*a*) *Schmaling* v. *Thomlinson*, 6 Taunt. 147; *Boulton* v. *Jones*, 2 H. & N. 564; 27 L.J. Ex. 117; *Hardman* v. *Booth*, 1 H. & C. 803; 32 L.J. Ex. 105.

(*b*) *Winch* v. *Keeley*, 1 T.R. 619.

(*c*) *Master* v. *Miller*, 4 T.R. 340; *Legh* v. *Legh*, 1 B. & P. 447; *Almer* v. *George*, 1 Campb. 392; *Brandt* v. *Heatig*, 2 Moore, 184; *Pickford* v. *Ewington*, 4 Dowl. P.C. 453; *Morrison* v. *Parsons*, 2 Taunt. 407.

(*d*) 4 & 5 Anne, c. 3, s. 20.

(*e*) *Thompson* v. *Farden*, 1 M. & Gr. 535; 9 L.J. C.P. 284; *Dias* v. *Freeman*, 5 T.R. 195.

(*f*) 51 Geo. 3, c. 64, s. 4; *Glynn* v. *Baker*, 13 East, 509.

(*g*) *Glynn* v. *Baker*, 13 East, 509; *Vertue* v. *East Angl. Ry.*, 5 Exch. 280; 19 L.J. Ex. 235.

(*h*) 20 & 21 Vict. c. 77, ss. 81, 83.

(*i*) 18 & 19 Vict. c. 111.

of marine (*k*) and life (*l*) assurance. The assignee of a Scotch bond, which is a negotiable instrument in Scotland, might maintain an action of *assumpsit* in this country against the obligor upon the implied promise raised by the indorsement and assignment to him of the bond (*m*); and, as the assignment of judgments by confession is authorised by Act of Parliament in Ireland, the assignee of such a judgment might maintain an action in this country upon it in his own name (*n*). A corporate body, having issued assignable debentures purporting to have been executed pursuant to powers conferred by statute, is estopped from alleging against an innocent assignee for value, that the debentures have been issued illegally and in contravention of the statutory powers (*o*).

The legislature had also authorised the assignee of the *choses in action* of a joint-stock company in liquidation (*p*), and the assignee of the book-debts of a bankrupt (*q*), to bring actions for such *choses in action* or book-debts in his own name. And now, by the Judicature Act, 1873 (*r*), any debt or other *chose in action* may be assigned absolutely by writing under the hand of the assignor; and such assignment, after express notice in writing has been given to the debtor, will be effectual in law (subject to all equities which would have been entitled to priority over the assignee if that Act had not passed), to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. Previously to the passing of this Act the general rule of the Court of Equity was that the assignee of a *chose in action* took it subject to all the equities between the original parties to the contract (*s*), that is, to all the equities subsisting at the date of the assignment (*t*), and this still prevails as the general rule; but the parties to the original contract may, by express stipulation or by implication arising from their conduct,

(*k*) 31 & 32 Vict. c. 86; a policy may be assigned under this Act after a loss has occurred: *Lloyd* v. *Fleming*, L.R. 7 Q.B. 299; 41 L.J. Q.B. 93; as to set off of premiums, see *Pellas* v. *Neptune Co.*, 5 C.P.D. 34.

(*l*) 30 & 31 Vict. c. 144; *Haycock's Policy, In re*, 1 Ch.D. 611; 45 L.J. Ch. 247.

(*m*) *Innes* v. *Dunlop*, 8 T.R. 595.

(*n*) *O'Callaghan* v. *Thomand*, 3 Taunt. 82.

(*o*) *Webb* v. *Herne Bay Commissioners*, L.R. 5 Q.B. 642; 39 L.J. Q.B. 221; *Romford Canal Co., In re*, 24 Ch.D. 85; 52 L.J. Ch. 729.

(*p*) 25 & 26 Vict. c. 89, ss. 95, 157.

(*q*) 32 & 33 Vict. c. 71, s. 111 (repealed).

(*r*) 36 & 37 Vict. c. 66, s. 25 (6). As to the assignment forming part of the cause of action, see *Read* v. *Brown*, 22 Q.B.D. 128; 58 L.J. Q.B. 120. As to what is a good assignment, see *Marchant* v. *Morton*, 70 L.J. K.B. 820; *Torkington* v. *Magee*, (1902) 2 K.B. 427; 71 L.J. K.B. 712.

(*s*) *Natal Investment Co., In re*, L.R. 3 Ch. 355; 37 L.J. Ch. 362; *Rodger* v. *Comptoir d'Escompte de Paris*, L.R. 2 P.C. 393; 38 L.J. P.C. 30. This last case has been dissented from on the ground that the title was not to a *chose in action* in that case, but to a legal right of ownership: see *Leask* v. *Scott*, 2 Q.B. D. 376; 46 L.J. Q.B. 576.

(*t*) *China Steamship Co., In re*, L.R. 7 Eq. 240; 38 L.J. Ch. 199.

agree that the *chose in action* may be assigned free from such equities; and in that case an assignee will take the *chose in action* discharged from such equities accordingly (*u*), or he may be released therefrom by the conduct of the debtor after the assignment (*x*). Where there is a distinct promise held out by a company informing all the world that they will pay to the order of a person named, it is not competent for that company afterwards to set up equities of their own, and say that, because the person who makes the order is indebted to them, they will not pay (*y*). And a debenture, which merely means an instrument showing that the maker owes and is bound to pay, if made payable to order or bearer, is such a promise (*z*). When the assignor of a debt has collateral securities for the debt, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties (*a*). But where debts have been assigned after proof of them in a bankruptcy has been allowed, the trustee has no authority to pay dividends to the assignee (*b*).

Moneys due and to become due under a contract may be assigned, and, if paid over *bonâ fide* to the original debtor, may be recovered back by the assignee. So where G., who was building a vessel for the defendant, directed the defendant to pay to the plaintiff, to whom he owed money, all money due or to be due from the defendant to G., and all money due had been paid, and the defendant, notwithstanding, paid the money becoming due to G., it was held that he must pay it over again to the plaintiff (*c*). But such an assignment is inoperative against the title of a trustee in bankruptcy as regards receipts accruing after the commencement of the bankruptcy (*d*). Whenever the result of the assignment of a contract would be to impose on one of the contracting parties a greater liability than he ever intended to assume, the contract cannot be assigned (*e*).

What is an assignment.—Sect. 25 of the Judicature Act, 1873 (*ante*, p. 203), does not make anything an assignment which was

(*u*) *Asiatic Banking Corp., Ex parte, Agra and Masterman's Bank, In re*, L.R. 2 Ch. 391; 36 L.J. Ch. 222; *Blakely Ordnance Co., In re*, L.R. 3 Ch. 154; 37 L.J. Ch. 418; *City Bank, Ex parte*, L.R. 3 Ch. 758; *Northern Assam Tea Co., In re*, L.R. 10 Eq. 458; 39 L.J. Ch. 829; *Dickson* v. *Swansea Vale Ry.*, L.R. 4 Q.B. 44; 38 L.J. Q.B. 17.

(*x*) *Higgs* v. *Northern Assam Tea Co.*, L.R. 4 Ex. 387; 38 L.J. Ex. 233; *Brunton, Ex parte*, L.R. 19 Eq. 302; 44 L.J. Ch. 450.

(*y*) *City Bank, Ex parte, supra.*

(*z*) *Imperial Land Co. of Marseilles, In re, Colborne & Strawbridge, Ex parte*, L.R. 11 Eq. 478; 40 L.J. Ch. 93.

(*a*) Story's Eq. Jur. § 1047 a.

(*b*) *Frost, In re*, (1899) 2 Q.B. 50; 68 L.J. Q.B. 663.

(*c*) *Brice* v. *Bannister*, 3 Q.B.D. 569; 47 L.J. Q.B. 722; *Hall, Ex parte*, 10 Ch.D. 615; 48 L.J. Bank. 79; *Western Wagon Co.* v. *West*, (1892) 1 Ch. 271; 61 L.J. Ch. 244.

(*d*) *Nichols, Ex parte*, 22 Ch.D. 783; 52 L.J. Ch. 635; see *Davis & Co., In re, Rawlings, Ex parte*, 22 Q.B.D. 193.

(*e*) *Tolhurst* v. *Portland Cement Manufacturers*, 71 L.J. K.B. 949.

not an assignment before (*f*). An assignment of moneys not yet due may be an "absolute assignment" (*g*). But there cannot be an absolute assignment of an unascertained portion of a debt (*h*). A mortgage of debts in the ordinary form is an absolute assignment (*i*). As a general rule, anything written, said, or done, in pursuance of an agreement, and for valuable consideration, or in consideration of an antecedent debt, to place a *chose in action* out of the control of the creditor, and appropriate it in favour of another person, amounts to an equitable assignment (*k*). So that an order given by a debtor to his creditor upon a person owing money to such debtor, directing such person to pay the creditor out of such money, will amount to an irrevocable equitable assignment of such money, or a sufficient part thereof, if made in consequence of a direct agreement; and, if such money is handed over to the assignor by the person so ordered to pay, he will be made to pay it over again to the assignee (*l*). But a promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment, so as to charge the debt in the hands of such third person (*m*). And a cheque is not an equitable assignment of the drawer's balance at his banker's (*n*). Where S. insured his life for the purpose, as he told the company, of giving C. a security for his debt, and sent the policies to C. with a letter, asking C. to get his solicitor to prepare an assignment, but none was ever made; and C., on S.'s death, gave notice to the company, which the company acknowledged, it was held that there was no equitable assignment (*o*). And an agreement in writing to execute, on request, an effectual mortgage of a policy deposited as security for a loan, is not an assignment (*p*).

Notice of assignment. — When a *chose in action* has been assigned, notice must be given to the debtor in order to perfect the interest of the assignee, and secure him against any claims by subsequent assignees (*q*). It is not necessary that notice should be given in the lifetime of the assignor (*r*); but an assignment with-

(*f*) *Walker* v. *Bradford Old Bank*, 12 Q.B.D. 511; 53 L.J. Q.B. 280; *Schroeder* v. *Central Bank of London*, 24 W.R. 710; *Haycock's Policy, In re*, 1 Ch.D. 611; 45 L.J. Ch. 247; *Culley, Ex parte*, 9 Ch.D. 307; 47 L.J. Bankr. 97.

(*g*) *Brice* v. *Bannister*, 3 Q.B.D. 569; 47 L.J. Q.B. 722. See *Durham* v. *Robertson*, (1898) 1 Q.B. 765; 67 L.J. Q.B. 484.

(*h*) *Jones* v. *Humphreys*, (1902) 1 K.B. 10; 71 L.J. K.B. 23.

(*i*) *Tancred* v. *Delagoa Bay Ry.*, 23 Q.B.D. 239; 58 L.J. Q.B. 459.

(*k*) Spence's Eq. Jur. vol. 2, pp. 855, 860, 861, 907; *Chowne* v. *Baylis*, 31 Beav. 351; 31 L.J. Ch. 757.

(*l*) *Jones* v. *Farrell*, 1 De G. & J. 208.

(*m*) *Field* v. *Megaw*, L.R. 4 C.P. 660.

(*n*) *Hopkinson* v. *Forster*, L.R. 19 Eq. 74.

(*o*) *Crossley* v. *City of Glasgow Ins. Soc.*, 4 Ch.D. 421; 46 L.J. Ch. 65.

(*p*) *Spencer* v. *Clarke*, 9 Ch.D. 137; 47 L.J. Ch. 692; as to what is an "absolute assignment," see *Burlinson* v. *Hall*, 12 Q.B.D. 347; 53 L.J. Q.B. 222; *Comfort* v. *Betts*, (1891) 1 Q.B. 737; 60 L.J. Q.B. 656; *Mercantile Bank of London* v. *Evans*, (1899) 2 Q.B. 613; 68 L.J. Q.B. 921; *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K.B. 190; 71 L.J. K.B. 630.

(*q*) See sect. 25 (6) of Jud. Act, 1873, *supra*.

(*r*) *Walker* v. *Bradford Old Bank*, 12 Q.B.D. 511; 53 L.J. Q.B. 280.

out notice is good as against a subsequent judgment creditor of the assignor (*s*). If no notice has been given to the debtor, payment by him to the assignor is a good discharge; and a subsequent assignee, who first gives notice to the debtor, will be preferred to a prior assignee who has not given notice (*t*). The principle applies where the second assignee of an interest in a trust fund has taken his assignment from the legal personal representative of the assignor, and not from the assignor himself (*u*). It is sufficient, however, if the assignee of such an interest give notice to all the trustees in existence at the time of the assignment to him, and he will get priority over a subsequent assignee who has given notice to a fresh set of trustees appointed after the first assignment (*x*). Notice of the assignment of a trade-debt not given to the debtor until after the bankruptcy of the assignor is insufficient to take it out of the order and disposition of the bankrupt; and the title of the trustee will prevail over that of the assignee (*y*). And it is immaterial that the notice was given by the assignee to the debtor before the latter had notice of the bankruptcy (*z*). It is sufficient, if the notice is given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable, or is merely charged with the duty of making the payment (*a*). Sect. 25 (6) of the Judicature Act, 1873 (*b*), requires, in order that the legal estate may pass, that the notice should be in writing; but a notice by word of mouth is sufficient to effect an equitable assignment (*c*). Where the debt is due from a company in course of winding up, notice to the official liquidator is sufficient (*d*). By an assignment of a bond, policy of insurance, or other instrument of contract, the right of property in the instrument itself passes to the assignee, so that an action is maintainable for the recovery of possession of the document (*e*). If the notice states that the assignment was made upon a specified date, upon which in fact no such assignment took place, the notice does not comply with the requirements of the section and is therefore

(*s*) *Bevan* v. *Oxford (Lord)*, 6 De G. M. & G. 492; 25 L.J. Ch. 299, which is to be preferred to *Watts* v. *Porter*, 3 E. & B. 743; 23 L.J. Q.B. 345; where the contrary was held by the majority of the Court: see *Pickering* v. *Ilfracombe Ry.*, L.R. 3 C.P. 235; 37 L.J. C.P. 118; and *Crow* v. *Robinson*, L.R. 3 C.P. 264; 36 L.J. C.P. 124.

(*t*) *Dearle* v. *Hale*, 3 Russ. 1; 2 L.J. (O.S.) Ch. 62; *Loveridge* v. *Cooper*, 3 Russ. 1, 30; 2 L.J. (O.S.) Ch. 75; *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Ward* v. *Duncombe*, (1893) A.C. 369; 62 L.J. Ch. 881; *Marchant* v. *Morton*, (1901) 2 K.B. 829; 70 L.J. K.B. 820. The rule does not apply to shares in a company: *Société Générale de Paris* v. *Walker*, 11 App.Cas. 20; 55 L.J. Q.B. 569.

(*u*) *Freshfield's Trust, In re*, 11 Ch.D. 198.

(*x*) *Wasdale, In re*, (1899) 1 Ch. 163; 68 L.J. Ch. 117.

(*y*) *Webb, In re*, 36 L.J. Ch. 341; *Barnes* v. *Pinkney*, 36 L.J. Ch. 815.

(*z*) *Tichener, In re*, 35 Beav. 317.

(*a*) *Addison* v. *Cox*, L.R. 8 Ch. 76; 42 L.J. Ch. 291.

(*b*) 36 & 37 Vict. c. 66, s. 25 (6).

(*c*) *Tichener, In re, supra.*

(*d*) *Wragge's case*, L.R. 5 Eq. 284.

(*e*) *Watson* v. *McLean*, 1 E. B. & E. 77.

invalid (*f*). Notice, however, to a debtor, who has given a negotiable instrument in payment of his debt, that the debt has been assigned, does not cast on the debtor any obligation not to pay the negotiable instrument, even although it is presented by the creditor who has assigned the debt (*g*).

When assignment of a chose in action *may be made foundation of new contract.*—When the assignment of a personal contract is defective in form merely, any promise, by the person liable upon the contract, to pay the demand or satisfy the claim, in consideration that the assignee will give him time for payment, or forbear for a particular period to sue him, will enable the assignee to maintain an action in his own name upon such new contract or promise (*h*).

Sub-section I.

COVENANTS RUNNING WITH THE LAND.

Covenants running with land are transferable; they pass from hand to hand with the interest in the realty to which they are annexed, and are called "real contracts." To enable a covenant to run with the land, it is not necessary that the covenantor should be possessed of any estate in the land; but the covenantee must be clothed with some transferable interest therein, to which the covenant can be attached; for otherwise the covenant is a mere personal covenant (*i*). If, therefore, the covenantee is a mortgagor in fee, or a *cestui que trust*, the covenants are personal covenants, and do not run with the land, as the covenantee has no estate recognised by law in the land to which the covenants can be annexed (*k*). A covenant cannot run with a ship or any personal perishable chattel (*l*).

Privity of estate and privity of contract.—Covenants entered into by owners of real property, who convey away their entire interest in the land to the covenantee, are annexed to the estate so transferred, and pass to the assignee of that estate, so as to give him an action upon them against the covenantor, his real and personal

(*f*) *Stanley* v. *English Fibres Industries*, 68 L.J. Q.B. 839.

(*g*) *Bence* v. *Shearman*, (1898) 2 Ch. 582; 67 L.J. Ch. 513.

(*h*) *Morton* v. *Burn*, 7 Ad. & E. 19; 7 L.J. Q.B. 104; *Forth* v. *Stanton*, 1 Saund. 210, n. 1, n. a; *Jeffs* v. *Day*, L.R. 1 Q.B. 372; 36 L.J. Q.B. 99.

(*i*) Co. Litt. 385 a.

(*k*) *Webb* v. *Russell*, 3 T.R. 393; *Whitton* v. *Peacock*, 2 Bing. N.C. 411; 5 L.J. C.P. 124.

(*l*) *Splidt* v. *Bowles*, 10 East, 279; *De Mattos* v. *Gibson*, 4 De G. & J. 276; 28 L.J. Ch. 502.

representatives. Thus, if A., seised of lands in fee, conveys his estate and interest by deed to B., and covenants with B. to make further assurance, and B. then conveys to C., who conveys to D., D. may require A. to make further assurance to him of the lands according to the covenant, and on his refusal may maintain an action against him (*m*). So, if two coparceners make partition of lands, and the one covenants with the other and her heirs to acquit her and her heirs of a certain suit issuing out of the lands, the assignee of the estate of the covenantee shall have an action upon the covenant (*n*); and the same transfer of the right of action upon the covenant prevails, whether the interest conveyed by the covenantor be an estate of inheritance in the land, or a chattel real only (*o*). If a man, too, purports to grant lands to another in fee, by such conveyance as will pass a fee, and covenants that he is seised in fee, and hath good right to convey, and it subsequently appears that at the time of the conveyance he was not seised in fee, and had not a right to convey, and no fee in the lands passed to the covenantee, yet the assignee of the covenantee who takes such estate and interest in the land as did pass to the covenantee, and who would have had the benefit of the covenant if it had been fulfilled, shall have an action upon it against the covenantor, to recover damages for the breach, the intent of the law in all these cases being "to give the damages to the party grieved" (*p*).

But covenants entered into by the owners of land with persons who have no estate or interest at all in the land are not, it seems, annexed to the estate of the covenantor, and do not run with the land, so as to charge the assignees of the covenantor with the burthen of the performance of them (*q*). If the owner of an estate of inheritance in land, for example, covenants with a stranger who has no interest at all in the soil, that the land holden by the covenantor shall never be built upon, or never planted or inclosed, or that it shall only be used or enjoyed by the covenantor in some particular manner, the covenant is a mere personal covenant (*r*). As a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract, to use the property for a particular purpose, the acquirer shall not, to the material damage of the third person, in opposition to the contract, use the property in a manner not allowable to the giver or seller (*s*).

(*m*) *Middlemore* v. *Goodale*, Cro. Car. 503, 505.

(*n*) Co. Litt. 385 a.

(*o*) *Lewis* v. *Campbell*, 3 Moore, 35; affirmed in err. *Campbell* v. *Lewis*, 3 B. & Ald. 392; *Simpson* v. *Clayton*, 4 Bing. N.C. 758; 8 L.J. C.P. 59.

(*p*) *Jones* v. *King*, 4 M. & S. 188.

(*q*) *Austerberry* v. *Oldham Corporation*, 29 Ch.D. 751; 55 L.J. Ch. 633.

(*r*) *Keppell* v. *Bailey*, 2 Myl. & K. 517, 538; *Ackroyd* v. *Smith*, 10 C.B. 164; 19 L.J. C.P. 315.

(*s*) *De Mattos* v. *Gibson*, 4 De G. & J. 276, 282; 28 L.J. Ch. 502.

If, therefore, a party buys an estate, and accepts a conveyance with full knowledge of the existence of a covenant or agreement of this description, he may be compelled to fulfil it (*t*). And, as a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, he may, in some cases, be bound by a covenant of this description, even without knowledge of its existence. Thus, where the owner of a freehold house, in the conveyance to himself, had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beer-shop, and the house was afterwards let to the defendant as tenant from year to year, without express notice of the covenant, it was held that the defendant was bound by it (*u*). Where a purchaser or lessee has notice of a deed, he has constructive notice of its contents, and is not protected by an express representation that such deed contains no restrictive covenants, nor anything affecting the title (*x*). But, where neither the original conveyance nor a subsequent assignment to the landlord of the defendant, contained any reference to a separate covenant entered into between the original grantor and grantee, and the landlord falsely stated that he was not aware of the existence of the covenant, it was held that no relief could be had against the tenant, who had opened a public-house, because if he had asked his landlord he would have been told there was no restriction, and if he had seen the conveyance he would have found none; and it was remarked that the doctrine of constructive notice had already been carried far enough (*y*). A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, though he has no reversion (*z*).

Covenants between landlord and tenant, or reversioner and lessee, affecting the value or enjoyment of the property by the lessee during the term, are annexed to the estate granted, and run with the land as long as that estate continues; and the right of action upon them in case of breach vests in the assignee of the term. Such are covenants by the lessor to repair, or to grant estovers for the repair and maintenance of the demised tenements, or for burning

(*t*) *Western* v. *M'Dermott*, L.R. 2 Ch. 72; 36 L.J. Ch. 76; *Jay* v. *Richardson*, 30 Beav. 563; 31 L.J. Ch. 398; *Catt* v. *Tourle*, L.R. 4 Ch. 656; 38 L.J. Ch. 665; *Luker* v. *Dennis*, 7 Ch.D. 227; 47 L.J. Ch. 174; *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73; *Andrew* v. *Aitken*, 22 Ch.D. 218; 52 L.J. Ch. 294.

(*u*) *Wilson* v. *Hart*, L.R. 1 Ch. 463; 35 L.J. Ch. 569; *Fielden* v. *Slater*, L.R. 7 Eq. 523; 38 L.J. Ch. 379; *Jones* v. *Bone*, L.R. 9 Eq. 674; 39 L.J. Ch. 405; *Keates* v. *Lyon*, L.R. 4 Ch. 222; 38 L.J. Ch. 357; *Nottingham Tile Co.* v. *Butler*, 16 Q.B.D. 778; 55 L.J. Q.B. 280; *Collins* v. *Castle*, 36 Ch.D. 243; 57 L.J. Ch. 76.

(*x*) *Patman* v. *Harland*, 17 Ch.D. 353; 50 L.J. Ch. 642; and this is so notwithstanding 37 & 38 Vict. c. 78, s. 2.

(*y*) *Carter* v. *Williams*, L.R. 9 Eq. 678; 39 L.J. Ch. 560.

(*z*) *Clements* v. *Welles*, L.R. 1 Eq. 200; 35 L.J. Ch. 265.

within the house during the term (*a*); to cleanse and repair water-courses (*b*); to supply the demised premises with water (*c*); to acquit the land of certain suits and charges (*d*); also covenants for renewal, and provisoes for re-entry or defeasance of the estate granted (*e*); covenants for quiet enjoyment (*f*); and all the usual covenants for title. "And of these covenants assignees in deed or in law, and assignees of assignees *in infinitum*, shall take advantage; also assignees of executors or administrators, tenants by statute or *elegit*, or after a sale upon a *fieri facias*, or a husband in right of his wife; any one of these, and any other that shall come lawfully to a term unto which such a covenant is incident, albeit he be not named therein, yet may he take advantage thereof" (*g*). By the Conveyancing Act, 1881, the obligations of a lessor's covenants are to run with the reversion, notwithstanding severance, as to leases made after 31st December, 1881 (*h*).

"If, on the other hand, the lessee enters into similar covenants with the lessor, and afterwards assigns over his estate, the assignee will be responsible for all breaches of covenant that accrued during the time the term or estate continued vested in him (*i*), although the covenant wants the word 'assigns,' and although he has never entered and taken possession of the land (*k*); for by taking the estate he makes himself subject to the covenants, *quia transit terra cum onere*" (*l*). But this liability is extinguished as soon as the privity of estate is destroyed; and the assignee, consequently, may get rid of the burthen of the performance of the covenant at any time by simply assigning over his estate (*m*). He cannot, by the assignment, release himself from liability in respect of actually existing breaches (*n*); but he escapes from all responsibility in respect of breaches afterwards accruing, though his assignee be a mere pauper or an insolvent (*o*). This, however, is not the case with the original lessee; the latter remains liable upon the covenants he himself has expressly entered into with the lessor; for the privity of contract, as between him and the lessor, is held to remain, although the privity of estate has been destroyed by the assignment of the estate (*p*); and he and his personal representatives (*post*,

(*a*) *Spencer's case*, 5 Co. 17, b; Bac. Abr. Covt. E. 5.
(*b*) *Holmes* v. *Buckley*, Prec. Ch. 39.
(*c*) *Jourdain* v. *Wilson*, 4 B. & Ald. 266.
(*d*) 5 Rep. 18, a.
(*e*) *Roe* v. *Hayley*, 12 East, 468.
(*f*) *Williams* v. *Burrell*, 1 C.B. 429.
(*g*) Shep. Touch. ch. 7.
(*h*) 44 & 45 Vict. c. 41, s. 11.
(*i*) *Harley* v. *King*, 2 C. M. & R. 18; 4 L.J. Ex. 144.
(*k*) *Williams* v. *Bosanquet*, 3 Moore, 500.
(*l*) *Bally* v. *Wells*, 3 Wils. 29; *Tatem* v. *Chaplin*, 2 H. Bl. 133.
(*m*) *Paul* v. *Nurse*, 8 B. & C. 486; 7 L.J. (O.S.) K.B. 12.
(*n*) *Harley* v. *King*, *supra*.
(*o*) *Lekeux* v. *Nash*, Str. 1221; *Taylor* v. *Shum*, 1 B. & P. 21; *Onslow* v. *Corrie*, 2 Madd. 330; *Valliant* v. *Dodemede*, 2 Atk. 546; *Hopkinson* v. *Lovering*, 11 Q.B.D. 92; 52 L.J. Q.B. 391.
(*p*) *Barnard* v. *Godscall*, Cro. Jac. 309.

Sect. II.) may consequently be sued upon the covenants by the lessor; for, "though the assignee becomes liable to the lessor for the performance of all the covenants which run with the land, yet the lessee is also liable, in the nature of a surety, for the performance of the same covenants" (*q*); and, if, by reason of the non-performance of the covenants by the assignee for the time being during the continuance of his interest in the premises, the burthen of the fulfilment of them is thrown upon the lessee, and the latter is compelled by the lessor to do that which the assignee, by taking the assignment, has impliedly undertaken to do as between himself and the lessee, the latter may maintain an action against him to recover the amount paid to the lessor, and all the costs and damages he has been put to by reason of the non-fulfilment of the covenant on the part of the assignee (*r*). And this appears to be so even where the breach of covenant took place before the assignment (*s*). But, in order to render the assignee liable upon the covenants, he must be clothed with the same estate as that which the lessee had in the land at the time the covenants were entered into. An underlessee, therefore, is not responsible upon the covenants, inasmuch as he is not possessed of the estate to which they are annexed (*t*). By the Conveyancing Act, 1881, the rent and benefits of the lessee's covenants are to run with the reversion, notwithstanding severance, in respect of leases made after December 31st, 1881 (*u*).

Covenants real annexed to reversionary estates.—Covenants, however, were held at common law to run with the estate of the lessee only, not with the estate of the reversioner. Consequently, although the assignee of the lessee was held to be entitled to sue upon them, yet the assignee of the reversion had no such remedy, and could not maintain an action upon any express covenants made between the lessor and the lessee in respect of the land. Thus, if the owner in fee made a lease, and obtained from the lessee covenants to repair, to manure the lands, or to cultivate them in a particular manner, &c., and then assigned his reversion, the assignee had no title to sue upon these express covenants. This inconvenience led to the passing of 32 Hen. 8, c. 34, which places the assignee of the reversion and the lessee and his assignees upon the same footing with respect to each other as that on which the lessor and the lessee and his assignees previously stood at common law, and gives them the same mutual remedies against one another as

(*q*) Parke, B., *Humble* v. *Langston*, 7 M. & W. 530; 10 L.J. Ex. 442; *Bickford* v. *Parson*, 5 C.B. 929; 17 L.J. C.P. 192.

(*r*) *Burnett* v. *Lynch*, 5 B. & C. 602; 4 L.J (O.S.) K.B. 274; *Moule* v. *Garrett*, L.R. 7 Ex. 101; 41 L.J. Ex. 62.

(*s*) *Gooch* v. *Clutterbuck*, (1899) 2 Q.B. 148; 68 L.J. Q.B. 108.

(*t*) *Holford* v. *Hatch*, 1 Doug. 186; *Derby* (*Earl*) v. *Taylor*, 1 East, 502; *Bonner* v. *Tottenham Building Society*, (1899) 1 Q.B. 161; 68 L.J. Q.B. 114.

(*u*) 44 & 45 Vict. c. 41, s. 10.

those previously existing between the lessor and the lessee and his assignees. The assignee of the reversion may consequently sue the lessee or his assignees upon the covenants entered into by the lessee with the lessor (*x*); and he may himself be sued by the lessee or his assignees upon the covenants entered into by the lessor with the lessee (*y*). But both the lease and the assignment must be under seal, or the benefit and the burthen of the covenants will not run with the land (*z*). The assignee, may, however, if there is a lease by simple contract for a term not exceeding three years in duration, maintain an action for use and occupation against the lessee or his assignee (*a*). If a tenant holds on under an assignee of the reversion, and continues in the enjoyment of all the benefits secured to him by his original lease, he may be presumed to have agreed with the assignee to hold upon the same terms as he held under the original lessor (*b*).

The statute 32 Hen. 8, c. 34, extends to the assignee of a reversion expectant upon the determination of an incorporeal right, such as a right to dig for and carry away clay granted for a term of years (*c*), or a right to kill and take game (*d*); also to the assignee of the reversion of copyhold tenements (*e*); to the assignee of the reversion of a lease for life as well as for years (*f*); to the assignee of part of the reversion in all the land (*g*); and to the assignee of the reversion as to part of the land, though the assignee has not the whole interest in the covenant (*h*); and, where a tenant for life makes a lease in pursuance of a leasing power, the remainderman is considered to be an assignee of the reversion within the statute (*i*). But, to enable the assignee of the reversion to avail himself of the statute, it was held that there should be what was technically termed a privity of estate between him and the party he sought to charge with the performance of the covenants, *i.e.*, the assignee of the reversion and the party sought to be charged must have been respectively possessed of the estates which the covenantor and the covenantee had in the land at the time the covenants were entered into. Where a lessee for a term of ninety-nine years created out of

(*x*) *Brett* v. *Cumberland*, Cro. Jac. 522.

(*y*) *Palmer* v. *Edwards*, 1 Doug. 186; *Thursby* v. *Plant*, 1 Wms. Saund. 240; *Jourdain* v. *Wilson*, 4 B. & Ald. 266.

(*z*) *Beely* v. *Parry*, 3 Lev. 154; *Elliott* v. *Johnson*, L.R. 2 Q.B. 120; 36 L.J. Q.B. 44.

(*a*) *Standen* v. *Chrismas*, 10 Q.B. 142; 16 L.J. Q.B. 265; *Bickford* v. *Parson*, 5 C.B. 929; 17 L.J. C.P. 192.

(*b*) *Arden* v. *Sullivan*, 14 Q.B. 832; 19 L.J. Q.B. 269.

(*c*) *Martyn* v. *Williams*, 1 H. & N. 817; 26 L.J. Ex. 117.

(*d*) *Hooper* v. *Clark*, L.R. 2 Q.B. 200; 36 L.J. Q.B. 79.

(*e*) *Glover* v. *Cope*, 3 Lev. 326; Carth. 205.

(*f*) *Lewes* v. *Ridge*, Cro. Eliz. 863; *Matures* v. *Westwood*, *ib.* 617.

(*g*) *Wright* v. *Burroughes*, 3 C.B. 685; 16 L.J. C.P. 6.

(*h*) *Twynam* v. *Pickard*, 2 B. & Ald. 105; Co. Litt. 215, a; *Badeley* v. *Vigurs*, 4 E. & B. 85; 23 L.J. Q.B. 377; *Swansea (Mayor)* v. *Thomas*, 10 Q.B.D. 48; 52 L.J. Q.B. 340.

(*i*) *Isherwood* v. *Oldknow*, 3 M. & S. 382; *Yellowly* v. *Gower*, 11 Exch. 274; 24 L.J. Ex. 297.

his estate an under-lease for eleven years, leaving in himself the immediate reversion for the remainder of the term, and obtained from the under-lessee covenants to pay rent and repair, and then assigned his immediate reversion for the term to A., who subsequently acquired the ultimate reversion in fee, wherein the reversion for the term became merged, it was held that A., after this merger, could no longer maintain an action upon the covenants, as the estate to which they were annexed, the reversion for the term immediately expectant upon the determination of the under-lease, no longer existed, and that, as the assignee was no longer in possession of the reversion which the covenantee had in the land, the privity of estate was gone, and with it the right of action upon the covenants (*k*). Where a lessor, who was himself an under-lessee, covenanted with his lessee that if he should obtain from the freeholder any extension of his term he would grant the lessee a new lease, it was held this covenant was not one for renewal and did not run with the land, but that under 32 Hen. 8, c. 34, s. 2, it was limited to the reversion which was vested in the covenantor at the time he entered into the covenant (*l*). But by 8 & 9 Vict. c. 106, repealing 7 & 8 Vict. c. 76, it is enacted (sect. 9) that, when the reversion expectant on a lease shall be surrendered or merged, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements, &c., shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

The assignee must also be the assignee of the legal estate in the land; and, whenever it appears upon the face of the deed containing the covenants that the lessor was clothed only with the equitable interest, the benefit and burthen of the covenant do not pass to the assignee (*m*); "for there is no estate in law to sustain and carry the covenant; and, if one having no estate at all in the land grants a lease to A., who assigns to B., with a covenant for quiet enjoyment, and B. assigns over to C., no action lies for C. against A., because nothing passed but by estoppel (*n*). But, whenever an estate by estoppel becomes an estate in interest by the lessor's subsequent acquisition of the estate, the lessor and lessee, and their respective assignees, are clothed with the same rights and liabilities as if the estate had *ab initio* been an estate in interest" (*o*). And if a lease be made by indenture in such a form

(*k*) *Webb* v. *Russell*, 3 T.R. 393.
(*l*) *Muller* v. *Trafford*, (1901) 1 Ch. 54; 70 L.J. Ch. 72.
(*m*) *Pargeter* v. *Harris*, 7 Q.B. 708; 15 L.J. Q.B. 113.
(*n*) *Noke* v. *Awder*, Cro. Eliz. 436; *Whitton* v. *Peacock*, 2 Bing. N.C. 411; 5 L.J. C.P. 124.
(*o*) *Walton* v. *Waterhouse*, 2 Wms. Saund. 418 n. e.

as to create between the lessor and lessee an estoppel to deny that the lessor had a reversion, and the lesser conveys all his interest, there seems to be no sound reason why the assignee should not establish his title by way of estoppel (*p*).

Assignees of grantees of a licence to take a profit from the soil of the grantor are as much bound by a covenant respecting the enjoyment of the licence or the making of compensation for injury done to other land not included in the licence as a lessee and his assignees (*q*).

Requisites of covenant.—Whether the assignees are named or are not named in the covenant has been said to be wholly immaterial (*r*); but the covenant must be "inherent in the land," that is, the performance or non-performance of it must affect the nature, quality, or value of the thing demised, and its mode of enjoyment, otherwise it does not run with the land (*s*). A covenant by the lessee of a house to account and pay so much for every tun of wine sold in the house is a collateral and mere personal covenant (*t*); so is a covenant by a lessee with his lessors, who are brewers, to take all his beer of such lessors or their successors in their trade; and such covenants go not with the land or the reversion by assignment (*u*). So a proviso for re-entry in case of a conviction under the game laws does not entitle the assignee of the lessor to re-enter upon such conviction (*x*); nor does a covenant not to build a public-house within half a mile of the demised premises run with the land (*y*). But all covenants relating to the cultivation of the demised premises (*z*); to conduct the business of a beerhouse in an orderly manner (*a*); to buy wines from the lessor, his successors or assigns (*b*); to pay rent, or render suits or services (*c*); not to assign or underlet or otherwise part with the possession of the demised premises, without first obtaining the

(*p*) *Spencer's case*, 1 Smith's L. C. 91 (ed. 10); *Webb* v. *Austin*, 8 Sc. N.R. 419; 13 L.J. C.P. 203; *Sturgeon* v. *Wingfield*, 15 M. & W. 228; 15 L.J. Ex. 212; *Rennie* v. *Robinson*, 7 Moore, 539; 1 L.J. (O.S.) C.P. 30.

(*q*) *Norval* v. *Pascoe*, 34 L.J. Ch. 82.

(*r*) *Minshull* v. *Oakes*, 2 H. & N. 809; 27 L.J. Ex. 194; this decision is contrary to the second rule in *Spencer's case*, and seems to be very doubtful law (see the notes to *Spencer's case*, 1 Smith's L. C. 52—98 (ed. 10), where the case of *Minshull* v. *Oakes* is commented upon); and see now 44 & 45 Vict. c. 41, s. 58, *post*, p. 216.

(*s*) *Congleton Corporation* v. *Pattison*, 10 East, 130; *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L.J. Ch. 59.

(*t*) Godb. pl. 140; *Canham* v. *Rust*, 8 Taunt. 227; 2 Moore, 164.

(*u*) Bayley, J., *Doe* v. *Reid*, 10 B. & C. 857; 8 L.J. (O.S.) K.B. 328; but see *Clegg* v. *Hands*, 45 Ch.D. 503; 59 L.J. Ch. 477; *Manchester Brewery Co.* v. *Coombs*, (1901) 2 Ch. 609; 70 L.J. Ch. 814.

(*x*) *Stevens* v. *Copp*, L.R. 4 Ex. 20; 38 L.J. Ex. 31.

(*y*) *Thomas* v. *Hayward*, L.R. 4 Ex. 311; 38 L.J. Ex. 175.

(*z*) *Cockson* v. *Cock*, Cro. Jac. 125.

(*a*) *Fleetwood* v. *Hull*, 23 Q.B.D. 35; 58 L.J. Q.B. 141.

(*b*) *White* v. *Southend Hotel Co.*, (1897) 1 Ch. 767; 66 L.J. Ch. 387.

(*c*) *Stevenson* v. *Lambard*, 2 East, 575. See *Swansea (Mayor)* v. *Thomas*, 10 Q.B.D. 48; 52 L.J. Q B. 340.

consent in writing of the lessor (*d*); to renew the lease (*e*); to dwell in and upon the demised farm and lands (*f*); to insure premises situate within the weekly bills of mortality (*g*); or not to exercise thereon certain specific trades (*h*); have been held to run with the land; as also covenants to repair the buildings, and to repair, renew, and replace tenants' fixtures and machinery fixed to the premises (*i*); to discharge the land from all taxes, burdens, &c. (*k*); to make good damage done by the exercise of a right granted for a term of years to dig for and carry away clay or minerals (*l*); to make a periodical payment in respect of coals carried by virtue of a wayleave over part of the lessor's land (*m*); and to keep on the land a certain quantity of game (*n*). A proviso for re-entry in case of liquidation or bankruptcy also runs with the land (*o*). Where a lessee covenanted to grind at the lessor's mill all the corn that should grow on the demised lands, it was held that this was a covenant which ran with the land, and passed to the assignee of the reversion as long as the ownership of the lands and the mill remained in the same individual (*p*). And, where a lessor demised a house, excepting two rooms and a free passage thereto, it was held that the exception amounted to an express covenant or grant of a free passage or right of way by the lessee, and would bind the assignees of the term (*q*). If the lessee covenants not to erect buildings on the land demised so as to obstruct the lessor's light, or destroy his prospect, or impede the air, this is a covenant which runs with the land, and binds all the assignees of the term (*r*). Where a vendor conveyed an estate to a purchaser to hold to him and his heirs to the use, intent, and purpose that certain specified trades should not be carried on upon the premises, it was held that there resulted from the stipulation an implied covenant not to carry on the specified trades in the house, which ran with the land, and bound all subsequent purchasers of the premises (*s*). But a covenant by a purchaser of land, not naming his assigns, that no building erected on the land shall be used as a beershop, does not run with the land (*t*). If the lessee

(*d*) *Williams* v. *Earle*, L.R. 3 Q.B. 739; 37 L.J. Q.B. 231.

(*e*) *Roe* v. *Hayley*, 12 East, 469.

(*f*) *Tatem* v. *Chaplin*, 2 H. Bl. 133.

(*g*) *Vernon* v. *Smith*, 5 B. & Ald. 1.

(*h*) *Doe* v. *Keeling*, 1 M. & S. 95.

(*i*) *Williams* v. *Earle*, L.R. 3 Q.B. 739; 37 L.J. Q.B. 231.

(*k*) *Windsor* (*Dean*), 5 Rep. 24, b; *Martyn* v. *Clue*, 18 Q.B. 681; 22 L.J. Q.B. 147.

(*l*) *Martyn* v. *Williams*, 1 H. & N. 828; 26 L.J. Ex. 122; *Norval* v. *Pascoe*, 34 L.J. Ch. 82.

(*m*) *Hastings* (*Lord*) v. *N. E. Ry.*, (1898) 2 Ch. 674; 67 L.J. Ch. 590.

(*n*) *Hooper* v. *Clark*, L.R. 2 Q.B. 200; 36 L.J. Q.B. 79.

(*o*) *Horsey Estate* v. *Steiger*, (1899) 2 Q.B. 79; 68 L.J. Q.B. 743.

(*p*) *Vyvyan* v. *Arthur*, 1 B. & C. 415; 1 L.J. (O.S.) K.B. 138.

(*q*) *Cole's case*, 1 Salk. 196; *Bush* v. *Calis*, 1 Show. 389; Carth. 232.

(*r*) *Bachelor* v. *Gage*, Cro. Car. 188.

(*s*) *Hodgson* v. *Coppard*, 30 L.J. Ch. 20; 20 Beav. 4.

(*t*) *Wilson* v. *Hart*, L.R. 1 Ch. 463; 35 L.J. Ch. 569.

covenants to build a wall, or an outhouse, or to erect a mill, or construct dwelling-houses on some part of the demised land, then, although the covenant extends to a thing to be newly made, yet, as it is to be made upon the thing demised, the assignee takes the benefit of it, if he be named (*u*). But, if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the covenants shall not extend to the assignee, "as if the lessee covenants, for himself and his assigns, to build a house upon land of the lessor which is no parcel of the demise" (*x*); or to repair, renew, and replace mere utensils or movable chattels used in the business carried on in the demised premises, and being there at the time of the demise (*y*). By the Conveyancing Act, 1881, a covenant relating to land of inheritance or devolving on the heir as special occupant, is to be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if so expressed, and when not so relating or devolving to be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if so expressed (*z*). A covenant and a contract, a bond or obligation under seal, though not expressed to bind the heirs, is to bind them and the real estate as well as the executors and personal estate, except where the contrary is expressed (*a*). A covenant, &c., with two or more jointly, implies, unless otherwise expressed, an obligation to the survivor, and to any person on whom the right to sue devolves (*b*); and where in a mortgage or an obligation money is advanced by more than one person, or a mortgage or obligation is made to more than one person, the mortgage money is deemed to be money belonging to those persons on a joint account as between them and the mortgagor or obligor, and the receipt in writing of the survivor or his personal representatives is a discharge notwithstanding any notice of severance (*c*).

Parties entitled to sue.—Continuing breaches.—Lastly, although the covenant is transferred with the land by assignment, as appurtenant to the estate, yet an existing breach of such covenant is not transferred (*d*). Thus, where rent covenanted to be paid was in arrear, and an action was brought, to which the defendant pleaded

(*u*) *Smith* v. *Arnold*, 3 Salk. 4; *Anon.*, Moore, 159, pl. 300; *Sampson* v. *Easterby*, 9 B. & C. 505; 5 L.J. (O.S.) K.B. 291; *Easterby* v. *Sampson*, 6 Bing. 645.

(*x*) *Spencer's case*, 5 Co. 16, a; 1 Smith's L. C. pp. 52—98 (ed. 10); *Doughty* v. *Bowman*, 11 Q.B. 454; 7 L.J. Q.B. 111; qualified and explained, *Minshull* v. *Oakes*, 2 H. & N. 809; 27 L.J. Ex. 194. See *ante*, p. 214, note (*r*).

(*y*) *Williams* v. *Earle*, L.R. 3 Q.B. 739; 37 L.J. Q.B. 231.

(*z*) 44 & 45 Vict. c. 41, s. 58.

(*a*) Sect. 59; this extends to implied covenants under the Act, and only to covenants, &c. made since the Act.

(*b*) Sect. 60; the section only applies to covenants, &c. after the Act.

(*c*) Sect. 61, unless otherwise provided in the mortgage, &c. The section only applies to mortgages, &c. after the Act.

(*d*) *Lewes* v. *Ridge*, Cro. Eliz. 863.

that, after the arrearages incurred, and before action brought, the plaintiff had assigned his reversion, it was held, on demurrer, that the right to the arrearages was "a right vested in the plaintiff before the assignment, the which he should not lose by the assignment" (*e*); for, although the covenant had been transferred with the estate to the assignee, yet it was not so with respect to the right of action which had previously accrued. But, as regards what are termed continuing breaches, the assignee may maintain an action as soon as he becomes seised or possessed of the estate to which the covenant running with the land is annexed; as in the case of a breach of a covenant to repair, where, although the covenant has been broken, and the premises are left out of repair at the time of the assignment, and come so out of repair to the hands of the assignee, yet, if they remain so afterwards, during the continuance of the term, the covenant is then broken again in the time of the assignee, there being a constant repetition of the breach, as long as the acts to be done upon the land remain unperformed (*f*). But, if the covenant is broken, and the lease expires, and then the premises are assigned, the assignee can maintain no action upon the covenant; for, the lease being at an end, there is an end of the covenant, which had been broken once for all, so that the ultimate damage had accrued before the time of the assignee. A breach of a covenant for title is in the nature of a continuing breach, as long as the party entitled to the benefit of the covenant is in possession of the land under a defective title; for, although if one covenants that "he is lawfully seised in fee, or that he hath a good estate, and hath not, the covenant is broken as soon as it is made," yet, as long as the assignee does not enjoy the land under a good title, "there is a continuing breach; for it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require" (*g*).

Implied covenants arising from the word "demise" in a lease under seal run with the estate or term of years created in the land, so that the assignee of the lessee, if evicted, has an action thereon against the original lessor. But the law raises no implied covenant from a person who has not the legal estate in the land, as from a mortgagor who has joined a mortgagee in making a lease (*h*), and from whom no legal interest passes. By 8 & 9 Vict. c. 106, s. 4,

(*e*) *Anon.*, Skin. 367; *Midgley* v. *Lovelace*, Carth. 289; 12 Mod. 46.

(*f*) *Mascal's case*, 1 Leon. 62; *Vivian* v. *Champion*, 1 Salk. 141; 2 Ld. Raym. 1125.

(*g*) Shep. Touch. 170.

(*h*) *Spencer's case*, 5 Co. 16 a; *Noke's case*, 4 Co. 80 b; *Smith* v. *Pocklington*, 1 C. & J. 445.

it is enacted that the word "give" or "grant," in a deed executed after the 1st of October, 1845, shall not imply any covenant in law; but from the word "demise" there is still an absolute covenant for quiet enjoyment (*i*). No covenant for title or quiet enjoyment is implied from the mere relation of landlord and tenant (*k*). (See *post*, p. 483.)

Covenants annexed to estate of joint tenants and tenants in common.—If the assignees have a joint interest in, and are jointly entitled to, the estate to which the covenants are annexed, they have a joint interest in the covenants; and separate interests when they have several estates, and a separate and distinct damage will accrue to each from a breach of the covenants. Joint tenants have a joint interest in respect of their joint estate; but tenants in common have, it seems, when a reversion expectant upon the determination of a lease for years, upon which a rent has been reserved, comes to them, a joint or separate interest in the rent, at their election (*l*). But, in covenants running with the land, and coming to parties either as tenants in common or joint tenants, the interest is joint or several, according as a joint duty arises in favour of all, or separate duties to each (*m*). The benefit of a covenant to repair in a joint demise by tenants in common runs with the entire reversion only; and, therefore, the representatives of all the tenants in common on a lease so jointly made by them have a joint interest in the damages arising from a breach of such covenant (*n*). If the entire reversion is divided among several persons, each possessing a distinct interest in his particular portion, and a breach of covenant takes place affecting the value of the entire reversion, each of the parties interested has a separate right of action; and the damages will be assessed and apportioned according to their several shares and interests in the subject-matter of the covenant (*o*).

Assignment of rent and annuities.—The grant of a sum of money to issue out of the land of the grantor, and to be paid at fixed consecutive periods, for a term of years, for life, or in fee, is in strictness of law a rent. When it is granted to be paid by the grantor and his representatives only, then it is an annuity. As, however, both the land and the personalty are generally made liable to the payment of the money, the term "annuity" has been indiscriminately used to signify both the charge on the person and

(*i*) See 44 & 45 Vict. c. 41, ss. 7, 49.

(*k*) *Baynes* v. *Lloyd*, (1895) 2 Q.B. 610; 64 L.J. Q.B. 787.

(*l*) *Martin* v. *Crompe*, 1 Ld. Raym. 341; *Harrison* v. *Barnby*, 5 T.R. 246.

(*m*) *Kitchen* v. *Buckley*, 1 Lev. 109; *Magnay* v. *Edwards*, 22 L.J. C.P. 170; 13 C.B. 479; *Simpson* v. *Clayton*, 4 Bing. N.C. 758; 8 L.J. C.P. 59.

(*n*) *Thompson* v. *Hakewell*, 19 C.B. N.S. 713; 35 L.J. C.P. 18.

(*o*) *Roberts* v. *Holland*, (1893) 1 Q.B. 665; 62 L.J. Q.B. 621.

the charge on the land, which, as the rights and properties by law incident to the one and the other are altogether different, is apt to create some misconception concerning them (*p*). A rent or sum of money, issuing out of land, is a direct interest in realty in possession, and was assignable by the common law; but an annuity or sum of money granted to be paid by the grantor and his representatives only, issuing therefore out of personalty, or, as it has been termed, "the coffers of the grantor," and not charged upon or issuing out of the land, was a mere personal contract or *chose in action*, and could not, therefore, be assigned so as to give the assignee a right of action for it in his own name (*q*). When both the person and the land of the grantor were made liable to the payment of the money, the grantee had an election, either to bring a writ of annuity, and, charging the person, to make the grant personal only, or by distraining on the land to make it real; but he could not have both the one and the other; for, the writ of annuity having been once brought, the land was thenceforth discharged. So long, however, as the election had not been made, the rent passed with all its legal incidents to the assignee, who, standing in the shoes of the grantee, had the same right of election as between the land and the person, and might by suing out a writ of annuity, release the land, and turn the charge entirely on the person of the grantor (*r*). As, however, no personal action other than the writ of annuity could be maintained in respect of a rent granted for life or in fee, so long as the estate of freehold had continuance (*s*), there being remedies of a higher and more summary nature by way of distress and assize, no right of action could be transferred to the assignee of a freehold rent; but, when the rent was granted for a term of years, then, as an action of debt might be maintained for the recovery of such rent, such right of action would pass to the assignee as incident to the interest in the land granted (*t*).

Rent reserved on a lease for years might at common law be severed from the reversion, and assigned so as to give the assignee an action of debt for the arrears (*u*). Where premises were demised for a term of years by an indenture of lease containing covenants by the lessee for the payment of rent, and subsequently the rent, and the counterpart of the lease, and the benefit of the covenants,

(*p*) Doct. & Stud. Dial. 1, c. 30.

(*q*) Co. Litt. 144 a, 144 b; *Maund's case*, 7 Co. 28 b; *Gerrard* v. *Boden*, Hetley, 80; *Baker* v. *Brook*, 1 Dy. 65 a.

(*r*) Bac. Abr. Rent (K), 2; Co. Litt. 144 b.

(*s*) *Webb* v. *Jiggs*, 4 M. & S. 113; *Randall* v. *Rigby*, 4 M. & W. 130; 7 L.J. Ex. 240.

(*t*) *Browne* v. *Pendlebury*, Cro. Eliz. 268; Gilbert's Rents, 93.

(*u*) *Newcomb* v. *Harvey*, Carth. 161; *Wilston* v. *Pilkney*, 2 Lev. 80; Ventr. 242; *Cartwright* v. *Pilkney*, Ventr. 272; *Arde* v. *Watkin*, Cro. Eliz. 637.

were assigned, it was held that the assignee might maintain debt against the lessee for the recovery of the rent (*x*). But, although the remedy by action of debt for the recovery of the specific sum payable out of the land passed to the assignee as incident to the direct interest in the land assigned, yet nothing in the shape of contract passed by the assignment, and the assignee had no remedy upon any contract or stipulation made concerning the land, or for better securing the payment of the rent, and could maintain no action of covenant; for a covenant cannot run with a RENT. Thus, where the defendant covenanted with Barnsley to pay him, his heirs and assigns, a certain rent to be issuing out of the land of the defendant, and covenanted to build one or more messuages on the land for better securing the payment of the rent, it was held that this covenant was a mere personal covenant, operative only between the immediate parties thereto and their privies, and that the assignee of the rent had no title to maintain an action upon the covenant, either for the non-payment of the rent, or for not building the messuages (*y*), or for non-repair (*z*).

SECTION II.

TRANSFER BY DEATH.

Land Transfer Act, 1897 (*a*).—In the case of the death after the commencement of this Act (*b*) of any person in whom real estate is vested, without a right in any other person, such as a co-trustee, to take by survivorship, the real estate devolves upon and becomes vested in the personal representatives of the deceased and not in the heir-at-law. Such personal representatives are to hold the real estate as trustees for the persons beneficially entitled thereto, and may convey it to the heir or devisee either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without such charge, and on the assent by the personal representatives to any devise of real estate contained in the will, or on such conveyance by them to the heir or devisee as before mentioned, all liabilities of the personal representative in respect of the land shall cease, except as to any acts

(*x*) *Allen* v. *Bryan*, 5 B. & C. 512; 4 L.J. (O.S.) K.B. 210; *Williams* v. *Hayward*, 28 L.J. Q.B. 374; 1 E. & E. 1040.

(*y*) *Milnes* v. *Branch*, 5 M. & S. 411; *Brewster* v. *Kitchin*, 1 Ld. Raym. 318; *Spencer's case*, 1 Smith's L. C. 52 (ed. 10).

(*z*) *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73.

(*a*) 60 & 61 Vict. c. 65.

(*b*) Jan. 1st, 1898.

done or contracts entered into by them, before such assent or conveyance (*c*).

The law, therefore, contained in this section as to the liability of heirs and devisees of real property upon covenants entered into by their ancestors, appears now only to be applicable where the death has occurred before 1898, and this must be borne in mind in reading the section.

Rights of heirs upon real and personal covenants and simple contracts entered into with their ancestors.—Real contracts, or covenants running with the land, annexed to an estate of inheritance, descend with the land, in case of death, to the heir-at-law, not only without his being named in the covenant, but also where the covenant is made with the covenantee and his executors (*d*). The heir-at-law also represents his ancestor upon such personal covenants as relate to the freehold, and affect the value of the inheritance. Thus, if a man covenants with another and his heirs to enfeoff him and his heirs of the manor of D., and will not to do it, and he to whom the covenant is made die, his heir will have a right of action upon the deed (*e*). If three co-partners purchase land in fee, and mutually covenant, each with the other of them and their heirs, that the survivors shall convey to the heirs of such as shall die first, the heir of a deceased covenantee may maintain an action upon the covenant (*f*), the principle established being that, if the heir-at-law would have had the benefit of whatever would have accrued from the performance of the covenant, he shall have the damages that accrue from the non-performance. So, where a contract for the purchase of land is entered into between an intestate and another person, and it has not been completed at the intestate's death, but is capable of being enforced, the money and the land are to go as if the contract had been actually carried into execution, and the heir-at-law is entitled to have either the land or the money which would have been applied in the purchase of the land under the intestate's contract (*g*). So, where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held that the heir-at-law was entitled to have the house finished at the expense of the personal estate (*h*). Where there is a contract enforceable against an heir or devisee for sale of a freehold interest descendible to heirs general, the deceased's per-

(*c*) Sect. 3, sub-s. 1.
(*d*) *Lougher* v. *Williams*, 2 Lev. 92.
(*e*) Fitz. N.B. 145 c; Touch. 175.
(*f*) *Wotton* v. *Cook*, Dy. 337 b.
(*g*) *Hudson* v. *Cook*, L.R. 13 Eq. 417; 41 L.J. Ch. 306.
(*h*) *Cooper* v. *Jarman*, L.R. 3 Eq. 98; 36 L.J. Ch. 85; *Day, In re*, (1898) 2 Ch. 510; 67 L.J. Ch. 619.

sonal representatives have power to convey the land, but such conveyance is not to affect the beneficial rights of any person (*i*).

Heir's right of action in respect of continuing breaches of real covenants.—When a real contract or covenant running with the land has been broken in the lifetime of the ancestor, and the breach remains a continuing breach in the time of the heir-at-law, the latter is the only party who can maintain an action in respect thereof, if no actual damage has resulted to the personal estate (*k*). Where the plaintiff, as executrix, declared that the defendant, by deed conveying to her testator certain lands, covenanted with the testator that he was seised in fee, and had a right to convey, &c., and assigned for breach that the defendant was not seised in fee, and had not a right to convey, &c., it was held that the executrix could not maintain an action for such breaches, without showing some special damage to the testator in his lifetime, as any damage that accrued after his decease would be a matter which concerned the heir (*l*). And, where a vendor of land executed a conveyance, professing to convey an estate in fee in the land, and covenanted with the vendee and his heirs for further assurance on request, and a request was made by the vendee in his lifetime to have a fine levied by the vendor for better assuring the estate granted, but no fine was levied, in consequence whereof the heir-at-law of the vendee, after the death of the latter, who quietly enjoyed the estate during his life, was evicted, and brought his action for the damages consequent thereon, it was held that, as the ultimate damage had been sustained by the heir-at-law, he was the proper party to maintain the action (*m*); where, however, the ancestor was himself evicted, it was held that, the eviction being to the ancestor, he could not have an heir or assignee of that land, and so the damages belonged to the executors, though not named in the covenant, and nothing descended to the heir (*n*).

Right of action of the personal representatives.—With respect to breaches of real contracts not in the nature of continuing breaches, where the covenant having been broken is broken once for all, and the entire and ultimate damage has accrued, such damage, if it results in the time of the ancestor, survives to his personal representative (*o*). Thus, an executor can sue for the breach of a covenant to repair in the lifetime of the lessor, who was tenant for life, without averring special damage (*p*), unless it be a covenant in respect of which the heir alone can sue (*q*).

(*i*) 44 & 45 Vict. c. 41, s. 4 (1), (2).
(*k*) *Vivian* v. *Champion*, 2 Ld. Raym. 1125.
(*l*) *Kingdon* v. *Nottle*, 1 M. & S. 355.
(*m*) *Jones* v. *King*, 4 M. & S. 188.
(*n*) *Lucy* v. *Levington*, 2 Lev. 26; 1 Ventr. 175.
(*o*) *Ricketts* v. *Weaver*, 12 M. & W. 718; 13 L.J. Ex. 195.
(*p*) *Raymond* v. *Fitch*, 2 C. M. & R. 588; 5 L.J. Ex. 45; *Morley* v. *Polhill*, 2 Ventr. 56.
(*q*) *Kingdon* v. *Nottle*, *supra*.

If a man covenants not to cut down certain trees growing on the land of the covenantee, and afterwards fells them in the lifetime of the latter, the personal representative is the proper party to maintain an action for the breach, as the entire damage has accrued, and the covenant has been broken, "once for all," before the time of the heir-at-law. There can be no continuing breach of such a covenant; and the right of action, therefore, remains with the personal representative as part of the personal estate (*r*). And, if a man enters into a covenant with the testator to discharge the testator's land from incumbrances, the executor is the proper party to maintain an action to recover damages for whatever breaches are committed in the lifetime of the testator, such breaches constituting separate and distinct causes of action, and operating as a direct injury to the personal estate (*s*). So, with regard to the breach of a covenant to pay rent, although the covenant when annexed to an estate of inheritance descends with the land to the heir-at-law, yet all the arrearages that have accrued up to the death of the ancestor are only to be sued for by the personal representative. In these cases each breach is entire, giving a separate and distinct right of action; and, although the covenant is transferred with the estate, yet it is not so with the breaches and consequent right of action that have previously accrued (*t*).

Transfer of trust and mortgage estates on death.—By sect. 30 of the Conveyancing Act, 1881 (*u*), provision is made for the devolution (notwithstanding any devise to the contrary) of trust and mortgage estates upon the personal representatives of the deceased with all the consequences of such devolution.

Transfer of covenants annexed to estates pur autre vie.—If an estate is holden during the life of another, and the grantee or assignee of such estate dies in the lifetime of the *cestui que vie*, the estate will pass to the heir-at-law or the personal representatives of the grantee *pur autre vie*, according as he or they may or may not be named in the deed or instrument of conveyance. If the estate *pur autre vie* is limited to the grantee or lessee and his heirs, the heir will take as special occupant on the death of the grantee, living *cestui que vie*, because he is included by name in the grant. If, on the other hand, the estate is limited to the grantee and his executors, the personal representative will take: for, although it is a freehold, which by the common law would not go to executors, yet they may be designated by name, so as to take as special occupants (*x*). And now, if the estate is granted or assigned to the

(*r*) *Raymond* v. *Fitch*, *supra*.
(*s*) *Smith* v. *Simonds*, Comb. 64.
(*t*) *Midgley* v. *Lovelace*, Carth. 289.
(*u*) 44 & 45 Vict. c. 41, s. 30.
(*x*) *Doe* v. *Robinson*, 8 B. & C. 296; 6 L.J. (O.S.) K.B. 273; Bac. Abr. Estates for life and occupancy, B. 3; *Carpenter* v. *Dunsmure*, 3 E. & B. 918.

party generally, without words of limitation, the personal representative will take the estate by force of the statute (*y*), and be entitled to the benefit of the performance of all covenants annexed thereto. If the owner of an estate *pur autre vie* which has been granted to him, his heirs and assigns, bequeaths the estate to A. and his assigns, and A. dies intestate in the lifetime of the *cestui que vie*, the premises will pass to A.'s personal representative under the statute, and not to his heir-at-law (*z*).

Transfer of covenants annexed to leasehold estates and interests.—All real contracts or covenants running with the land, annexed to reversions for terms of years, leases, and chattel interests in land, pass, together with the estates to which they are annexed, to the personal representatives of the deceased covenantee (*a*). No mere words of limitation can vary the course of succession of a chattel interest. If a lease for years is made to a man and his heirs, or a term of years is limited to him and the heirs of his body, or the heirs male of his body, it will go to his executors (*b*). So, if a lease for years is granted to a bishop, parson, or other sole corporation, and his successors, it passes, on the death of the lessee, to his personal representatives, and not to his successors; succession in a body politic being as inheritance in the case of a body private (*c*). No estate of freehold can be created out of a term of years. If, therefore, a lessee for years makes a lease for life, it is a chattel interest (*d*). If a person holds lands as tenant by statute merchant, statute staple, or *elegit*, he also has a chattel interest only, which passes to his personal representative (*e*). Whatever covenants, therefore, are annexed to such estates and interest in the land pass to the personal representative as the assignee in law of the covenantee; and he alone can maintain an action upon them.

The executor or administrator is alone entitled to sue upon all bonds and personal covenants and simple contracts entered into with the testator or intestate, and to recover debts of record due to him, such as judgments, statutes, or recognizances, or debts due on specialties (*f*). So completely does the executor or administrator represent the testator or intestate, in respect of his personal contracts, that, if a bond or other personal obligation under seal is made to a man and his heirs, the executor or administrator is the only party who can maintain an action upon the instrument (*g*);

(*y*) 29 Car. 2, c. 3, s. 12; 1 Vict. c. 26, s. 6.

(*z*) *Doe* v. *Lewis*, 9 M. & W. 662; 11 L.J. Ex. 305.

(*a*) Co. Litt. 46 b, 388 a.

(*b*) *Leonard Lovie's case*, 10 Co. 87 b; *Leventhorpe* v. *Ashbre*, 1 Roll. Abr. 611.

(*c*) *Fulwood's case*, 4 Co. 65 a; *Howley* v. *Knight*, 14 Q.B. 240; 19 L.J. Q.B. 3.

(*d*) *Butt's case*, 7 Co. 23 a.

(*e*) Co. Litt. 42 a; 2 Saund. 68; 2 Inst. 396.

(*f*) Com. Dig. Administration (B. 13); Vin. Abr. Executors.

(*g*) *Devon* v. *Paulett*, 11 Vin. Abr. 133, pl. 27.

but, if a bond is conditioned to pay money to such person as the testator shall by will appoint, and the testator makes no appointment, the representative has no claim to the money, as he is not the appointee contemplated by the bond (*h*). The right of action upon all simple or parol contracts entered into with the testator or intestate, whether they be or be not made concerning land, is transferred to the executor or administrator (*i*); and so also is the right of action upon all bills of exchange, promissory notes, and negotiable securities payable to the testator or intestate (*k*). The executor is entitled to indorse and negotiate all notes payable to the order of the testator; and, if the testator has indorsed such a note in his lifetime for a valuable consideration, but has neglected to deliver it to the indorsee, the latter is entitled to call upon the personal representative for an indorsement of the note (*l*). Where a passenger on a railway is injured by an accident and after an interval dies in consequence, his executor may recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business (*m*), but the executor cannot recover such expenses where the action is founded in tort (*n*).

The personal representative is entitled to the benefit of all such of the executory contracts of the deceased as he can fairly and efficiently fulfil; and, therefore, if a man builds half a house, or makes half a pair of shoes, and dies, the executors may complete and deliver them, and sue either for work and labour done by them, or for goods sold and delivered by them as executors (*o*). When, however, the contract is founded upon the known skill of the deceased, or his peculiar intellectual acquirements, it is determined by his death. If a publisher, for example, agrees to pay some celebrated author a fixed sum of money for a treatise, and the writer dies before he has completed his task, the contract is absolutely determined, and the publisher is not bound to pay any part of the stipulated remuneration, unless he has accepted and used some portion of the work, in which case he will be liable upon the ordinary implied promise in respect of a benefit actually received. But, although determined,

(*h*) *Pease* v. *Mead*, Hob. 9.

(*i*) *Orme* v. *Broughton*, 10 Bing. 533; 3 L.J. C.P. 208; *Knights* v. *Quarles*, 4 Moore, 532; *Bishop* v. *Curtis*, 18 Q.B. 878; 21 L.J. Q.B. 391.

(*k*) *Timmis* v. *Platt*, 2 M. & W. 720; 6 L.J. Ex. 183; *Murray* v. *E. I. Co.*, 5 B. & Ald. 216.

(*l*) *Watkins* v. *Maule*, 2 Jac. & Walk. 243.

(*m*) *Bradshaw* v. *Lancashire & Yorkshire Ry.*, L.R. 10 C.P. 189; 44 L.J. C.P. 148; *Leggott* v. *G. N. Ry.*, 1 Q.B.D. 599; 45 L.J. Q.B. 557.

(*n*) *Pulling* v. *G. E. Ry.*, 9 Q.B.D. 110; 51 L.J. Q.B. 543; Addison on Torts, 59 (ed. 7).

(*o*) *Werner* v. *Humphreys*, 2 M. & Gr. 853; 3 Sc. N.R. 226; *Marshall* v. *Broadhurst*, 1 Cr. & J. 405; 9 L.J. (O.S.) Ex. 105; *Collinson* v. *Lister*, 7 De G. M. & G. 634; 25 L.J. Ch. 38.

the contract is not rescinded so as to take away a right of action already vested; and, therefore, where an engineer was appointed to construct certain works, which it was calculated would occupy fifteen months, and was to be paid for his services during that period the sum of 500*l.*, by equal quarterly instalments, and shortly after the end of the third quarter he died, two of the quarterly instalments then remaining unpaid, it was held that, although his death put an end to the contract for the future, it did not divest the right of action for those instalments which had already accrued to him, and that his administrator was therefore entitled to recover them, and not merely to sue upon a *quantum meruit* for the value of the amount of the work actually done (*p*). Contracts of apprenticeship, founded upon personal instruction on the one side and the rendering of work and service on the other, have been held to be discharged and put an end to by the death of either party (*q*); but most contracts of apprenticeship are regulated by statute, or by the custom of trade in particular districts; and the executors, in some places, are bound to assign the apprentice to another master. If the master has covenanted, in the usual way, to find the apprentice in meat, drink, and other necessaries during the term of apprenticeship, the death of the master is no discharge of this covenant, but the personal representatives are bound to perform it, so far as they have assets (*r*).

Liability of heir-at-law and devisees.—The heir-at-law was liable at common law to an action for a breach of a covenant annexed to a reversionary estate which had descended to the heir (*s*). The heir-at-law was also liable, in common with the personal representative, to the extent of the assets which had come to him by descent, upon all contracts under seal entered into by the ancestor in which he was expressly named, but not otherwise (*t*). If there was a devisee of the real estates of a debtor (not being a devisee for payment of debts, or in pursuance of an ante-nuptial marriage contract), such devisee was not liable at common law, but might, by 11 Geo. 4 & 1 Will. 4, c. 47, be sued jointly with the heir upon all contracts under seal made by the ancestor and devisor in which the heirs were named, and whereby the ancestor or devisor became indebted, in his lifetime, to the covenantee or obligee. If there was a devisee and no heir, then the action lay against the devisee only. The heir was not, at common law, responsible upon any simple

(*p*) *Stubbs* v. *Holywell Ry.*, L.R. 2 Ex. 311; 36 L.J. Ex. 166.
(*q*) *Baxter* v. *Burfield*, 2 Str. 1266.
(*r*) *Wadsworth* v. *Guy*, 1 Sid. 216; *R.* v. *Peek*, 1 Salk. 65; *Walker* v. *Hull*, 1 Lev. 177.
(*s*) *Derisley* v. *Custance*, 4 T.R. 75.
(*t*) *Dyke* v. *Sweeting*, Willes, 585; Bac. Abr. HEIR (F); Co. Litt. 209 a; and see the notes to *Jeffreson* v. *Morton*, 2 Wms. Saund. 7 b.

contract entered into by the ancestor, whether he was or was not named therein, or whether he had or had not assets by descent; but the legislature has by various statutes made all the real estate of every debtor assets for the payment of every kind of debt (*u*). If the heir has sold or conveyed away the lands that have descended to him before the commencement of the action the lands cannot be charged in the hands of a *bonâ fide* alienee (*x*), but the heir is, nevertheless, responsible to the extent of the full value of such lands (*y*); and, if assets by descent vest in the heir, the charge continues to run against his heir taking the same assets (*z*).

Liabilities of executors and administrators on covenants for payment of rent.—The personal representative of a deceased lessee or termor is, in contemplation of law, the assignee of the term, and is liable, as such, upon all covenants running with the land annexed to leases and chattel interests (*a*), to the extent of the assets in his hands, although he does not enter upon, or take possession of, the demised premises (*b*). If he enters and takes possession, he then becomes *primâ facie* chargeable *de bonis propriis* for the full amount of the rent; if, however, the annual value of the property is less than the rent, he is then personally responsible only to the extent of the actual annual value; but he continues liable, in his representative character, to the extent of the assets in his hands, for the proportion of the rent which exceeds the annual profits, or what the land is worth to let (*c*). If the rent is of less value than the lands, which the law *primâ facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and no other payment out of the profits can be justified till the rent is answered. On the other hand, if the rent is more than the land is worth, the profits must be appropriated to its discharge as far as they will go (*d*). The personal representatives cannot rely on any deterioration in value which has resulted from non-performance of covenants which ought to have been fulfilled by them (*e*).

Covenants to repair.—If the executor has entered and taken possession of leasehold premises, he will become personally respon-

(*u*) *Fleming* v. *Buchanan*, 22 L.J. Ch. 886; 3 De G. M. & G. 976; *Hamer, Ex parte*, 21 L.J. Ch. 832; 4 De G. M. & G. 866; 3 & 4 Will. 4, c. 104; 32 & 33 Vict. c. 46.

(*x*) *British Mutual Investment Co.* v. *Smart*, L.R. 10 Ch. 567; 44 L.J. Ch. 695.

(*y*) 11 Geo. 4 & 1 Will. 4, c. 47, ss. 3, 4, 6; *Farley* v. *Briant*, 3 Ad. & E. 846; 5 L.J. K.B. 132.

(*z*) *Anon.*, Dyer, 368 a, pl. 46.

(*a*) *Spencer's case*, 5 Co. 17 b; *ante*, p. 210.

(*b*) *Howse* v. *Webster*, Yelv. 103; but see *Rendall* v. *Andreæ*, 67 L.J. Q.B. 630.

(*c*) *Rubery* v. *Stevens*, 4 B. & Ad. 241; 2 L.J. K.B. 46; *Wollaston* v. *Hakewill*, 3 Man. & G. 297; 10 L.J. C.P. 303; *Hopwood* v. *Whaley*, 6 C.B. 744; 18 L.J. C.P. 43; *Rendall* v. *Andreæ*, *supra*.

(*d*) *Buckley* v. *Pirk*, 1 Salk. 316; 1 Wms. Saund. 112, n. (c); *Jevens* v. *Harridge*, 1 Saund. 1, n. (1).

(*e*) *Hornidge* v. *Wilson*, 11 Ad. & E. 645; 9 L.J. Q.B. 72.

sible, *de bonis propriis*, to the extent of the entire damage resulting from the breach of a covenant to repair, whether the profits derived from the premises are or are not adequate to meet the costs of repairing (*f*).

After an assignment of the term, whether made by the lessee in his lifetime, or by the executor after his decease, the executor cannot be charged upon the covenants of the lease as assignee of the estate; but he still remains liable upon the privity of contract (*ante*, p. 207) (*g*). If he has himself assigned the lease, he is chargeable as assignee, in respect of breaches of covenants that accrued during the time the term was vested in him, but not for breaches committed afterwards. The executor of the lessee always remains liable, in his representative character, to the extent of the assets in his hands, and may be sued as executor upon the covenants contained in the lease, notwithstanding the assignment of the term; and, if the lessor has assigned his reversion, the action may be brought against him by the assignee of the reversion; "for, by the express words of 32 Hen. 8, c. 34, such remedy as the lessor might have had against the lessee or his executors, such remedy the assignee of the lessor shall have against them" (*h*). Hence the executor of a lessee, who has contracted to sell the lease, is entitled to require, and ought to obtain, from the purchaser, an indemnity against the payment of rent and performance of covenants (*i*). But the personal representative of an assignee of the lease is exonerated from all liability after an assignment of the term. The assignee may, as we have already seen, get rid of his liability upon the covenants by simply assigning his estate; and the same power of release is naturally possessed by his personal representative (*k*). The executor of an assignee of a lease, who has covenanted to indemnify the assignor for breaches of the covenants of the lease, is not bound to retain the proceeds of a sale of the lease to form a fund for indemnification in respect of some possible breach of the covenant by his testator (*l*).

Liabilities of executors upon personal contracts.—The personal representatives are responsible, to the extent of the assets that come to their hands, upon all the contracts of their testator or intestate, whether they are deeds or contracts by record or simple contracts, and whether the "executors or administrators" are named in the contract, or whether they are not, and whether the

(*f*) *Tremeere* v. *Morison*, 1 Bing. N.C. 89; 3 L.J. C.P. 260; *Sleap* v. *Newman*, 12 C.B. N.S. 116.

(*g*) *Helier* v. *Casebert*, 1 Lev. 127; *Coghil* v. *Freelove*, 3 Mod. 326.

(*h*) *Brett* v. *Cumberland*, Cro. Jac. 523.

(*i*) *Staines* v. *Morris*, 1 Ves. & B. 8.

(*k*) *Rowley* v. *Adams*, 4 Myl. & Cr. 542; 9 L.J. Ch. 34.

(*l*) *Collins* v. *Crouch*, 13 Q.B. 542; 18 L.J. Q.B. 209; and see further, as to the liability of executors and administrators upon covenants contained in leases, 22 & 23 Vict. c. 35, s. 27, *infra*.

breach has been incurred in the lifetime of the testator or intestate, or after his decease. They are liable even where the heir is named, and the executors are not named, in the contract. They are liable to pay calls and subscriptions upon covenants and subscription contracts made by their testator, so long, at all events, as they are in possession of the shares held by the testator (*m*); but they are not bound to reserve funds for the payment of calls that may or may not be made.

Administration of assets.—Sect. 27 of 22 & 23 Vict. c. 35, which is retrospective in its operation (*n*), contains provisions limiting the liability of executors and administrators upon covenants or agreements contained in any lease or agreement for a lease after an assignment thereof, and for a distribution of assets after setting aside a certain fund to answer claims on such covenants. And an executor who has distributed the assets of his testator after taking the steps pointed out by the Act, will have the same protection as if he had administered the estate under a decree of court (*o*). Formerly the assets must have been applied first in satisfaction of the judgment creditors of the testator or intestate, and then in payment of debts due from him on contracts of record and contracts under seal, and debts due for rent, whether reserved by deed or by simple contract, and, lastly, in satisfaction and discharge of simple contract debts (*p*). But now, by 32 & 33 Vict. c. 46, it is provided that in the administration of the estate of every person who shall die on or after the first day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a special debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: provided always that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt. Rent is a specialty debt within the Act and ranks with simple contract debts (*q*). If the liability upon a covenant is contingent, and may or may not come into existence, the executor cannot reserve funds

(*m*) *Wills* v. *Murray*, 4 Exch. 863; 19 L.J. Ex. 209; *Birkenhead, &c. Ry.* v. *Cotesworth*, 5 Exch. 226; 19 L.J. Ex. 240; *Heward* v. *Wheatley*, 3 De G. M. & G. 628; 22 L.J. Ch. 435.

(*n*) *Dodson* v. *Sammell*, 1 Drew. & Sm. 575; 30 L.J. Ch. 799.

(*o*) *Clegg* v. *Rowland*, L.R. 3 Eq. 368; 36 L.J. Ch. 137.

(*p*) Williams, EXECUTORS, 869 (ed. 9); *Vincent* v. *Godson*, 4 De G. M. & G. 546; 24 L.J. Ch. 121.

(*q*) *Hastings, In re*, 6 Ch.D. 610; 47 L.J. Ch. 137.

to meet the probable liability, but must pay the specialty or simple contract debts which have actually accrued (*r*). When a will contains a direction to the executor to pay the testator's debts, and then a devise of real estate to that executor, the real estate so devised is charged with the debts (*s*). If the executor pays a debt of a lower degree before one of a higher, he must, on a deficiency of assets, answer the superior debt out of his own estate, if he had notice of the existence of the last-named debt at the time he made the payment; but, if he had no notice of its existence, he cannot then be charged *de bonis propriis;* for it is the creditor's own fault not to have made a prompt application to the executor for payment (*t*). It must be observed, however, that the personal representative has notice of all judgment debts recovered against himself, and will pay debts of inferior degree at his own peril (*u*); but, as regards judgment debts recovered against the testator or intestate, and of which he may have had no notice, these must be docketed or registered pursuant to the statutes in that behalf (*x*), before he can be made liable for a *devastavit* in paying simple contract debts before them. Where the executors of a shareholder in a company, which was a going concern at the time of the testator's death, paid a legacy under his will without leaving assets to meet any liability in respect of shares which they retained unsold, they were held liable as contributories to pay the amount of the legacy in satisfaction of calls (*y*).

The executor has a right to pay creditors of equal degree in any order he may think fit, and to sell or mortgage the assets for that purpose (*z*), unless one of such creditors has obtained judgment for his debt (*a*); but he cannot pay simple contract debts in preference to specialty debts in the case of an insolvent estate (*b*). He has a right to retain for his own debt in preference to all other debts of equal degree; and he may, after actions are commenced against him by a creditor on simple contract, confess a judgment in favour of another creditor of equal degree, and thus give the latter a

(*r*) *Henderson* v. *Gilchrist*, 22 L.J. Ch. 970.

(*s*) *Harris* v. *Watkins*, 23 L.J. Ch. 540; Kay, 438; *Wrigley* v. *Sykes*, 25 L.J. Ch. 458; 21 Beav. 337.

(*t*) *Harman* v. *Harman*, 2 Show. 478; Bac. Abr. EXECUTORS, L. 2; 22 & 23 Vict. c. 35, s. 29; *Rock* v. *Leighton*, 1 Salk. 310; *Britton* v. *Bathurst*, 3 Lev. 114; 1 Saund. 333, a. n.; *Davies* v. *Monkhouse*, Fitzgib. 76; *Sawyer* v. *Mercer*, 1 T. R. 690.

(*u*) *Littleton* v. *Hibbins*, Cro. Eliz. 793.

(*x*) 23 & 24 Vict. c. 38; 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 27 & 28 Vict. c. 112; Williams, EXECUTORS, 859 (ed. 9); *Gaunt* v. *Taylor*, 3 M. & Gr. 886; 11 L.J. C.P. 68; *Jennings* v. *Rigby*, 33 Beav. 198; 33 L.J. Ch. 149; *Williams, In re*, L.R. 15 Eq. 270; 42 L.J. Ch. 158.

(*y*) *Taylor* v. *Taylor*, L.R. 10 Eq. 477; 39 L.J. Ch. 676.

(*z*) *Vane (Earl)* v. *Rigden*, L.R. 5 Ch. 663; 39 L.J. Ch. 797.

(*a*) See 32 & 33 Vict. c. 46, *ante*, p. 229.

(*b*) *Hankey, In re*, (1899) 1 Ch. 541; 68 L.J. Ch. 242.

preference (*c*). Process need not have been issued by the creditor to whom the judgment is confessed; but the judgment must be confessed to a *bonâ fide* creditor, and must be confined to the debt really due to him (*d*). If the executor sets up the defence of *plene administravit*, the question will be whether or not there are assets in his hands available for the payment of the creditor (*e*), and if, in the distribution of assets, a creditor misleads an executor either by *laches* or by express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (*f*). If two actions have been brought against the executor by two several creditors standing in the same degree, and the executor has pleaded *plene administravit præter* a certain sum to one action, he may plead in bar to the action by the other creditor *plene administravit præter* the same sum, and as to that sum that he has confessed it in another action; and the plaintiff in the second action can then only obtain judgment of assets *quando acciderint* (*g*). The executor of a deceased incumbent is by custom bound to satisfy and discharge all the debts, both specialty and simple contract debts of the deceased, before he satisfies claims for dilapidations (*h*). The effect of 34 & 35 Vict. c. 43, s. 36, which makes the claim for dilapidations as ascertained by that Act a debt due from the late incumbent, his executors or administrators, to the new incumbent, has been to place claims for dilapidations on an equal footing with simple contract debts, a position which they seem to have previously held in the administration of equitable assets by the Court of Chancery (*i*).

Liability of personal representatives on executory contracts of deceased.—If a purchaser who has ordered goods dies before the time of delivery, his executor or administrator must receive them and pay for them, or make good the damage sustained by his refusal to accept, to the extent of the assets in his hands (*k*). If a testator has agreed to build a house by such a day, or to pay a certain sum as liquidated damages for the default, his executor is bound either to build the house or to pay the money (*l*). The per-

(*c*) *Lyttleton* v. *Cross*, 3 B. & C. 322; 3 L.J. (O.S.) K.B. 2; *Cockroft* v. *Black*, 2 P. Wms. 298; *Wynch* v. *Grant*, 24 L.J. Ch. 6; 2 Drew. 312; *Vibart* v. *Coles*, 24 Q.B.D. 364; 59 L.J. Q.B. 152.

(*d*) *Tolputt* v. *Wells*, 1 M. & S. 404.

(*e*) *Cooper* v. *Taylor*, 6 M. & G. 989; 13 L.J. C.P. 92.

(*f*) *Richards* v. *Browne*, 3 Bing. N.C. 493; 6 L.J. C.P. 95.

(*g*) *Waters* v. *Ogden*, 2 Doug. 455.

(*h*) *Bryan* v. *Clay*, 1 E. & B. 38; 22 L.J. Q.B. 23.

(*i*) *Bissett* v. *Burgess*, 23 Beav. 278; 26 L.J. Ch. 697; *Monk*, *In re*, 35 Ch.D. 583; 56 L.J. Ch. 809.

(*k*) *Wentworth* v. *Cock*, 10 Ad. & E. 42; 8 L.J. Q.B. 230; *Cooper* v. *Jarman*, L.R. 3 Eq. 98, 100; 36 L.J. Ch. 85.

(*l*) 15 H. 7, f. 13; *Quick* v. *Ludburrow*, 3 Bulstr. 30; Parke, B., *Siboni* v. *Kirkman*, 1 M. & W. 423; 5 L.J. Ex. 212; *Marshall* v. *Broadhurst*, 1 Cr. & J. 405; 9 L.J. (O.S.) Ex. 105; *Collinson* v. *Lister*, 20 Beav. 365.

sonal representatives of a deceased promisor are not, however, liable in an action for breach of promise of marriage where no special damage is alleged (*m*). The special damage which would keep the right of action alive must be damage to the property and not to the person of the promisee, and must have been within the contemplation of both parties at the time of the promise. Only such special damage, and no general damages can be recovered against the personal representatives in such an action (*n*).

Joint liability of executors and administrators.—If there are several executors or administrators, they are jointly liable, in case they have all proved the will or administered (*o*). And, when one of several executors to whom probate has been granted is an infant, he is liable in his representative character, and may be sued jointly with the adult executors upon the contracts of the testator (*p*).

Executor de son tort.—If one who is neither executor nor administrator intermeddles with the goods of the deceased in this country, and does acts appertaining to the office of an executor, he makes himself what is called in law an executor *de son tort*, or an executor of his own wrong, and becomes clothed with all the liabilities that appertain to the office of an executor, and may be sued as executor by the creditors of the deceased, although there is a lawful executor (*q*); but a person does not make himself an executor *de son tort* by taking possession of property of a deceased person situate abroad (*r*). There are many acts, however, which a stranger may do without incurring the hazard of being considered executor *de son tort*, such as giving directions for the funeral of the deceased, making an inventory of his effects, providing necessaries for his children, and the performance of such deeds of charity and kindness as are due from one neighbour or friend to another. The intermeddling must be an uncalled-for and officious intermeddling with the estate of the deceased. The nature of the acts and the degree of interference which will constitute a party executor of his own wrong are questions of law for the court; but it is a question of fact whether the acts creating the liability have been done by the party sought to be charged (*s*). The executor *de son tort* and the lawful executor may be joined as defendants in the same action, or they may be sued separately; but a wrongful executor and rightful administrator cannot be made joint defendants (*t*). The executor *de son tort* may be made responsible upon the contracts of

(*m*) *Finlay* v. *Chirney*, 20 Q.B.D. 494; 57 L.J. Q.B. 247.

(*n*) *Finlay* v. *Chirney*, *supra*.

(*o*) Com. Dig. Administration, B. 12; Pleader, 2, D. 6; Abatement, F. 10; *Swallow* v. *Emberson*, 1 Lev. 161.

(*p*) *Frescobaldi* v. *Kinaston*, 2 Str. 784.

(*q*) *Read's case*, 5 Co. 33 b.

(*r*) *Beavan* v. *Hastings* (*Lord*), 2 Kay & J. 724.

(*s*) *Padget* v. *Priest*, 2 T.R. 97.

(*t*) Com. Dig. Administrator, C. 3; 1 W. Saund. 264, c. n. (2).

the deceased to the extent of the assets which have come to his hands, but no further (*u*). The executor of an executor *de son tort* is not liable for a breach of contract by the person with whose property the executor *de son tort* has intermeddled (*x*).

A person who takes property under an executor *de son tort* does not himself become an executor *de son tort* by so doing, unless, before action, he has handed in or paid over the property to the rightful representative (*y*). Where a lessee died intestate during the term, and his widow entered and paid rent, and afterwards the defendant, her son-in-law, took the premises with the assent of the landlord, and paid rent, and continued to occupy during the remainder of the term, it was held that, there being no assignment in writing, he could not be considered an assignee; for, though the widow might have been chargeable as executrix *de son tort*, the defendant had not made himself executor *de son tort* by taking the premises after her (*z*).

Feme covert *executrix*.—A married woman may be appointed executrix; and, by the Married Women's Property Act, 1882, she is clothed with all the powers of a *feme sole*. Before that Act she could not act without her husband's assent, but payment to her of a debt due to her testator was a valid payment, though her husband refused to allow her to act, and prevented probate of the will from being granted to her (*a*). She may now act as executrix or administratrix without reference to her husband, and he does not become liable unless he acts or intermeddles in the administration (*b*). Formerly he had to sue jointly with her, as in the case of *choses in action* vested in the wife in her own right (*c*); and he was liable for a *devastavit*, unless the money was properly administered (*d*). If a debt due to the wife as executrix was paid to a third party without any authority from the husband, the debt still remained due to the wife in her representative character; and if the husband died, the wife might bring an action for it; but, if the money had been received by the authority of the husband, the action might be brought in his name alone (*e*). A *feme covert* executrix might, notwithstanding her coverture, by will appoint her executor, so as to continue the chain of representation (*f*). A *feme covert* executrix

(*u*) Dyer, 166 b; 1 Saund. 265.

(*x*) *Wilson* v. *Hodson*, L.R. 7 Ex. 84; 41 L.J. Ex. 49.

(*y*) *Hill* v. *Curtis*, L.R. 1 Eq. 90; 35 L.J. Ch. 133.

(*z*) *Paull* v. *Simpson*, 9 Q.B. 365; 15 L.J. Q.B. 382; see, however, *Williams* v. *Heales*, L.R. 9 C.P. 177; 43 L.J. C.P. 80.

(*a*) *Pemberton* v. *Chapman*, E. B. & E. 1056; 27 L.J. Q.B. 429.

(*b*) 45 & 46 Vict. c. 75, ss. 18, 24.

(*c*) *Tirrell* v. *Bennett*, 1 Sid. 299.

(*d*) *Ankerstein* v. *Clarke*, 4 T.R. 616; *Yard* v. *Ellard*, 1 Ld. Raym. 368; 1 Salk. 117.

(*e*) *Anon.*, 1 Salk. 282.

(*f*) *Scammell* v. *Wilkinson*, 2 East, 551; *Barr* v. *Carter*, 2 Cox, 429.

who survived her husband was liable for a *devastavit* committed by the husband during their joint lives (*g*).

Death of personal representatives.—Continuation of chain of representation.—On the death of one of several executors, either before or after probate, the entire right of representation survives to the others. When the surviving executor, or when a sole executor, dies after probate, his executor, and the executor of such executor, is in law the executor of the first testator, and as such is entitled to all contracts entered into with the latter. If, therefore, one of two executors makes his will, appoints his executor, and dies, and then the other dies intestate, the executor of him who died first cannot be executor to the first testator, but administration of the goods of the first testator with the will annexed must be taken out. But, when the sole or surviving executor dies before probate of the will has been granted, his executor cannot be made executor to the first testator, inasmuch as he cannot prove the will of the first testator, and is consequently incapable of recovering his debts (*h*). Administration of the goods and chattels of the first testator with the will annexed, therefore, must be taken out. An administrator *durante minore ætate* of the executor of an executor is the representative of the first testator; for such an administrator stands *in loco executoris* (*i*). At one time the renunciation of one executor was, during the lifetime of his co-executor, a nullity. Notwithstanding his renunciation, the right of representation survived to him on the death of the co-executor (*k*); but now, by 20 & 21 Vict. c. 77, s. 79, where any person, after the commencement of the Act, renounces probate of a will of which he is appointed executor, or one of the executors, his rights in respect of the executorship shall wholly cease, and the representation of the testator and the administration of his effects shall, without any further renunciation, devolve as if such person had not been appointed executor. The court may, however, possibly allow the renunciation to be retracted if it is for the benefit of the estate (*l*).

Administration de bonis non.—On the death of an administrator, or of a sole or surviving executor after probate intestate, no interest or right of representation is transmitted to his administrator; but administration *de bonis non* must be taken out (*m*). By the grant of such administration, the administrator

(*g*) *Soady* v. *Turnbull*, L.R. 1 Ch. 494; 35 L.J. Ch. 784.
(*h*) *Wankford* v. *Wankford*, 1 Salk. 308.
(*i*) *Anon.*, 1 Freem. 288, pl. 335.
(*k*) *House* v. *Petre* (*Lord*), 1 Salk. 311; *Arnold* v. *Blencowe*, 1 Cox, 226.
(*l*) *Gill, In re*, L.R. 3 P. & D. 113.
(*m*) *Tingrey* v. *Brown*, 1 Bos. & P. 310; *Elliott* v. *Kemp*, 7 M. & W. 311; 10 L.J. Ex. 321; *Moseley* v. *Rendell*, L.R. 6 Q B. 338; 40 L.J. Q.B. 111.

de bonis non becomes the only personal representative of the original deceased, and is clothed with all the legal rights which belonged to the former executor or administrator in his representative character (*n*). It was held, however, in an old case, that, where an administrator received part of a debt, being rent in arrear due to the intestate, and took a promissory note payable to himself personally for the residue, this was such an alteration of the property as vested it in the administrator himself, and therefore that, on his death, his own personal representative, and not the administrator *de bonis non*, was entitled to the note (*o*). Consistently with more recent decisions, however, it could now hardly be held that the taking of such a note by a man in his character of administrator, as a further security for a debt due to the estate of the intestate, would be an absolute conversion of the debt to his own use, so as to render him liable for a *devastavit;* and, if not, the note so received would still be assets in his hands, he might sue in his representative capacity upon it, and it would consequently go to the administrator *de bonis non*, as the personal representative of the original intestate, and not to his own executor or administrator (*p*). If, however, the administrator should take a bond or other obligation under seal, payable to himself personally, this would be an absolute conversion to his own use of the property, and his own personal representative, and not the administrator *de bonis non*, would be entitled to the legal interest in the new security (*q*). Where an administrator being possessed of a term for ninety-nine years in his representative capacity, made an under-lease, reserving rent to himself individually, which the under-lessee covenanted to pay to him, his executors, &c., it was held that the executor of the administrator, and not the administrator *de bonis non*, was the proper party to maintain an action upon the covenant (*r*). When administration has been granted to two persons, and one dies, the survivor will be sole administrator (*s*); and, as the administrator has no interest or right of representation but what he derives from the act of the ordinary, he can in no case continue the trust reposed in him to his own executor.

Survivorship of liability.—On the death of one of several executors or administrators, the survivors become liable upon all contracts made by the testator or intestate in his lifetime; and, on the death of the surviving executor, the personal representative

(*n*) *Hirst* v. *Smith*, 7 T.R. 182; *Suwerkrop* v. *Day*, 8 Ad. & E. 624; 7 L.J. Q.B. 261.
(*o*) *Barker* v. *Talcot*, 1 Vern. 474.
(*p*) *Catherwood* v. *Chaband*, 1 B. & C. 150; 1 L.J. (O.S.) K.B. 66.
(*q*) *Norden* v. *Levit*, 2 Lev. 189.
(*r*) *Drew* v. *Bayly*, 3 Keb. 298, 427, 495, 548; 2 Lev. 100.
(*s*) *Adams* v. *Buckland*, 2 Vern. 514.

of each survivor (*t*). If the surviving executor dies intestate, the administrator *de bonis non* of the original testator is the party liable; and so he is also on the death of the administrator of the original testator.

Appointment of debtor as executor.—It was a doctrine of the common law that, if a creditor made his debtor his executor, the right of action for the debt was discharged; but this was really only an objection to the form of the action; for the debt was assets, and the executor was answerable for the amount (*u*).

Appointment of debtor as administrator.—If a person dies intestate, and administration is granted to a debtor of the deceased, the debt is not thereby extinguished; for he comes into the administration by the act of the law, whereas the other is the act of the party (*x*). He is, moreover, clothed with a mere authority; and his interest is less than that of an executor. Therefore, if the obligor of a bond takes out administration to the obligee, and dies, the administrator *de bonis non* of the obligee may maintain an action against the executor of the obligor for the recovery of the debt (*y*).

Appointment of creditor as executor.—If a debtor makes his creditor his executor, the action for the debt is not released, unless the latter thinks fit to act, and to take upon himself the burden of the administration of the estate (*z*); and, if he does act, the right of action for his debt is not discharged, unless he has legal assets in his hand sufficient to satisfy the debt, in which case he may pay himself out of such assets (*a*), without reference to the Statute of Limitations (*b*). If one of two joint and several debtors makes their common creditor his executor and dies, and the executor has no assets of the deceased wherewith to satisfy the debt due to him, he may sue the surviving debtor; but not if he has assets out of which he may retain the debt; for the having assets amounts to payment (*c*). So, if the debtor appoints his creditor to be one of several executors, and there are no assets, or the creditor executor neither proves the will nor acts, he is not prevented from suing his co-executor (*d*); and, if he dies, his executor can maintain an action for the debt against the surviving

(*t*) Com. Dig. Abatement, F. 10.

(*u*) *Wankford* v. *Wankford*, 1 Salk. 306; *Brown* v. *Selwyn*, Cas. temp. Talbot, 241; 3 Bro. P.C. 607; *Rawlinson* v. *Shaw*, 3 T.R. 559; *Flud* v. *Rumcey*, Yelv. 160; 1 Rolle's Abr. 920, pl. 12, 13; *Phillips* v. *Phillips*, 2 Freem. 11; 1 Ch.C. 292; *Simmons* v. *Gutteridge*, 13 Ves. 262; *Carey* v. *Goodinge*, 3 Bro. Ch.C. 110.

(*x*) Bac. Abr. EXECUTORS, A. 10.

(*y*) *Hudson* v. *Hudson*, 1 Atk. 461; *Lockier* v. *Smith*, 1 Sid. 79; 1 Keb. 313; pl. 33.

(*z*) *Rawlinson* v. *Shaw*, 3 T.R. 559.

(*a*) *Lowe* v. *Peskett*, 16 C.B. 511; 24 L.J. C.P. 196; Powys, J., *Wankford* v. *Wankford*, 1 Salk. 304; Holt, C.J., *ib.* 305; *Ashby* v. *Child*, 1 Rolle, Abr. 940.

(*b*) *Hill* v. *Walker*, 32 L.T. 71.

(*c*) *Cock* v. *Cross*, 2 Lev. 73; *Anon.*, 1 Freem. 49.

(*d*) *Dorchester* v. *Webb*, W. Jones, 345.

executor. A creditor executor is in all cases entitled to retain the amount of his debt out of the assets that come to his hands to be administered (*e*), also a debt due from the testator to the wife of such executor before her marriage (*f*). An executor whose debt largely exceeds the value of the testator's estate may retain the entire assets *in specie* without first realising them (*g*).

Civil death.—Where a person has been outlawed, he is civilly dead, and is incapable of enforcing any contract he may have entered into (*h*), although he is liable to be sued thereon (*i*). If he is outlawed for a capital offence, he forfeits all his lands and tenements; and in all cases, after outlawry, he forfeits his goods and chattels, debts, and *choses in action*. All his bonds, bills, notes and covenants, and securities for the payment of money, vest in the crown; and the king or his grantee may maintain an action upon them in his own name (*k*). The forfeiture extends also to all property in which he is beneficially interested, and to all equitable as well as legal rights. Therefore, a bond taken in another's name, or a lease granted to another in trust for him, becomes forfeited to the crown (*l*). The removal of the disability by reversal of the outlawry does not enable the party thus restored to his civil rights to sue upon any of the bonds, covenants, or personal contracts which have been forfeited and have become vested in the crown. But, inasmuch as his freehold land is not divested out of him and transferred to the crown until office found (*m*), he has a right to sue the lessees and tenants of such property upon covenants for the payment of rent, covenants to repair, and other real contracts connected with such estates, unless the crown interferes to prevent him. He may also grant leases thereof, and deal generally with the property subject to the paramount title of the crown (*n*). The outlaw may, however, sue in *autre droit*, as, for instance, in his character of executor; and a mayor and commonalty may sue, although the mayor himself has been outlawed (*o*).

Felons.—The law was formerly the same with respect to felons; but a considerable change was effected by the 33 & 34 Vict. c. 23, by which forfeiture or escheat for felony, with its conse-

(*e*) *Morris's Estate, In re*, L.R. 10 Ch. 68; 44 L.J. Ch. 178.

(*f*) *Woodward* v. *D'Arcy* (*Lord*), Plowd. 185 a; *Boyd* v. *Brooks*, 34 Beav. 7; 34 L.J. Ch. 605.

(*g*) *Gilbert, In re*, (1898) 1 Q.B. 282; 67 L.J. Q.B. 229.

(*h*) Hawk. P. C. lib. 2, c. 49, s. 9.

(*i*) *Macdonald* v. *Ramsey*, Foster, 61; Sid. 60; Cro. Jac. 426.

(*k*) Com. Dig. Forfeiture, B. 2; *Slade's case*, 4 Co. 95 a; *Ford's case*, 12 Co. 2; *Bullock* v. *Dodds*, 2 B. & Ald. 276; *Roberts* v. *Walker*, 1 Russ. & M. 753.

(*l*) Hawk. P. C. lib. 2, c. 49, s. 10; *Earl of Somerset's case*, Hob. 214.

(*m*) *Doe* v. *Evans*, 5 B. & C. 587; 4 L.J. (O.S.) K.B. 322.

(*n*) *Doe* v. *Pritchard*, 5 B. & Ad. 765; 3 L.J. K.B. 11; *Clerke* v. *Scroggs*, 2 Lutw. 1513.

(*o*) Co. Litt. 128 a.

quences, is abolished. But the *choses in action* to which a convict, that is a person against whom, after the passing of that Act, judgment of death or of penal servitude has been pronounced, was, at the time of his conviction, or may thereafter, until he has suffered his punishment or received a pardon, become entitled, pass to the administrator or *interim curator* appointed under that Act, who may cause payment or satisfaction to be made out of the convict's property of any debt or liability of the convict (*p*).

Survivorship of joint contractors.—At common law, when several persons took a joint interest in, and had a joint right of action upon, a contract, and one of them died, the action must have been brought in the name of the survivors; and the personal representative of the deceased could not be joined (*q*); nor could he sue separately (*r*). If a sum of money was invested in the funds in the joint names of two persons, the survivor took the whole at law, although he might be accountable in equity as a trustee of the money (*s*). If two persons advanced a sum of money by way of mortgage, and took the mortgage to them jointly, and one died, the whole interest and right of action at law went to the survivor; but, in equity, the representative of him who was dead had his proportion (*t*). It followed, therefore, that, if all the parties jointly interested in a contract died, the right of action vested in the personal representative of the one who survived the others, and that the executors or administrators of those who died previously could not be joined. And, although, for the furtherance of trade and commerce, the doctrine of survivorship was excluded among merchants, so as to permit the interest in joint contracts of a commercial character to pass, in case of death, to the personal representative, and to enable him to maintain an action of account against the survivors for the share of the deceased, yet the remedy by way of action upon the contract always survived (*u*). If several persons jointly contract for the building of a ship, or the furnishing a house, for the common benefit of all, for a certain sum, and it is expressly agreed that, if any of the parties should die before the completion of the work, his executors should stand in his place, there, though the legal remedy of the party employed would have been solely against the survivors, yet the law would certainly imply a contract on the part of the deceased, that his executors should pay their proportion of the contract price (*x*).

(*p*) 33 & 34 Vict. c. 23, ss. 14, 24.

(*q*) *Bellingham* v. *Clark*, 1 B. & S. 332.

(*r*) *Anderson* v. *Martindale*, 1 East, 497; *Bradburne* v. *Botfield*, 14 M. & W. 571; 14 L.J. Ex. 830; *Rolls* v. *Yate*, Yelv. 177.

(*s*) *Crossfield* v. *Such*, 8 Exch. 825; 22 L.J. Ex. 325.

(*t*) *Petty* v. *Styward*, 1 Ch. Rep. 31.

(*u*) *Martin* v. *Crompe*, 1 Ld. Raym. 340.

(*x*) *Prior* v. *Hembrow*, 8 M. & W. 889; 10 L.J. Ex. 371.

SECTION III.

TRANSFER BY MARRIAGE.

Rights of husband upon wife's contracts before marriage at common law.—At common law the husband by the marriage acquired a qualified property in the wife's *choses in action;* but it was a qualified property only; for, until he had reduced them into his possession, they remained the property of the wife; and, if the husband omitted to reduce them into his possession in his lifetime, they survived to the wife, who was alone entitled to the benefit of them (*y*). The husband and wife had therefore a joint interest in them. But, as the husband had the power of immediately enforcing a claim of the wife, forbearance by him from so doing was a sufficient consideration to support a promise made to him alone (*z*).

The husband was alone entitled during the coverture to the benefit of covenants running with the wife's land, and might sue alone even after the wife's death for all breaches not in the nature of continuing breaches, where the ultimate damage had accrued during the coverture, or he might sue jointly with the wife in her lifetime (*a*). The husband was also entitled to the benefit of all bills of exchange and promissory notes payable to the wife not indorsed by her before marriage (*b*). In the exercise of his marital rights, he might at once indorse them, the wife's power of indorsement over them being superseded by the marriage, and vested in the husband (*c*). If the husband did not reduce *choses in action* of this nature into his possession in his lifetime, they survived to the wife (*d*).

Rights of husband upon wife's contracts by statute.—The Married Women's Property Act, 1870 (*e*), and still more the Married Women's Property Act, 1882 (*f*), have largely modified the common law right of the husband to his wife's property, and to her *choses in action*. By sect. 2 of the earlier Act, deposits in savings banks made by, and annuities granted by the Commissioners for the Reduction of the National Debt to, women who

(*y*) *Milner* v. *Milnes*, 3 T.R. 631; *Sherrington* v. *Yates*, 12 M. & W. 865; 13 L.J. Ex. 249.

(*z*) *Rumsey* v. *George*, 1 M. & S. 180.

(*a*) *Aleberry* v. *Walby*, 1 Str. 229; *Dunstan* v. *Burwell*, 1 Wils. 224; Bro. Abr. Covenant, p. 110; *Brett* v. *Cumberland*, 3 Bulst. 163; Cro. Jac. 399; *Nurse* v. *Wills*, 4 B. & Ad. 739; *Middlemore* v. *Goodale*, 1 Roll. Ab. 348.

(*b*) *M'Neilage* v. *Holloway*, 1 B. & Ald. 221; see per Parke, B., *Gaters* v. *Madeley*, 6 M. & W. 427; 9 L.J. Ex. 173.

(*c*) *Mason* v. *Morgan*, 2 Ad. & E. 30; 4 L.J. K.B. 12; *Connor* v. *Martin*, cited 3 Wils. 5.

(*d*) *Hart* v. *Stephens*, 6 Q.B. 937; 14 L.J. Q.B. 148.

(*e*) 33 & 34 Vict. c. 93.

(*f*) 45 & 46 Vict. c. 75.

afterwards marry, remain the separate property of such women, and are to be accounted for and paid to them as if they were unmarried women. And a woman, married after the passing of that Act, will be solely entitled to the benefit of covenants running with any freehold, copyhold, or customary land which may descend to her as heiress of an intestate (*g*).

By sect. 2 of the Act of 1882, every woman who marries after January 1st, 1883, shall be entitled to hold as her separate property all real and personal property, including *choses in action* (*h*), which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage; and by sect. 5, every woman married before that date shall be entitled to hold as her separate property all real and personal property, including *choses in action* (*h*), her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after that date. By sect. 1, a married woman is made capable of disposing of her separate property as if she were a *feme sole* (*i*).

By sect. 6, all deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt, or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, which on January 1, 1883, were standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock or other interests of or in any corporation, company or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building or loan society which at that date were standing in her name, are to be deemed, unless and until the contrary is shown, to be the separate property of such married woman; and the fact that such deposit was then standing in the sole name of a married woman is sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise her to receive and transfer the same, and to receive the dividends, interests and profits thereof without the concurrence of her husband.

By sect. 7, all stocks or funds, &c., mentioned in the previous section, which after January 1st, 1883, shall be allotted to, or placed, registered, or transferred in, or unto, or made to stand in the sole name of any married woman, shall be deemed, unless and until the contrary be shown, to be her separate property in respect of which her separate estate alone shall be liable. By sect. 8, these pro-

(*g*) Sect. 8; see *Voss, In re*, 13 Ch.D. 504.

(*h*) Sect. 24.

(*i*) As to the effect of this section on previous agreements to settle future-acquired property, see sect. 19, and *Stonor's Trusts, In re*, 24 Ch.D. 195; 52 L.J. Ch. 776.

visions are extended to the case of investments standing in the name of a married woman jointly with any person other than her husband; and by sect. 9, in such a case there is no need for the husband of any such married woman in respect of her interest to join in the transfer of such investments.

Liability of husband upon wife's contracts made before coverture.—At common law, if a *feme sole* executed a bond, or made a promissory note, or accepted a bill of exchange, and then married, the husband and wife were jointly liable (*k*); and, if judgment was recovered against them both in the wife's lifetime, execution might be issued against the husband, who might thus be compelled to fulfil his wife's contract made before marriage, or to discharge and satisfy the wife's debt (*l*). But, if these debts were not recovered against the husband and wife in the lifetime of the wife, the husband could not be charged with them. And, if the wife died during the pendency of the action, and before a joint judgment had been obtained against them both, the husband was discharged (*m*); but, if she died after judgment, the husband remained liable. If no action was brought during the coverture, and the wife survived, she remained as liable for the debt as she was before the marriage (*n*); but, if an action was brought and judgment recovered against husband and wife during the coverture, and if the husband became bankrupt, and obtained his discharge, the liability of both was gone at law (*o*), although her property settled to her separate use at the time of the marriage remained liable in equity (*p*).

This liability of the husband was affected by the Married Women's Property Act, 1870 (*q*), which provided (sect. 12) that a husband should not, by reason of any marriage that might take place after the coming into operation of the Act (*r*), be liable for the debts of his wife contracted before marriage; but she was liable to be sued for, and any property belonging to her for her separate use was liable to satisfy, such debts as if she had continued unmarried. A judgment was entered against a wife but in favour of a husband, and an action was then commenced for the purpose of enforcing the judgment against the wife and for recovery from her estate of the costs payable to the husband. The wife's property had been settled on her marriage to her separate use without power

(*k*) *Drue* v. *Thorne*, Aleyn, 72; *Mitchinson* v. *Hewson*, 7 T.R. 348; *Hayward* v. *Williams*, Sty. 280; *Haydon* v. *Miller*, 2 Rolle, 53; *Milner* v. *Milnes*, 3 T.R. 631.

(*l*) *Eyres* v. *Coward*, 1 Sid. 337; *O'Brian* v. *Ram*, 3 Mod. 186; Bac. Abr. Baron and Feme, (F).

(*m*) 1 Rolle Abr. 351, G. pl. 2; *Heard* v. *Stamford*, 3 P. Wms. 411.

(*n*) *Woodman* v. *Chapman*, 1 Campb. 188.

(*o*) *Lockwood* v. *Salter*, 5 B. & Ad. 303; 2 L.J. K.B. 198; *Miles* v. *Williams*, 1 P. Wms. 249, 257.

(*p*) *Chubb* v. *Stretch*, L.R. 9 Eq. 555; 39 L.J. Ch. 329; *London & Prov. Bank* v. *Bogle*, 7 Ch.D. 773; 47 L.J. Ch. 301.

(*q*) 33 & 34 Vict. c. 93.

(*r*) Aug. 9, 1870.

of anticipation, but it was held that the plaintiffs might recover against her estate the whole of their claim (*s*). By the Married Women's Property Act, 1874 (37 & 38 Vict. c. 50), s. 1, however, so much of the Married Women's Property Act, 1870, as enacted that a husband should not be liable for the debts of his wife contracted before marriage, was repealed so far as respects marriages which should take place after the passing of the later Act, and a husband and wife married after the passing of the later Act, and prior to Jan. 1st, 1883, may be jointly sued for any such debt.

By sect. 2, the husband shall in such action, and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets thereinafter specified (*t*); and, in addition to any other plea or pleas, may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and, if no such plea is pleaded, the husband shall be deemed to have confessed his liability so far as assets are concerned.

By sect. 3, if it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife.

By sect. 4, when a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife; and, as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

By sect. 5, the assets in respect of, and to the extent of, which the husband shall in any such action be liable, are as follows:— (1.) The value of the personal estate in possession of the wife which shall have vested in the husband. (2.) The value of the *choses in action* of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession. (3.) The value of the chattels real of the

(*s*) *London & Prov. Bank* v. *Bogle*, *supra*; see also *Sanger* v. *Sanger*, L.R. 11 Eq. 470; 40 L.J. Ch. 372; *Chubb* v. *Stretch*, *supra*; *Axford* v. *Reid*, 22 Q.B.D. 548; 58 L.J. Q.B. 230. Execution may issue against her as if she were a *feme sole*, and her husband need not be joined in the action: *Williams* v. *Mercier*, 9 Q.B.D. 337; 51 L.J. Q.B. 694; affirmed on construction of agreement, 10 App.Cas. 1; 54 L.J. Q.B. 148.

(*t*) This was held to apply to a husband of a wife married in England but who had contracted debts in Jersey: *De Greuchy* v. *Wills*, 4 C.P.D. 362; 48 L.J. C.P. 726.

wife which shall have vested in the husband and wife. (4.) The value of rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received. (5.) The value of the husband's estate or interest in any property real or personal which the wife in contemplation of her marriage with him shall have transferred to him or to any other person. (6.) The value of any property real or personal which the wife in contemplation of her marriage with the husband shall, with his consent, have transferred to any person with the view of defeating or delaying her existing creditors. Provided that, when the husband after marriage pays any debt of his wife, or has a judgment *bonâ fide* recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action (*u*) be liable. The husband is not liable under this Act after the death of his wife for debts contracted by her before marriage (*x*).

It would seem that in proceedings under this Act against a married woman to recover an ante-nuptial debt, it is not necessary to show that she had separate estate at the date of the judgment (*y*).

In the case of marriages since January 1, 1883, the law has been still further altered by the Married Women's Property Act, 1882 (*z*), which by sect. 13 provides that a woman after her marriage shall continue to be liable in respect of, and to the extent of, her separate property for all debts contracted and all contracts entered into by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt, and for any liability in damages or otherwise under any such contract, and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts and contracts, and for all costs recovered in respect thereof.

By sect. 14, a husband shall be liable for the debts of his wife contracted, and for all contracts entered into by her before marriage (*a*), including any liabilities to which she may be so subject

(*u*) This means any action commenced subsequently to the commencement of the former action: *Fear* v. *Castle*, 8 Q.B.D. 380; 51 L.J. Q.B. 279.

(*x*) *Bell* v. *Stocker*, 10 Q.B.D. 129; 52 L.J. Q.B. 49.

(*y*) *Downe* v. *Fletcher*, 21 Q.B.D. 11.

(*z*) 45 & 46 Vict. c. 75.

(*a*) As to liability of husband after death of wife, see *Surman* v. *Wharton*, (1891) 1 Q.B. 491; 60 L.J. Q.B. 233.

under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law in respect of any debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property.

By sect. 15, a husband and wife may be jointly sued in respect of any such debt or other liability contracted or incurred by the wife before marriage, as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife, if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally, and against the wife as to her separate property; and, as to the residue (if any) of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

By sect. 19, no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage; and no settlement or agreement for a settlement shall have any greater validity or force against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

A husband who has received property with his wife cannot, when sued for her ante-nuptial debts, defend himself by setting up a previous judgment obtained against her separate estate for the same debt, if, owing to the want of separate estate, that judgment is unsatisfied; but he is not liable for an ante-nuptial debt of his wife which accrued more than six years before the commencement

of the action against him (*b*). Where judgment was recovered against the separate estate of a married woman who afterwards obtained a dissolution of her marriage and married again, this was held to be a debt contracted before marriage within the meaning of sects. 13 and 19 (*c*).

Liabilities of surviving wife.—A married woman is liable at common law for a debt contracted before her marriage. The Married Women's Property Act, 1882, leaves that liability untouched, and judgment can therefore be obtained against her personally (*d*). All debts contracted by the wife prior to the marriage, and which have not been barred by the Statutes of Limitation, survive against her on the death of her husband; and she may then be charged with the payment of them (*e*).

SECTION IV.

TRANSFER BY BANKRUPTCY.

Effect of receiving order.—Immediately upon a receiving order being made against a debtor, his *choses in action* and obligations vest in the official receiver, and upon the appointment of a trustee they forthwith pass to and vest in the trustee (*f*); and they are to be deemed to have been duly assigned to the trustee for the purpose of his instituting an action for their recovery (*g*).

Under the former Acts it was held, that the usual covenant in a lease, not to underlet or assign, would not prevent the transfer of the lease to the assignees if they thought fit to claim it (*h*). Trustees in bankruptcy possess the same remedies for the recovery of the bankrupt's debts and *choses in action*, and for the recovery of unliquidated damages for breaches of contract, in which the bankrupt is beneficially interested, as the bankrupt himself would have had, had he not become bankrupt (*i*). His rights are their rights; and the damages due to him, in respect of his personal estate, are due to them (*k*). So, where a person was adjudicated bankrupt in

(*b*) *Beck* v. *Pierce*, 23 Q.B.D. 316; 58 L.J. Q.B. 516.
(*c*) *Jay* v. *Robinson*, 25 Q.B.D. 467; 59 L.J. Q.B. 367.
(*d*) *Robinson* v. *Lynes*, (1894) 2 Q.B. 577; 63 L.J. Q.B. 759.
(*e*) *Woodman* v. *Chapman*, 1 Campb. 188.
(*f*) 46 & 47 Vict. c. 52, ss. 9, 54.
(*g*) Sect. 50 (5).
(*h*) *Doe* v. *Beavan*, 3 M. & S. 353; *Doe* v. *Carter*, 8 T.R. 57, 300; *Doe* v. *Smith*, 5 Taunt. 795.
(*i*) *Wright* v. *Fairfield*, 2 B. & Ad. 727; 9 L.J. (O.S.) K.B. 309.
(*k*) *Hill* v. *Smith*, 12 M. & W. 630; 13 L.J. Ex. 243; *Beckham* v. *Drake*, 2 H.L.C. 616; *Wetherell* v. *Julius*, 10 C.B. 280; 19 L.J. C.P. 367; *Stanton* v. *Collier*, 3 E. & B. 274; 29 L.J. Q.B. 116; *Ashdown* v. *Ingamells*, 5 Ex.D. 280; 50 L.J. Ex. 109.

1878, and sued for damages for wrongful dismissal in 1880, from an employment under a contract made before bankruptcy, and for money earned under such contract, it was held that both causes of action passed to the trustee (*l*). The trustees represent the creditors for all purposes, as well as the bankrupt himself; and if any fraud exist in a transaction to which the bankrupt was a party, they may take advantage of it for the benefit of the creditors (*m*), and may consequently make claims which the bankrupt himself would be estopped from doing (*n*). They may recover money received by agents of the bankrupt, and paid over to the latter after the act of bankruptcy; they may also recover the money from a creditor, who has received payment of his debt after an act of bankruptcy by way of fraudulent preference, or has enforced payment in a foreign country of a debt due to him from the bankrupt, having, at the time, notice of the bankruptcy (*o*). Whenever a third party has received money of the bankrupt under circumstances which create a right to recover it back, the trustee may sue for and recover it (*p*).

Executory contracts.—Among the beneficial rights and interests which pass to the trustee by virtue of his appointment are executory contracts in which the bankrupt is interested, and from which benefit may accrue to the estate, and which can be performed on the part of the bankrupt by the trustee himself. The bankruptcy has no other effect on these contracts than to put the trustee in the place of the bankrupt, neither rescinding the obligations of either party, nor imposing new ones (*q*). The trustee consequently may sue upon all executory contracts of sale entered into with the bankrupt, either for the non-delivery of goods and chattels, stock or shares, purchased by the bankrupt, or for the non-acceptance of property sold by him (*r*). And the bankrupt cannot, by stipulations inserted in a contract made by him with third parties, restrict the legal rights of the trustee, or deprive him of property, or of the benefit of a contract, to which he would otherwise be entitled (*s*). All that the trustee is bound to do is to fulfil the bankrupt's part of the engagement when the proper time arrives. If he expressly waives the contract, or, without any express waiver, if, at the proper time, he omits to do what by the terms of the contract he is bound to do, in the first case he

(*l*) *Emden* v. *Carte*, 17 Ch.D. 768; 51 L.J. Ch. 41.

(*m*) *Doe* v. *Ball*, 11 M. & W. 533; 12 L.J. Ex. 328.

(*n*) *Russell* v. *Bell*, 10 M. & W. 352.

(*o*) *Hunter* v. *Potts*, 4 T.R. 182; *Sill* v. *Worswick*, 1 H. Bl. 665; *Phillips* v. *Hunter*, 2 *ib.* 402.

(*p*) *Brandon* v. *Pate*, 2 H. Bl. 308; *Holmes* v. *Walsh*, 7 T.R. 458.

(*q*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L.J. Ex. 138.

(*r*) *Boorman* v. *Nash*, 9 B. & C. 152; 7 L.J. (O.S.) K.B. 150.

(*s*) *Tripp* v. *Armitage*, 4 M. & W. 699; 8 L.J. Ex. 107.

certainly will, and in the second he probably may, absolve the other party from all obligation towards him (*t*). Some executory contracts, founded upon the personal skill and talent of the bankrupt, or upon a mutuality of obligation and liability, are discharged by the bankruptcy when nothing has been done under them (*u*); but, if the bankrupt does execute the contract, the trustee may sue upon it on the completion of the work (*x*).

Equitable interests not vesting in trustee.—If, by the assignment of a debt or other *chose in action*, the bankrupt has given to the assignee of such debt an equitable claim thereto, no right of action passes to the trustee (*y*), as the money, when recovered, is not distributable among the creditors. But, if the bankrupt possesses a legal interest and estate, with a possibility of a beneficial interest from which a benefit to his creditors may result, such legal interest and possibility of benefit will pass to the trustee, if he thinks fit to claim it (*z*). And, in the case of the assignment of a trade debt, if the debtor has received no notice of the assignment, the debt will remain in the order and disposition of the bankrupt, and will pass to the trustee (*a*). An assignment of a debenture which is a *chose in action* confers a good title on the assignee, notwithstanding he gave no notice to the company until after the bankruptcy (*b*).

If a bill of exchange has been indorsed merely for the accommodation of the bankrupt, then, as the latter has no right of action upon the bill against the acceptor, no right of action can pass to the trustee; and, as the bill, in his hands, could not be made available for the benefit of the creditors, it does not pass to him, but remains with the bankrupt, who in several instances has indorsed the bill after his bankruptcy, so as to give to the *bonâ fide* indorsee a right of action thereon against the accommodation acceptor (*c*). And it has been held that, if a bill has been delivered by the bankrupt for a valuable consideration to another, so as to transfer to him the beneficial interest therein, the bankrupt may, after his bankruptcy, indorse the bill, and thus complete the legal title (*d*); and he may, of course, indorse all bills and notes which

(*t*) *Gibson* v. *Carruthers*, *supra*.

(*u*) *Beckham* v. *Drake*, 2 H.L. Cas. 579; *Knight* v. *Burgess*, 33 L.J. Ch. 727.

(*x*) *Whitmore* v. *Gilmour*, 12 M. & W. 808; 13 L.J. Ex. 201.

(*y*) *Tibbits* v. *George*, 5 Ad. & E. 113; 9 L.J. K.B. 255; *Moss*, *Ex parte*, *Toward*, *In re*, 14 Q.B.D. 310; 54 L.J. Q.B. 126; *Davis*, *In re*, *Rawlings*, *Ex parte*, 22 Q.B.D. 193; *Drew* v. *Josolyne*, 18 Q.B.D. 590; 56 L.J. Q.B. 490.

(*z*) *Carvalho* v. *Burn*, 4 B. &. Ad. 393; in err. 1 Ad. & E. 883; *Doe* v. *Steward*, *ib.* 300; 3 L.J. K.B. 141.

(*a*) 46 & 47 Vict. c. 52, s. 44 (3); *Buck* v. *Lee*, 1 Ad. & E. 804; 3 L.J. K.B. 206; *Goetz Jonas & Co.*, *In re*, (1898) 1 Q.B. 787; 67 L.J. Q.B. 577. As to assignment of future receipts of a business, see *Nichols*, *Ex parte*, *Jones*, *In re*, 22 Ch.D. 782; 52 L.J. Ch. 635; *Wilmot* v. *Alton*, (1896) 2 Q.B. 254; 65 L.J. Q.B. 669.

(*b*) *Pryce*, *In re*, 4 Ch.D. 685.

(*c*) *Wallace* v. *Hardacre*, 1 Campb. 46; *Willis* v. *Freeman*, 12 East, 660.

(*d*) *Watkins* v. *Maule*, 2 Jac. & Walk. 243; *Greening*, *Ex parte*, 13 Ves. 206.

he holds with authority to indorse as agent or trustee for another (*e*). But all bills of exchange and promissory notes, holden *bonâ fide* by the bankrupt or insolvent for a valuable consideration, and in which he is beneficially interested, vest in the trustee, and may be put in suit by him in his own name (*f*). Where there are two separate causes of action totally distinct from each other, although arising upon one and the same instrument, and the bankrupt has no beneficial interest in one, the cause of action in which he has a beneficial interest will pass to the trustee, while the other will not (*g*).

Money in the hands of a bankrupt, clothed with a specific trust, does not pass to the trustee. If, therefore, money has been advanced to a bankrupt to be applied to a special purpose, and to be returned if the purpose cannot be accomplished, that money does not vest in the trustee, if it has been kept separate and apart from the moneys of the bankrupt, and has not been used by him so as to make him a borrower of the money for his own use (*h*).

Sale of bankrupt's book-debts, goodwill, &c.—By sect. 56, subsect. 1, of the Bankruptcy Act of 1883, the trustee is authorised to sell the book-debts of the bankrupt and the goodwill of his business. This section appears not to authorise the sale of the books of a bankrupt solicitor (*i*). The book-debts referred to in the section are such debts accruing in the ordinary course of a man's trade as are usually entered in the trade books (*k*). A sale to the bankrupt himself is permissible, and in that case the bankrupt may sue in his own name (*l*).

Transfer to trustee of contracts in which bankrupt is interested in right of his wife.—The Married Women's Property Act, 1882 (*m*), materially altered the rights of husband and wife in respect of the wife's property. A wife, though married before the Act, will now take for her separate use any property to which her title has accrued subsequently to the Act coming into operation, and her husband will have no power over it, nor will it pass to his trustee in bankruptcy. In the case of a wife married after the commencement of the Act, she will be entitled as a *feme sole* to all property belonging to her at the time of her marriage, or subsequently acquired by her during coverture. In the case, however, of property of a wife married before the commencement of the Act, and to

(*e*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L.J. Ex. 138.

(*f*) *Willis* v. *Freeman*, 12 East, 656.

(*g*) *Boddington* v. *Castelli*, 23 L.J. Q.B. 31; 1 E. & B. 879.

(*h*) *Toovey* v. *Milne*, 2 B. & Ald. 683; *Edwards* v. *Glyn*, 28 L.J. Q.B. 359.

(*i*) *Roberts, Ex parte, Holder, In re*, 33 L.J. Bankr. 8.

(*k*) *Shipley* v. *Marshall*, 14 C.B. N.S. 566; 32 L.J. C.P. 258.

(*l*) *Kitson* v. *Hardwick*, L.R. 7 C.P. 473. By sect. 57 (1) the trustee is empowered, with the permission of the committee of inspection, to carry on the business so far as necessary for the beneficial winding up of the same: see *Emmanuel, Ex parte*, 17 Ch.D. 35; 50 L.J. Ch. 305.

(*m*) 45 & 46 Vict. c. 75.

which her title accrued before that date, the bankrupt's disposable interest in his wife's property, not settled upon the wife for her separate use, passes, together with the property which the bankrupt or insolvent possesses in his own right, to the trustee, who thus becomes entitled to the rents and profits of all the real estates of which the husband is seised in right of his wife, and which have not been vested in trustees for her sole and exclusive use, and to the benefit of all covenants annexed to such estates, and all contracts relating to the same (*n*). The trustee will take the rights of the husband over the *choses in action* of the wife in the same plight and condition as the husband himself had them (*o*), and must bring a joint action in his own name and in that of the wife for the purpose of reducing her *choses in action* into possession, and must recover judgment and take out execution in such joint action before the death of the husband, in order to make good their title against the wife, in case she should survive him (*p*). The trustee cannot sue on a promissory note, not negotiable, given to the wife before marriage (*q*); and, if the wife before her marriage has assigned to a trustee a *chose in action* for the benefit of herself, the right to sue on that *chose in action* cannot pass to the trustee of the bankrupt husband (*r*). By sect. 1 (5) of the Married Women's Property Act, 1882, a married woman carrying on a trade separately from her husband is subject to the Bankruptcy Laws in the same manner as if she were a *feme sole*, even in cases where she has ceased to carry on business at the date of the bankruptcy (*s*). This section, however, does not apply to a married woman possessed of separate estate but not carrying on a separate trade (*t*).

Contracts made with bankrupt during bankruptcy.—The trustee also is entitled to sue, if he thinks fit, upon all contracts entered into with the bankrupt during the bankruptcy, not being contracts for the personal labour and services of the bankrupt made for the earning of his necessary subsistence. If the bankrupt or his servants have sold goods, after the bankruptcy, to parties who bought with notice of the bankruptcy, the trustee may treat the bankrupt as his agent, and sue such purchasers for the price, or he

(*n*) *Doe* v. *Steward*, 1 Ad. & E. 311; 3 L.J. K.B. 141. As to his contingent interest in money paid to his wife after his discharge, see *Dever, Ex parte*, 18 Q.B.D. 660; 56 L.J. Q.B. 552.

(*o*) *Coysegame, Ex parte*, 1 Atk. 192.

(*p*) *Mitford* v. *Mitford*, 9 Ves. 99; *Pierce* v. *Thornley*, 2 Sim. 177; *Purdew* v. *Jackson*, 1 Russ. 26; 4 L.J. (O.S.) Ch. 1; *Honner* v. *Morton*, 3 Russ. 68.

(*q*) *Sherrington* v. *Yates*, 12 M. & W. 864; 13 L.J. Ex. 249.

(*r*) *Parnham* v. *Hurst*, 8 M. & W. 743; 10 L.J. Ex. 435.

(*s*) *Worsley, In re*, (1901) 1 K.B. 309; 70 L.J. K.B. 93; *Dagnall, In re*, (1896) 2 Q.B. 407; 65 L.J. Q.B. 666.

(*t*) *Gardiner, In re, Coulson, Ex parte*, 20 Q.B.D. 249; 57 L.J. Q.B. 149; *Stevens, In re*, 20 Ch.D. 697; 51 L.J. Ch. 909; *Lynes, In re*, (1893) 2 Q.B. 113; 62 L.J. Q.B. 372; *Helsby, In re*, 63 L.J. Q.B. 261; *Simonson, In re*, (1894) 1 Q.B. 433; 63 L.J. Q.B. 242.

may treat the purchasers as wrong-doers, and bring an action for the goods. An application by the trustee to the purchasers for payment of the price, treating the transaction as a contract for sale, amounts only to a conditional adoption of the contract, and is dependent upon the demand of payment being acceded to. If payment is not made, the trustee may repudiate the sale altogether (*u*). Upon a contract which has been entered into before the bankruptcy, but which has not been finally completed until after the bankruptcy, the trustee alone is entitled to sue (*x*). And, with regard to all contracts made by the bankrupt before he obtains his certificate, the trustee may, if he pleases, adopt such contracts, treating the bankrupt as his agent in the transaction. He may enforce payment of a bill of exchange, or negotiable security, made payable to the bankrupt after the bankruptcy (*y*). He may claim the fruits of his trading, or of his carrying on business as a general medical practitioner, the proceeds of his inventions and discoveries, the profit of his patent rights and money awarded to him as compensation for a breach of contract (*z*). If the bankrupt has bestowed his work and labour and skill upon materials provided by the trustee, he is entitled to the benefit of such work and labour in common with the materials upon which it has been employed; and, if he has entered into an executory contract for the sale of goods, the trustee may affirm this contract, and treating the bankrupt as his agent in the matter, may bring an action for the price (*a*). If, however, the trustee permits an undischarged bankrupt to pay away for value money which he has received since the adjudication, which the trustee could have required to be paid to him, he cannot follow it, even though the person to whom the money was paid had notice of the bankruptcy (*b*).

Rights of undischarged bankrupts.—The bankrupt has a right to maintain actions upon contracts entered into with him after his bankruptcy, and before he has obtained his certificate, unless the trustee interferes to prevent him (*c*); he may sue for money lent,

(*u*) *Valpy* v. *Sanders*, 17 L.J. C.P. 249; 5 C.B. 886.

(*x*) *Hillary* v. *Morris*, 5 C. & P. 6.

(*y*) *Kitchen* v. *Bartsch*, 7 East, 53.

(*z*) *Crofton* v. *Poole*, 1 B. & Ad. 568; 9 L.J. (O.S.) K.B. 59; *Elliot* v. *Clayton*, 16 Q.B. 584; 20 L.J. Q.B. 217; *Hesse* v. *Stevenson*, 3 Bos. & P. 578; *Wadling* v. *Oliphant*, 1 Q.B.D. 145; 45 L.J. Q.B. 173; see also *Ford, Ex parte*, 1 Ch.D. 521; 45 L.J. Bankr. 96; *Dowling, In re*, 4 Ch.D. 689; 46 L.J. Bankr. 74; *Emden* v. *Carte*, 17 Ch.D. 768; 51 L.J. Ch. 41.

(*a*) *Whitmore* v. *Gilmour*, 13 L.J. Ex. 201; 12 M. & W. 808; *Evans* v. *Mann*, Cowp. 569.

(*b*) *Dewhirst, Ex parte, Vanlohe, In re*, L.R. 7 Ch. 185; 41 L.J. Bankr. 18; *Payne, Ex parte*, 15 Q.B.D. 616; but see *Edwards, Ex parte*, 13 Q.B.D. 747; *Collins* v. *Stimpson*, 11 Q.B.D. 142; 52 L.J. Q.B. 440.

(*c*) *Cohen* v. *Mitchell*, 25 Q.B.D. 262; 59 L.J. Q.B. 409; *Hunt* v. *Fripp*, (1898) 1 Ch. 675; 67 L.J. Ch. 377. This doctrine, however, does not apply to real estate: *Newland Development Association, In re*, (1892) 2 Ch. 138; 61 L.J.Ch. 495; but does to leaseholds: *Clayton's Contract, In re*, (1895) 2 Ch. 212; 64 L.J. Ch. 615.

goods sold and delivered, and for work and labour done and materials provided by him, after he has been adjudged bankrupt, inasmuch as such after-acquired property does not vest absolutely in the trustee, although he has a right to claim it; if he does not make any claim, the bankrupt has a perfect right as against all other persons, and may maintain actions accordingly (*d*). When, therefore, after the bankruptcy, the defendant made a promissory note payable to the bankrupt or his order, and the latter indorsed the note without the previous consent of the trustee, it was held, first, that, as against the defendant, and as against all the world excepting the trustee, the bankrupt was competent to make the indorsement; and secondly, that as the defendant, notwithstanding the bankruptcy, had made the note payable to the order of the bankrupt, he could not afterwards dispute the power of the latter to indorse it, and was therefore estopped from setting up the bankruptcy as an answer to the action (*e*). Any property that a bankrupt acquires before his discharge belongs to his trustee, excepting only what is necessary for the support of himself and his family (*f*); he may sue for and recover his earnings if the trustee does not interfere, but what he recovers he recovers with this exception for the benefit of his creditors (*g*); and it has consequently been held that, if the trustee himself employs the bankrupt (*h*), and has the benefit of his personal labour under an agreement to pay him wages, he may maintain an action against him for the recovery thereof (*i*). But he cannot acquire a right of property in anything beyond the produce of his daily labour reasonably necessary for his subsistence. After the close of the bankruptcy proceedings, property falling in to the bankrupt belongs to him, and not to the trustee (*k*).

Liability of trustee upon bankrupt's covenants and executory contracts.—If the trustee elects to take the bankrupt's leases and interests in land, he becomes chargeable upon the covenants annexed to such estates and running with the land. So, also, the trustee may elect to take the bankrupt's executory contracts, and will then be chargeable therewith (*l*).

(*d*) *Webb* v. *Fox*, 7 T.R. 391; *Herbert* v. *Sayer*, 5 Q.B. 965; 12 L.J. Q.B. 286; *Jameson* v. *Brick and Stone Co.*, 4 Q.B.D. 208; 48 L.J. Q.B. 249.

(*e*) *Drayton* v. *Dale*, 2 B. & C. 293; 2 L.J. (O.S.) K.B. 20.

(*f*) *Graydon, In re*, (1896) 1 Q.B. 417; 65 L.J. Q.B. 328.

(*g*) *Roberts, In re*, (1900) 1 Q.B. 122; 69 L.J. Q.B. 19; explaining *Chippendall* v. *Tomlinson*, 4 Doug. 318. As to meaning of "salary or income" in sect. 53 of 46 & 47 Vict. c. 52, see *Shine, In re*, (1892) 1 Q.B. 522; 61 L.J. Q.B. 253; *Rogers, In re*, (1894) 1 Q.B. 425; 63 L.J. Q.B. 178.

(*h*) 46 & 47 Vict. c. 52, s. 64.

(*i*) *Coles* v. *Barrow*, 4 Taunt. 754.

(*k*) *Pettit's Estate, In re*, 1 Ch.D. 478; 45 L.J. Bankr. 63.

(*l*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L.J. Ex. 138; *Boorman* v. *Nash*, 9 B. & C. 145; 7 L.J. (O.S.) K.B. 150; *Pearce* v. *Bastable*, (1901) 2 Ch. 122; 70 L.J. Ch. 446; *Bastable, In re*, (1901) 2 K.B. 518; 70 L.J. K.B. 784. The

Set-off in bankruptcy.—The right of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties. The latter was given by the Statutes of Set-off (*m*) to prevent cross actions; and if the defendant could have sued the plaintiff for a debt due to him, not in his representative character, he might have set it off under those statutes in an action by a plaintiff suing in his individual character also, though the plaintiff or defendant might be claiming their respective debts as a trustee for a third person. If the debts were legal debts due to each in his own right, it was sufficient. But under the Bankruptcy Acts, the mutual credit clause (*n*) has not been so construed. The object of this clause is not to avoid cross actions, for none would lie against the trustee in bankruptcy, and one against the bankrupt would be unavailing; but to do substantial justice between the parties where a debt is really due from the bankrupt to the debtor to his estate; and it does not authorise a set-off, where the debt, though legally due to the debtor from the bankrupt, is really due to him as a trustee for another, and though recoverable in a cross action would not have been recovered for his own benefit (*o*).

Effect of annulling adjudication.—Whenever any adjudication in bankruptcy is annulled (*p*), all sales and dispositions of property and payments duly made, and all acts theretofore done, by the trustee or any person acting under his authority, or by the court, will be valid; but the property of the debtor, who was adjudged a bankrupt, will in such case vest in such person as the court may appoint, or in default of any such appointment revert to the bankrupt for all his estate or interest therein, upon such terms and subject to such conditions, if any, as the court may declare by order (*q*). A notice of the order of the court, annulling the adjudication, must be forthwith gazetted and published in a local paper (*p*).

subject of disclaimer by the trustee in bankruptcy is fully treated in Addison on Torts, pp. 240—243 (ed. 7).

(*m*) 2 Geo. 2, c. 22, s. 13; and 8 Geo. 2, c. 24, s. 4, now repealed; see 46 & 47 Vict. c. 49.

(*n*) 46 & 47 Vict. c. 52, s. 38.

(*o*) Parke, B., *Forster* v. *Wilson*, 12 M. & W. 191, 203; 13 L.J. Ex. 209.

(*p*) 46 & 47 Vict. c. 52, s. 35.

(*q*) See *Bailey* v. *Johnston*, L.R. 7 Ex. 263; 41 L.J. Ex. 211; *Crew* v. *Terry*, 2 C.P.D. 403; 46 L.J. C.P. 787; *Chidley, In re*, 1 Ch.D. 177; 45 L.J. Bankr. 49.

CHAPTER VI.

OF REMEDIES FOR BREACH OF CONTRACT.

SECTION I.

DAMAGES.

Compensation in damages for breach of contract.—Whenever one party to a contract has failed in performing what he has undertaken to do in favour of another contracting party, the latter is entitled to compensation in damages, that is, so far as money can do it, he is to be placed in the same situation with respect to damages as if the contract had been performed (*a*). All evidence tending to show what the damages really are is admissible; but the pecuniary consideration given for the contract is no criterion of the pecuniary damage resulting from the breach of it (*b*). Damages may be recovered, although the plaintiffs are not entitled to the whole in their own right, and although the damages are divisible between the plaintiffs and other parties in certain unknown proportions (*c*); but the right to recover is of course confined to the parties to the contract (*d*). But if a contract is made with A. for the benefit of B., A. can sue for and recover all that B. could recover if the contract had been made with him (*e*).

Nominal damages.—Whenever a contract has been broken, and no particular or precise damage can be proved to have been sustained, and no evidence of actual damage can be given, nominal damages are recoverable as a matter of course (*f*). If, therefore, on a breach of contract, the jury are unable to ascertain the

(*a*) *Robinson* v. *Harman*, 1 Exch. 855; 18 L.J. Ex. 202; see however *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D. 357; 51 L.J. Q.B. 330; *post*, p. 257.

(*b*) *Brady* v. *Oastler*, 33 L.J. Ex. 300; 3 H. & C. 112.

(*c*) *Robertson* v. *Wait*, 8 Exch. 299; 22 L.J. Ex. 209.

(*d*) *Winterbottom* v. *Wright*, 10 M. & W. 115; 11 L.J. Ex. 415; *Blakemore* v. *Bristol & Exeter Ry.*, 8 E. & B. 1049; 27 L.J. Q.B. 167; see *Heaven* v. *Pender*, 11 Q.B.D. 503; 52 L.J. Q.B. 702; and Addison on Torts, pp. 20, 21 (ed. 7).

(*e*) *Murray* v. *Flavell*, 25 Ch.D. 89; 53 L.J. Ch. 185.

(*f*) *Ashby* v. *White*, 2 Ld. Raym. 955; *Van Wart* v. *Woolley*, 3 B. & C. 439; 3 L.J. (O.S.) K.B. 51; *Marzetti* v. *Williams*, 1 B. & Ad. 424; 9 L.J. (O.S.) K.B. 42.

amount of damages, but find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages (*g*). But a creditor who has received the full amount of a debt due to him in satisfaction and discharge of the debt cannot sue for nominal damages in respect of the detention or non-payment of the money due (*h*).

General and special damages.—In the case of a warranty of the health and soundness of cattle at the time of a sale thereof, the general damage resulting from the breach of warranty is the deterioration in the value of the cattle resulting from disease; special damage may arise, if the diseased cattle are mixed with other flocks, and communicate to them a contagious disorder (*i*). In an action for the breach of a covenant to repair, the general damages are such a sum as it will cost to put the premises into repair. Special damages may arise and be recoverable, if the covenantee is himself only a lessee of the premises, holding them under a like covenant to repair, and has been sued by the original lessor, and compelled to pay damages and costs in consequence of the defendant's breach of covenant (*k*). In the case of contracts for the payment of a specified sum of money, the general damages are obviously the sum agreed to be paid, if the contract has been fully and properly performed by the plaintiff, and nothing has been paid on account. But when the contract is not for the payment of a specific sum of money at an appointed time, but for the performance of some particular act, the plaintiff is entitled to a full and fair compensation for the injury and inconvenience resulting from the breach of contract; and the court will not tie a jury down to any nice calculation, but will leave them considerable latitude in assessing the damages (*l*). The plaintiff is entitled to be replaced in the position in which he would have been had the contract not been broken. Thus, where stockbrokers bought shares for their principal, and contracted to resell them at any time before settling day at his request, it was held that the damages for a breach of this contract were the difference between the highest price the shares reached between the date of purchase and settling day and the price at which the brokers actually sold the shares (*m*). This point was not dealt with on appeal (*mm*).

Damages are recoverable only up to the time of the commence-

(*g*) *Feize* v. *Thompson*, 1 Taunt. 121.

(*h*) *Beaumont* v. *Greathead*, 2 C.B. 500; 15 L.J. C.P. 130.

(*i*) *Mullett* v. *Mason*, L.R. 1 C.P. 559; 35 L.J. C.P. 299; *Smith* v. *Green*, 1 C.P.D. 92; 45 L.J. C.P. 28; *Ward* v. *Hobbs*, 4 App.Cas. 13; 48 L.J. Q.B. 281; see also 56 & 57 Vict. c. 71, s. 56 (2).

(*k*) *Smith* v. *Howell*, 6 Exch. 737; 20 L.J. Ex. 377.

(*l*) *Lowe* v. *Peers*, 2 Burr. 2225; *Loosemore* v. *Radford*, 9 M. & W. 657; 11 L.J. Ex. 284; *Sondes* (*Lord*) v. *Fletcher*, 5 B. & Ald. 835.

(*m*) *Michael* v. *Hart*, (1901) 2 K.B. 867; 70 L.J. K.B. 1000.

(*mm*) See (1902) 1 K.B. 482; 71 L.J. K.B. 265.

ment of the action; but the prospective as well as the present injury sustained at the time the action was commenced may be regarded in determining what will be a fair compensation to be awarded to the plaintiff (*n*).

Recovery of interest generally.—As regards the recovery of interest at common law, the general rule is, that interest is allowed only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. In the case of bills of exchange and promissory notes, made payable with interest, the interest runs from the day of the date of the bill or note; if they are silent as to interest, it is payable only from the time when the bill or note becomes due (*o*). The interest forms part of the damages, and the jury may allow such a reasonable amount as they think proper (*p*). When a bill or note is payable on demand, interest may be given from the issuing of the writ, if there has been no previous demand (*q*). In the case of a bank stopping payment, the closing of the doors of the bank does not dispense with the necessity of a formal demand of payment of the notes and drafts current at the time of the stoppage; and interest will run upon them from the respective times of the claims in respect of their being sent in to the liquidator (*r*). If goods are sold, to be paid for by a bill, and the bill be not given, interest may be recovered on the price from the time when the bill would have become due (*s*). If accounts between the parties show that interest has always been claimed and allowed on sums advanced or balances unpaid, there will be evidence from which a promise to pay interest may be implied (*t*). And, if an express contract to pay interest is proved, the non-payment of it forms part of the general damages (*u*). If no rate of interest is specified on the face of a bill of exchange, the rate of interest recoverable by way of damages is the current rate of interest payable at the place where the contract was made. If, therefore, such a bill of exchange is drawn in one country and payable in another, the drawer is liable, on the dishonour of the bill, to pay interest according to the current rate of interest in the country where the bill was drawn (*x*). Where a simple contract debt has been secured by deposit of title

(*n*) Com. Dig. DAMAGES, D.; *Fetter* v. *Beal*, 1 Raym. 339, 692.

(*o*) As to interest, see now 45 & 46 Vict. c. 61, s. 9, *post*, pp. 1110, 1111.

(*p*) *Roffey* v. *Greenwell*, 10 Ad. & E. 222; 8 L.J. Q.B. 336.

(*q*) *Pierce* v. *Fothergill*, 2 Sc. 334.

(*r*) *East of England Banking Co., In re*, L.R. 4 Ch. 14; 38 L.J. Ch. 121.

(*s*) *Marshall* v. *Poole*, 13 East, 101; *Farr* v. *Ward*, 3 M. & W. 25.

(*t*) *Bruce* v. *Hunter*, 3 Campb. 467; *Calton* v. *Bragg*, 15 East, 227.

(*u*) *Harrison* v. *Allen*, 9 Moore, 28, 30; 2 L.J. (O.S.) C.P. 97.

(*x*) *Gibbs* v. *Fremont*, 9 Exch. 31; 22 L.J. Ex. 302.

deeds, and nothing has been said as to interest, the mortgagee is entitled to interest at the rate of 4*l.* per cent. (*y*).

By sect. 28 of 3 & 4 Will. 4, c. 42, upon all debts or sums certain, payable at a certain time (*z*), or otherwise the jury, on the trial of any issue or any inquisition of damages, may, if they think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing (*a*), so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment (*b*). The jury may also (sect. 29), if they think fit, give damages, in the nature of interest, over and above the sum recoverable, in all actions on policies of assurance made after the passing of the Act. By 1 & 2 Vict. c. 110, s. 17, it is enacted that every judgment debt shall carry interest at the rate of 4*l.* per cent. per annum from the time of entering up the judgment (*c*). A notice of a call on a contributory under a winding-up, which states that if the call is not paid at the time appointed interest will be charged thereon, is a sufficient notice that interest will be claimed (*d*). A general intimation upon a tradesman's account that interest will be charged after one year's credit cannot be considered as referring to each item in the account, and is not a sufficient notice claiming interest within the section (*e*). But in the case of notes payable on demand payment must be demanded, or interest will not begin to run (*f*), and the demand must be made on the person liable to pay: a demand upon the trustee in bankruptcy is insufficient (*g*). A policy of assurance does not bear interest, and interest is only payable under the statute where there has been a wrongful detention of the principal (*h*). It seems now to be settled law that interest is not due, and therefore cannot be given as damages under the section, on money secured by a written instrument, unless it appears on the face of that instrument that interest was intended to be paid or

(*y*) *Kerr's Policy, In re*, L.R. 8 Eq. 331; 38 L.J. Ch. 539.

(*z*) *Horner, In re*, (1896) 2 Ch. 188; 65 L.J. Ch. 694.

(*a*) As to what is a demand in writing, see *Ward* v. *Eyre*, 15 Ch.D. 130; 49 L.J. Ch. 657; *Rhymney Ry.* v. *Rhymney Iron Co.*, 25 Q.B.D. 147; 59 L.J. Q.B. 414.

(*b*) See as to this section, *L. C. & D. Ry.* v. *S. E. Ry.*, (1893) A.C. 429; 63 L.J. Ch. 93; *Caudery* v. *Finnerty*, 61 L.J. Q.B. 496.

(*c*) *Newton* v. *Grand Junc. Ry.*, 16 M. & W. 139; 16 L.J. Ex. 276.

(*d*) *Lintott, Ex parte*, L.R. 4 Eq. 184; 36 L.J. Ch. 510; *Barrow's case*, L.R. 3 Ch. 784; 38 L.J. Ch. 15.

(*e*) *Edwards, In re*, 61 L.J. Ch. 22.

(*f*) *Herefordshire Banking Co., In re*, L.R. 4 Eq. 250; 36 L.J. Ch. 806. See sect. 57 (1) (*b*) of 45 & 46 Vict. c. 61, *post*, p. 1162.

(*g*) *Herefordshire Banking Co., In re*, L.R. 4 Eq. 250; 36 L.J. Ch. 806.

(*h*) *Webster* v. *British Empire Assur. Co.*, 15 Ch.D. 169; 49 L.J. Ch. 769.

unless it be implied from the usage of trade (*i*). A written application for a loan till a fixed day is not an instrument by virtue of which money is payable within 3 & 4 Will. 4, c. 42, s. 28, so as to enable a jury to give interest as damages, though the loan is made on the terms of the application (*k*).

Special damages.—The general rule is that all damages which are the fair and natural result of the defendant's breach of contract, although arising out of special circumstances, may be recovered in the action brought against him, provided they must, in the ordinary course of things, have been expected to occur, or may fairly be considered to have been contemplated by the parties as the probable consequence of a breach of the contract (*l*). If the contract has been made under special circumstances which were communicated and known to both parties, the damages they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated; but, if the special circumstances were wholly unknown to the party breaking the contract, he can only be supposed to have had in his contemplation the amount of injury which would arise generally, and not from any special circumstances (*m*). Where the defendant covenanted with the plaintiff, that, if the plaintiff would surrender his lease, in order that a new lease might be granted to the defendant, the defendant would sink a pit on the land in search of coal, and, in case a marketable vein of coal should be reached would pay the plaintiff 2,500*l.*, and the pit was never sunk, and the defendant was sued for a breach of his covenant, and it was shown that marketable coal would probably have been found if the pit had been sunk, it was held that the whole 2,500*l.* were recoverable (*n*). Where the plaintiff, who was a large farmer, and was known by the defendant to be accustomed to thresh out his wheat in the field and send it off to market, gave an order to the defendant for a threshing machine, which was to be delivered on the 11th of August, at which time the wheat might reasonably be expected to be ripe, and the threshing machine was not ready, but was promised from time to time, and was not delivered before the middle of September, and it became necessary to stack the

(*i*) *L. C. & D. Ry.* v. *S. E. Ry.*, (1893) A.C. 429; 63 L.J. Ch. 93; following *Page* v. *Newman*, 9 B. & C. 378; 7 L.J. (O.S.) K.B. 267.

(*k*) *Taylor* v. *Holt*, 3 H. & C. 452; 34 L.J. Ex. 1; sed quære.

(*l*) *Hadley* v. *Baxendale*, 9 Exch. 341; 23 L.J. Ex. 179; *Welch* v. *Anderson*, 61 L.J. Q.B. 167; see also 56 & 57 Vict. c. 71, ss. 51, 54.

(*m*) *Sully* v. *Duranty*, 3 H. & C. 270; 33 L.J. Ex. 319; *Burton* v. *Pinkerton*, L.R. 2 Ex. 340; 36 L.J. Ex. 137; *Borradaile* v. *Brunton*, 2 Moore, 582; 8 Taunt. 535.

(*n*) *Pell* v. *Shearman*, 10 Exch. 766; see, however, *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D. 357; 51 L.J. Q.B. 330; *post*, p. 259.

wheat out in the field, where it was damaged by a thunder-storm before it could be thatched, and had to be kiln-dried, it was held that the plaintiff was entitled to recover the damage he had sustained and the extra expense he had incurred, as the injury was such as might naturally be expected to result from the breach of contract, and ought to have been contemplated by the defendant as a probable consequence of failure on his part to send the machine at the time appointed (*o*). Where the defendants, a gas company, contracted to supply the plaintiff with a proper service-pipe from the main outside to a meter inside his premises, and the gas escaped from a defect in the pipe, and the servant of a gas-fitter, who happened to be working in an adjoining room, incautiously went into the shop with a lighted candle, and the escaped gas exploded, it was held that the defendants were liable for all the damage done (*p*). Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, the buyer can recover, as damages for the non-delivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount (*q*). Where the defendant had been guilty of a breach of contract in not repairing a steam-ship within the time stipulated for, it was held that he was liable to pay as damages the net profits which the owners might have obtained by chartering the vessel, if she had been delivered at the time fixed by the contract (*r*). So where the defendant did not give possession under a lease to the plaintiff, whom he knew to be about to carry on a trade on the premises, he was held liable for the loss of trade (*s*). Where the plaintiff had entered into a contract of subsale with respect to certain goods, and the defendant knew that the plaintiff had purchased them for re-sale, but did not know of any contract of re-sale, it was held that the plaintiff could not recover damages for loss of profit of re-sale (*t*). Where, on the other hand, a miller delivered to a carrier the broken shaft of his mill to be carried for hire to an engineer, and the carrier negligently delayed the delivery of the shaft, and in consequence of the delay the mill was kept standing

(*o*) *Smeed* v. *Foord*, 1 E. & E. 602; 28 L.J. Q.B. 178; *Prior* v. *Wilson*, 35 L.T. 549; 8 W.R. 260.

(*p*) *Burrows* v. *March Gas and Coke Co.*, L.R. 5 Ex. 67; 39 L.J. Ex. 33; L.R. 7 Ex. 96; 41 L.J. Ex. 46; *Mowbray* v. *Merryweather*, (1895) 2 Q.B. 640; 65 L.J. Q.B. 50; see *McMahon* v. *Field*, 7 Q.B.D. 591; 50 L.J. Q.B. 552.

(*q*) *Cory* v. *Thames Ironworks Co.*, L.R. 3 Q.B. 181; 37 L.J. Q.B. 68; *Hammond* v. *Bussey*, 20 Q.B.D. 79; 57 L.J. Q.B. 98.

(*r*) *Trent and Humber Ship-building Co., In re, Cambrian Steam Packet Co., Ex parte*, L.R. 4 Ch. 112; 38 L.J. Ch. 38.

(*s*) *Jacques* v. *Millar*, 6 Ch.D. 153; 47 L.J. Ch. 544; overruled on another point, see *Marshall* v. *Berridge*, 19 Ch.D. 233; 51 L.J. Ch. 329.

(*t*) *Thol* v. *Henderson*, 8 Q.B.D. 457.

idle, and the miller brought an action for damages against the carrier, and sought to recover compensation for the loss of the profits of his trade whilst the mill was stopped through the default of the carrier, it was held that, in order to recover these damages, the miller should have communicated to the carrier the fact that he had no other shaft, and that his mill was necessarily stopped until the new shaft was put up; for the stoppage of the mill could not reasonably be contemplated by the carrier as the natural result of delay in the delivery of the broken shaft (*u*). The same principle of law was adopted in a case where a cotton mill came to a standstill in consequence of delay by a carrier in delivering some cotton (*x*). Where the plaintiff sent goods from Manchester by a railway company to his traveller at Cardiff, and the delivery of the goods was, through the negligence of the company, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits he would have derived from a sale at Cardiff, it was held that, in the absence of notice to the company of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay (*y*). So, also, where a commercial traveller delivered a parcel of samples to a common carrier to be carried to A., but did not state the contents of the parcel, or the purpose for which it was required, and by the negligence of the carrier the parcel was delayed, and the traveller spent three days at A. unemployed waiting for it, it was held that the carrier was not liable to pay the hotel expenses of the traveller during the time he was waiting for the parcel, such damages being too remote (*z*). Where there has been a warranty that an animal is free from disease, and the plaintiff trusting to that has let the animal be with others which have become infected, the defendant is liable for all the loss if he must reasonably have known what would happen (*a*). Where there was a covenant to build a wall, and there was a breach of the covenant, but the cost of building a wall would be greatly in excess of the damage from not building one, it was held that the cost of building the wall was not the true measure of damages, but the pecuniary amount of the difference between the position of the plaintiffs by the breach or by the performance (*b*).

(*u*) *Hadley* v. *Baxendale*, 9 Exch. 941; 23 L.J. Ex. 179; *Williams* v. *Reynolds*, 6 B. & S. 4 5; 34 L.J. Q.B. 221; *Portman* v. *Middleton*, 4 C.B. N.S. 324; 27 L.J. C.P. 231.

(*x*) *Gee* v. *Lanc. & York. Ry.*, 6 H. & N. 211; 30 L.J. Ex. 11; *Fletcher* v. *Tayleur*, 17 C.B. 21; 25 L.J. C.P. 65.

(*y*) *G. W. Ry.* v. *Redmayne*, L.R. 1 C.P. 329; and see *Hales* v. *L. & N. W. Ry.*, 4 B. & S. 66; 32 L.J. Q.B. 292.

(*z*) *Woodger* v. *G. W. Ry.*, L.R. 2 C.P. 318; 36 L.J. C.P. 177.

(*a*) *Smith* v. *Green*, 1 C.P.D. 92; 45 L.J. C.P. 28.

(*b*) *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D. 357; 51 L.J. Q.B. 330.

Recovery of cost of previous legal proceedings as part of damages.—If an agent promises to execute a commission for hire or reward, and breaks his promise, the general damage is the loss, which immediately results from the non-execution of the thing agreed to be done. Special damages may arise and be recoverable, if the employer is himself only an agent acting on behalf of, and responsible to, a third party, and is sued by the latter, and has to pay damages and costs in consequence of the defendant's breach of contract (*c*). If a principal who has employed an agent to make a contract repudiates the contract made by the agent, or denies his liability, and the agent is himself sued and defends unsuccessfully, he may, in an action against his principal, recover the costs of his unsuccessful defence, if in defending the action he has pursued the course which a prudent man would have done under the circumstances (*d*). The defendant demised premises for a term of years to the plaintiff, and covenanted that the plaintiff should occupy the same during the term "without any interruption whatsoever from or by the defendant, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him or them." An action of trespass was afterwards brought by a person claiming under the defendant against the plaintiff who gave notice of it to the defendant, who paid no attention to the notice, and the plaintiff, acting on his own judgment, and without express authority, defended the action, in which a verdict was eventually found against him, and he was obliged to pay damages and costs. It was held that he was entitled to recover from the defendant the costs and damages he had paid, and also the expenses he had himself incurred in defending the action of trespass (*e*). But the costs of previous legal proceedings can only be recovered where they are the natural and proximate consequence of the breach of contract (*f*); and costs cannot be recovered which were incurred in upholding a defence manifestly untenable (*g*). Where a platform put up for the plaintiffs by the defendant under a contract, in order to enable them to paint a house, was so insecure that one of the plaintiffs' servants sustained injury by falling from it, and brought an action against the plaintiffs under the Employers'

(*c*) *Mainwaring* v. *Brandon*, 2 Moore, 125; 8 Taunt. 202.

(*d*) *Broom* v. *Hall*, 7 C.B. N.S. 503.

(*e*) *Rolph* v. *Crouch*, L.R. 3 Ex. 44; 37 L.J. Ex. 8; *Howard* v. *Lovegrove*, L.R. 6 Ex. 43; 40 L.J. Ex. 13.

(*f*) *Richardson* v. *Dunn*, 8 C.B. N.S. 655; 30 L.J. C.P. 47; *Pow* v. *Davis*, 1 B. & S. 220; 30 L.J. Q.B. 257; *Bazendale* v. *L. C. & D. Ry.*, L.R. 10 Ex. 35; 44 L.J. Ex. 20; overruling *Mors-le-Blanch* v. *Wilson*, L.R. 8 C.P. 227; 42 L.J. C.P. 70; and see *Fisher* v. *Val de Travers Co.*, 1 C.P.D. 511; 45 L.J. C.P. 479; *Hornby* v. *Cardwell*, 8 Q.B.D. 329; 51 L.J. Q.B. 89; *Hammond* v. *Bussey*, 20 Q.B.D. 79; 57 L.J. Q.B. 58; *Agius* v. *G. W. Colliery Co.*, (1899) 1 Q.B. 413; 68 L.J. Q.B. 312.

(*g*) *Ronnberg* v. *Falkland Islands Co*, 17 C.B. N.S. 1; 34 L.J. C.P. 34.

Liability Act, which they compromised by paying him a certain sum, and then sued the defendant for breach of contract, it was held that the defendant was liable under the contract, but that since the plaintiffs had employed a competent contractor to put up the platform there was no negligence on their part, and they were not liable to their servant for the injuries he had sustained, and therefore could not recover from the defendant, by way of damages, the money which they had paid to compromise their servant's action against them (*h*).

Pecuniary liabilities swelling amount of damages.—A pecuniary liability incurred by the plaintiff in consequence of the breach of the defendant's contract may form part of the damages, though it may be difficult to estimate the extent of such pecuniary liability. Where the plaintiff, having purchased seed barley with a warranty, sold it again with a similar warranty, and the warranty was broken, and the sub-vendee claimed damages from the plaintiff, his immediate vendor, it was held that the jury ought to take this item of claim and liability on the part of the plaintiff into their consideration in estimating the amount of the damages (*i*). But where a purchaser buys goods ordinarily procurable in the market, and before he has received them sells them again, and the goods are not delivered by the first vendor, and the purchaser fails to deliver them to his vendee, he cannot charge the damages paid to the latter against the first vendor, if it appears that he had the means of fulfilling his sub-contract by going into the market and supplying himself with the article and delivering it to his vendee (*k*). Where a tenant holds over after a notice to quit, or after the expiration of his lease, and the landlord is compelled to pay damages to a party to whom he had contracted to let the land, these damages will be recoverable from the obstructive tenant (*l*).

Reduction of damages.—In estimating the damages sustained by a breach of contract the defendants are not entitled to bring into account the amount which the plaintiff may have received under a policy of insurance (*m*). So in an action for breach of contract for the quick discharge of a ship made with several persons jointly, where some of the plaintiffs had made profits by reason of such breach of contract which they would not otherwise have made, another ship in which they were interested having been substituted for the purpose for which the former ship

(*h*) *Kiddle* v. *Lovett*, 16 Q.B.D. 605.

(*i*) *Randall* v. *Raper*, E. B. & E. 84; 27 L.J. Q.B. 266.

(*k*) Maule, J., *Peterson* v. *Ayre*, 13 C.B. 365; *Josling* v. *Irvine*, 30 L.J. Ex. 78; 6 H. & N. 512.

(*l*) *Bramley* v. *Chesterton*, 2 C.B. N.S. 592; 27 L.J. C.P. 23.

(*m*) *Bradburn* v. *G. W. Ry.*, L.R. 10 Ex. 1; 44 L.J. Ex. 9.

was required, it was held that the amount of the joint damages could not be reduced by the profits so made by some of the plaintiffs individually (*n*).

Excessive damages.—It is a general rule of law, that the indemnity to be recovered in respect of damages sustained by reason of a breach of contract shall be fairly proportioned to the real injury sustained; and the court will not permit a defendant to be mulcted in excessive damages. It is a rule, also, that a catching bargain shall not be taken advantage of, so as to enable the plaintiff to put into his pocket a greater sum of money than will form a reasonable compensation for the injury he has sustained by the breach of contract. Thus, where the defendant bought a horse of the plaintiff, and agreed to pay, as the price of the horse, "a barleycorn a nail, for each nail in the horse's shoes, doubling every nail," and there were thirty-two nails in every shoe, and the plaintiff, after doubling every nail, and reckoning the entire amount, claimed five hundred quarters of barley as the price of the horse, which the defendant refused to pay, Hyde, J., directed the jury to give no more than the actual value of the horse as damages; and they accordingly gave the plaintiff 8*l.*, which was held to be good (*o*).

Penal obligations.—In ancient times resort was had to penalties to secure the performance of contracts; but subsequently the legislature, by 8 & 9 Will. 3, c. 11, s. 8, extended to defendants a reasonable relief from penalties, by requiring the plaintiff in all actions upon any bond (*p*) or any penal sum for non-performance of any covenants or agreements in any indenture, deed or writing contained, to assign breaches, and the jury, upon the trial, to assess the damages that the plaintiffs have sustained thereby (*q*), which damages only are to be recovered; but judgment for the amount of the penalty is to be entered and to stand as a further security to answer to the plaintiff such damages as may be sustained from further breach of any covenants in the same indenture, deed, or writing contained.

Penalties for breach of contract.—The statute of Will. 3 embraces all penalties established to secure the performance of contracts, and is in all cases compulsory upon plaintiffs. "It is not in the power of a plaintiff to refuse to proceed according to that statute; he must assign the breach of such covenants as he proceeds to recover satisfaction for; and, if the defendant pleads to issue, and the

(*n*) *Jebsen* v. *East & West India Dock Co.*, L.R. 10 C.P. 300; 44 L.J. C.P. 181.

(*o*) *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whiteacre*, 2 Ld. Raym. 1164; *Chesterfield* v. *Jansen*, 1 Wils. 286.

(*p*) As to what is a "bond," see *Gerard* v. *Clowes*, (1892) 2 Q.B. 11; 61 L.J. Q.B. 487; *Strickland* v. *Williams*, (1899) 1 Q.B. 382; 68 L.J. Q.B. 241.

(*q*) 3 & 4 Will. 4, c. 42, s. 16.

cause goes to a jury for trial, the jury, upon trial of such cause, must assess damages for such of the breaches assigned as the plaintiff, upon trial of the issues, shall prove to have been broken" (*r*). The statute, it will be seen, refers simply to penalties for the non-performance of contracts, and does not extend to any bond conditioned for the mere payment of money. Bail bonds, replevin bonds, post-obit bonds, and all bonds conditioned for the payment of a sum certain, at a day certain, are not within the statute (*s*); but bonds for the payment of annuities, and of sums of money by instalments have been held to come within its provisions (*t*). Where, a debt being payable by instalments, with interest, the debtor made default in payment of one of the instalments, and by a deed, reciting that the creditor agreed to give the debtor time upon having the payment of the debt secured to him with interest, "by the instalments and in manner thereinafter appearing," provision was made for payment of the debt, with interest, by instalments different from the former ones, with a proviso that, upon default being made in payment of any instalment, the whole unpaid portion of the debt, with interest, should become immediately payable, and the debtor made default, it was held that the proviso was not in the nature of a penalty, and that the creditor ought not to be restrained from enforcing immediate payment of the whole of the money remaining due (*u*). So, where a creditor agreed with his debtor to remit part of the debt upon having a mortgage to secure the payment of the balance within two years, without prejudice to his right to recover the whole debt if such balance was not paid within that time, and the debtor executed a mortgage for such balance, containing a proviso that, if the mortgage debt was not paid within the two years, the whole of the original debt should be recovered, and the debt was not paid within the two years, it was held that the proviso was not of the nature of a penalty from which the mortgagor was entitled to be relieved, and that the mortgagee could recover the whole debt (*x*).

In an action upon a bond conditioned for the performance of covenants or collateral acts, the obligee cannot recover more damages against the obligor, for a breach of the condition of the

(*r*) *Hardy* v. *Bern*, 5 T.R. 636.

(*s*) *Smith* v. *Bond*, 3 Moo. & Sc. 528; 2 L.J. C.P. 269; *James* v. *Thomas*, 5 B. & Ad. 40; 2 L.J. K.B. 207; 1 Saund. 48, n. (b).

(*t*) *Willoughby* v. *Swinton*, 6 East, 550; *Walcot* v. *Goulding*, 8 T.R. 126; a warrant of attorney conditioned for the payment of money by instalments, or to secure the payment of an annuity, is not within the statute: *Cox* v. *Rodbard*, 3 Taunt. 74; *Shaw* v. *Worcester* (*Marquis*), 4 M. & P. 21; 8 L.J. (O.S.) C.P. 98.

(*u*) *Sterne* v. *Beck*, 1 De G. J. & S. 595; 32 L.J. Ch. 682; *Protector Loan Co.* v. *Grice*, 5 Q.B.D. 592; 49 L.J. Q.B. 812.

(*x*) *Thompson* v. *Hudson*, L.R. 4 H.L. 1; 38 L.J. Ch. 431.

bond, than the amount of the penalty and costs: for the bond ascertains the extent of the damage by consent of the parties; and, therefore, if a bond be conditioned for the performance of any act, and the obligee, by reason of the obligor's non-performance, sustains a damage far exceeding the amount of the penalty, yet he can only recover to the extent of the penalty and costs (*y*). But, where the penalty is contained in a deed *inter partes* or an agreement, damages may be recovered beyond the penalty. When the performance of a covenant or agreement is secured by a penalty imposed in the contract itself, the plaintiff may, at his election, bring an action for the penalty, and recover the penalty (after which he cannot resort again to the covenants, because the penalty is to be a satisfaction for the whole), or, if he does not choose to go for the penalty, he may proceed upon the covenants, and recover more or less than the penalty *toties quoties* (*z*). If he proceeds and recovers judgment for the penalty, he, of course, subjects himself to the restrictions imposed by 8 & 9 Will. 3, c. 11, as to issuing execution upon such judgment, and must take the opinion of a jury as to the amount that he ought, under the circumstances, to be permitted to levy. But, if he rejects the penalty, and proceeds for his real damages, he may recover a sum larger in amount than the penalty, if the jury think him entitled to it (*a*). A bond of indemnity given to protect a purchaser of land against adverse claims threatened at the time of the purchase, was held to be valid to the full amount of the penal sum, which greatly exceeded the original purchase-money, there being no equity in the circumstances of the case to justify an interference with the legal right, and the purchaser having, in discharge of the claim and expenses incident thereto, expended a larger sum than the full amount of the penal sum named in the bond (*b*).

Liquidated damages.—But a sum *in solido*, fixed upon by the parties and limited to be paid by the one to the other as a compensation for a breach of contract, is not necessarily a penalty, such as courts of equity would have relieved against, or such as comes within the operation of 8 & 9 Will. 3, c. 11. If the damages accruing from a breach of contract are of an uncertain nature, and the parties have chosen to assess them beforehand, by agreement amongst themselves, and the amount agreed upon is no more than what may be a reasonable measure of damages, it is not a penalty within the meaning of the statute, although it is denominated a

(*y*) *Wilde* v. *Clarkson*, 6 T.R. 304.

(*z*) *Lowe* v. *Peters*, 4 Burr. 2228; *Hurst* v. *Hurst*, 4 Exch. 579; 19 L J. Ex. 410; and see *Legh* v. *Lillie*, 6 H. & N. 170, n.; 30 L.J. Ex. 25.

(*a*) *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 343.

(*b*) *Osborne* v. *Eales*, 2 Moo. P.C. N.S. 125.

"penal sum." If, however, the contract contained various stipulations, some of which were of trivial importance and none of which were for the payment of an ascertained sum of money, it is doubtful whether a condition for the payment of a sum of money as liquidated damages for the breach of any of the provisions of the contract would not be treated as constituting a penalty, but this would not be the case where there was a condition for the forfeiture of a deposit on the breach of any of the stipulations (*c*). A man in possession of an estate in the country may set his own value upon the view, the timber, or other ornaments and conveniences of the property; and, if he parts with the possession, he may part with it on the terms that a tenant shall use it or cultivate it in a particular way, or pay a large sum of money as a compensation for the damage or injury occasioned by his neglect. "He may set an extraordinary value," observes Lord Eldon, "upon a particular piece of land or wood, on account of the amusement which it may afford him; and, if he chuse to stipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract" (*d*). Where, therefore, there was a reservation of an additional rent of 5*l.* per acre for every acre of meadow land which the tenant should break up or convert into tillage, and of 50*l.* for every acre of arable land which should not be laid down for grass, and so kept, it was held that the landlord was entitled to the increased rent for every acre dealt with contrary to the stipulations of the lease (*e*). And, where a tenant covenanted not to sow more than seventy acres in one year with clover, or, if he did so, to pay an additional rent of 10*l.* per acre, it was held that such additional rent was not a penalty (*f*). An agreement between a vendor and purchaser that until payment, interest shall be paid at a certain specified increasing rate is not in the nature of a penalty (*g*). Where lessees had been granted the privilege of placing slag on land let to them, and had covenanted to pay the lessor 100*l.* per acre (bearing interest) for all land not restored at a particular date, such sum though described as a penalty was regarded as stipulated damages (*h*).

In cases, also, affecting the personal affections, the amount of

(*c*) *Wallis* v. *Smith*, 21 Ch.D. 243; 52 L.J. Ch. 145; *Willson* v. *Love*, (1896) 1 Q.B. 626; 65 L.J. Q.B. 474.

(*d*) *Astley* v. *Weldon*, 2 Bos. & P. 346.

(*e*) *Birch* v. *Stephenson*, 3 Taunt. 469; *Rolfe* v. *Peterson*, 2 Bro. P.C. 436; *Denton* v. *Richmond*, 1 Cr. & M. 734; 2 L.J. Ex. 269; *Farrant* v. *Olmius*, 3 B. & Ald. 692.

(*f*) *Jones* v. *Green*, 3 Y. & J. 304; *Pollitt* v. *Forrest*, 11 Q.B. 967; 16 L.J. Q.B. 424; *Bowers* v. *Nixon*, 12 Q.B. 558; 18 L.J. Q.B. 35.

(*g*) *Herbert* v. *Salisbury & Yeovil Ry.*, L.R. 2 Eq. 221.

(*h*) *Elphinstone* (*Lord*) v. *Monkland Iron Co.*, 11 App.Cas. 332; *Law* v. *Redditch Local Board*, (1892) 1 Q.B. 127; 61 L.J. Q.B. 172.

damages which ought to be awarded by way of compensation cannot easily be measured by the taste or judgment of third parties; it is often such as the persons interested can alone correctly estimate; and they are permitted, when that is the case, to fix them beforehand, at a precise sum to be paid as liquidated damages. If a man seals and delivers a written promise of marriage, whereby he promises to marry a particular lady, and in default to pay her the sum of 1,000*l.*, "that very sum is the ascertained damage, and the jury are confined to it" (*i*). If a deed or agreement contains promises for the performance of various acts, and then provides for the payment of one large sum, such as 1,000*l.*, by way of compensation, in case of the non-performance of all or of any one of the things stipulated to be done, and the damages in every case of non-performance are altogether uncertain, the sum agreed to be paid will be treated as liquidated damages, and not as a penalty. Thus, where in a deed of co-partnership between the plaintiff and defendant, as surgeons, the defendant covenanted that after the determination of the co-partnership he would not, at any time, practise as a surgeon within two miles and a-half of Dorset Crescent, and would not prevail on any of the patients of the firm to withdraw from the plaintiff or employ any other medical man, but would, as far as was in his power, promote the business of the plaintiff, and that if he infringed the covenant in any respect he would pay to the plaintiff 1,000*l.* as liquidated damages, it was held that, as the damages resulting from the breach of these different stipulations were altogether uncertain, and very difficult to reduce to a pecuniary standard, the parties had a right to measure them for themselves, and settle the amount to be paid for a breach of all or any one of the stipulations (*k*). The same point was decided in the case of a deed of dissolution of co-partnership between the plaintiff and defendant, as attorneys (*l*); and also where, in an agreement for the sale of the lease and goodwill of a tavern, it was stipulated that the defendant should not thenceforth be in any way concerned in carrying on the trade of a licensed victualler within one mile of the tavern, under the penal sum of 500*l.*, to be recovered as liquidated damages. In cases of this sort, the claim for damages depends not only on things which have been done, which are difficult of proof, but on what may be done, which it is impossible to prove, on the value of the customers which the vendor of the

(*i*) *Lowe* v. *Peers*, 4 Burr. 2229.

(*k*) *Atkyns* v. *Kinnier*, 4 Exch. 784; 19 L.J. Ex. 132; *Leighton* v. *Wales*, 3 M. & W. 545; 7 L.J. Ex. 145; *Reynold* v. *Bridge*, 6 E. & B. 528; 26 L.J. Q.B. 12; *Mercer* v. *Irving*, E. B. & E. 563; 27 L.J. Q.B. 291; *Price* v. *Green*, 16 M. & W. 346; 16 L.J. Ex. 108.

(*l*) *Galsworthy* v. *Strutt*, 1 Exch. 663; 17 L.J. Ex. 226.

lease has attached to him, and on the number which his future conduct of the house which he has taken may draw to him (*m*). On a guarantee that a vessel should sail with or before any other vessel then in the berth "under penalty of forfeiting one-half of the freight," another vessel having sailed first, it was held that "one-half of the freight" was recoverable as liquidated damages; and that it was immaterial whether the money intended to be made payable was called by the parties a penalty or liquidated damages (*n*).

Where the obligee of a bond bound himself to complete certain smith's work in a church in a limited time, and in default to forfeit and pay 10*l.* for every week after the expiration of the time limited for the doing thereof, until the work should be completely finished, it was held that the 10*l.* a week was recoverable as liquidated damages (*o*). Whether the sum provided to be paid is to be treated as a penalty, or as liquidated damages, is a question of law to be decided by the judge upon a consideration of the whole instrument (*p*).

Penalties under the denomination of liquidated damages.—If a contract contains stipulations for the performance of divers things, and the damages resulting from the non-performance of some of them are capable of being measured by a precise sum, and one sum is stipulated to be paid in respect of the non-performance of the contract generally, that sum is a penalty, although the parties may choose to call it liquidated damages, and even expressly declare that it is not a penalty. Since 8 & 9 Will. 3, c. 11, parties, in framing agreements, have frequently changed the word "penalty" for "liquidated damages"; and the mere alteration of the term cannot alter the nature of the thing. If the sum, by whatsoever name called, is in point of fact a "penalty," the court will treat it as such; and the stipulation that it shall be recovered as liquidated damages will not prevent the party from insisting on the compulsory provisions of the statute as to assessing the damages. There is one case in which the sum agreed for must always be considered a penalty; and that is where the payment of a smaller sum is secured by a larger.

Where by articles of agreement between the plaintiff and defendant, the former was to pay the latter 1*l.* 11*s.* 6*d.* per week, and her travelling expenses, and the defendant was to perform at his theatres, and conform to the several regulations of the theatres,

(*m*) *Crisdee* v. *Bolton*, 3 C. & P. 243.

(*n*) *Sparrow* v. *Paris*, 7 H. & N. 594; 31 L.J. Ex. 137.

(*o*) *Fletcher* v. *Dyche*, 2 T.R. 36; *Duckworth* v. *Alison*, 1 M. & W. 412; 5 L.J. Ex. 171; *Legge* v. *Harlock*, 12 Q.B. 1015; 18 L.J. Q.B. 45.

(*p*) *Sainter* v. *Ferguson*, 7 C.B. 716; 18 L.J. C.P. 217.

and pay all fines that might become payable, and it was agreed "that either of the parties neglecting to perform that agreement should pay to the other of them the full sum of 200*l.*," it was held that the 200*l.* was a penalty; for, if the 1*l.* 11*s.* 6*d.* was not paid, or the travelling expenses were not paid, or a half-crown fine was not paid, the whole 200*l.* would be recoverable. The effect of the agreement, therefore, was to give the plaintiff his option either to proceed upon the agreement *toties quoties*, or upon the first breach to proceed at once for the 200*l.*, out of which he might be satisfied for the damage actually sustained, and which might stand as a security against future breaches (*q*). Where articles of agreement had been entered into between the plaintiff and the defendant for the sale and purchase of the goodwill of a surgeon's business, and the lease of his house, for 800*l.*, and the stock in trade and fixtures for 170*l.* 4*s.*, and amongst various other stipulations it was provided that the 170*l.* 4*s.* should be paid by certain bills of exchange in manner therein mentioned, "and for the true performance of the agreement the defendant and plaintiff did bind and oblige himself unto the other of them in the penal sum of 500*l.*, to be recoverable for the breach of the said agreement as and by way of liquidated damages," it was held that the sum named was a penalty; for, if any part of the sum secured by the bills, however small, remained unpaid, the whole 500*l.* would be recoverable; and, wherever the payment of a smaller sum is secured by a larger, the latter sum must be considered a penalty (*r*).

By articles of agreement between the plaintiff and the defendant, the latter agreed to act at Covent Garden Theatre for four seasons, and to conform to the usual regulations of the theatre, and the plaintiff agreed to pay him 3*l.* 6*s.* 8*d.* a night; and it was agreed that, if either of them should neglect to fulfil the agreement, or any stipulation therein, such party should pay to the other 1,000*l.*, to which sum it was agreed that the damages sustained by any such neglect or refusal would amount, and which sum was thereby declared to be the liquidated and ascertained amount of the said damages, and not a penalty or penal sum, or in the nature thereof; but it was held that the sum so agreed to be paid was nevertheless a penalty, and that the parties could not change the *thing* by changing the *name* (*s*). By articles of agreement under seal, the defendant covenanted to demise to the

(*q*) *Astley* v. *Weldon*, 2 Bos. & P. 346, 353.

(*r*) *Davies* v. *Penton*, 6 B. & C. 223; 5 L.J. (O.S.) K.B. 112.

(*s*) *Kemble* v. *Farren*, 6 Bing. 141; 7 L.J. (O.S.) C.P. 258; *Betts* v. *Burch*, 4 H. & N. 506; 28 L.J. Ex. 267; *Dimech* v. *Corlett*, 12 Moo. P.C. 220; see *per* Lord Westbury, *Thompson* v. *Hudson*, L.R. 4 H.L. 30; 38 L.J. Ch. 431; *Newman, In re*, 4 Ch.D. 724; 46 L.J. Bankr. 57; see *Wallis* v. *Smith*, 21 Ch.D. 243; 52 L.J. Ch. 145.

plaintiff two messuages, the indenture to contain certain specified covenants and provisos, and all other usual and reasonable covenants; and the plaintiff covenanted to accept the lease upon the terms specified, and to execute a counterpart thereof, and to pay the expenses of the lease and counterpart; "and for the true performance of the agreement each of the parties bound himself unto the other in the penal sum of 500*l.*, to be recovered against the defaulter as liquidated damages"; and it was held that the 500*l.* must be considered as a penalty; for the forfeiture would not only attach on the defendant's refusal to grant the lease, but also on the plaintiff's refusal to pay the expenses of preparing the lease and counterpart (*t*).

Parties to be made plaintiffs in actions for damages for tort founded on contract.—Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for a tort. Both the non-feazance and the mis-feazance constitute a wrongful act, for which the remedy is by action of contract or of tort, at the option of the party injured (*u*). Whenever the goods or materials of an employer are placed in the hands of a workman to be worked upon, any loss or injury from the negligent execution of the work forms a ground of action upon a tort as well as upon a contract. So, if goods are delivered to a carrier to be carried for hire, and the goods are lost or injured through the negligent performance of the work of carrying, an action of contract or of tort is maintainable against the carrier, at the option of the owner of the goods (*x*).

But it is said to be a rule of law that, whenever a wrong is founded upon a breach of contract, the plaintiff who sues in respect thereof must be either a party or privy to the contract, in order to establish a duty on the part of the defendant towards the plaintiff, and show a wrong done to the latter (*y*). So where a person sent his luggage with his servant by a railway, and himself went by a later train, and the railway company received the luggage as the servant's, it was held that the master could not sue for its loss (*z*). But every person who exercises an employment is bound to take especial care to do his work so as not to injure another by the negligent performance of that work, whether what he does is done merely to please himself, or by virtue of a contract made with

(*t*) *Boys* v. *Ancell*, 7 Sc. 364; 8 L.J. C.P. 267.

(*u*) *Boorman* v. *Brown*, 3 Q.B. 511; 11 L.J. Ex. 437; 11 Cl. & Fin. 1.

(*x*) *Coggs* v. *Bernard*, 1 Smith's L. C., 167 (ed. 10).

(*y*) *Tollit* v. *Sherstone*, 5 M. & W. 283; 8 L.J. Ex. 244; *Winterbottom* v. *Wright*, 10 M. & W. 115; 11 L.J. Ex. 415; *Blakemore* v. *Bristol and Exeter Ry.*, 8 E. & B. 1049; 27 L.J. Q.B. 167; but see *Heaven* v. *Pender*, 11 Q.B.D. 503; 52 L.J. Q.B. 702; Addison on Torts, 20, 21 (ed. 7).

(*z*) *Becher* v. *G. E. Ry.*, L.R. 5 Q.B. 241; 39 L.J. Q.B. 122.

another. If materials furnished to a workman to be manufactured or worked upon are injured by the negligent execution of the work, the owner of the materials, or the person who furnished them to the workman, is the person to be made plaintiff in an action for the neglect of duty; but if the person or the property of a stranger is injured by the negligent execution of the work, the injured stranger is the person to be made plaintiff.

Every person who enters upon the performance of the work of carrying merchandise or passengers is bound to exercise due and proper care and skill in the performance of the work, whether the work is done under a contract or gratuitously (*a*), and every person who has been injured by the negligent performance of the work of carrying is entitled to an action against the carrier, although he is no party to the contract under which the work was done (*b*).

There are other cases, also, in which a third person, though not a party to a contract, may sue for the damage sustained if it be broken. As, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskilfully treats him, and thereby injures his health, the apothecary and the surgeon will be liable to the patient, although the father or friend of the patient may have been the contracting party with the apothecary or surgeon: for, though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for a misfeazance (*c*).

SECTION II.

SPECIFIC PERFORMANCE (*d*).

Specific performance of contracts.—There are very many cases in which money compensation for a breach of contract affords a very inadequate remedy; and the Court of Chancery, from a very early period, in the exercise of its equitable jurisdiction, enforced the specific performance of contracts in cases where damages at law

(*a*) See *Austin* v. *G. W. Ry.*, L.R. 2 Q.B. 442; 36 L.J. Q.B. 201.

(*b*) *Collett* v. *L. & N. W. Ry.*, 16 Q.B. 984; 20 L.J. Q.B. 411; *Marshall* v. *York and Newcastle Ry.*, 11 C.B. 655; 21 L.J. C.P. 34; *post*, p. 940.

(*c*) *Longmeid* v. *Holliday*, 6 Exch. 767; 20 L.J. Ex. 430; *Gladwell* v. *Steggall*, 5 Bing. N.C. 733; 8 L.J. C.P. 361.

(*d*) As to the power of the court to grant a mandamus for the performance of contracts in certain cases, see *post*, p. 406.

would not have afforded a complete remedy (*e*). In the case of contracts for the sale of lands, and houses, the court will compel the vendor to convey the estate agreed to be sold to the purchaser, and to enter into all the usual covenants for title, and will compel the purchaser to pay the purchase-money, whether the price has been fixed by the parties themselves, or whether it has to be determined by valuation (*f*), it being considered that compensation in damages is not an adequate remedy, and that the purchaser ought to have the estate which he has agreed to buy, and the vendor to sell (*g*); whilst in the case of contracts for the sale of corn, wine, hops, sugar, and of merchandise in general, and all such things as can be readily purchased in the open market, the court refuses to interfere, because it is obvious that in such cases the money which will buy the article affords the speediest and best compensation that can be given to the purchaser (*h*), unless the chattel is of a peculiar character, having a *pretium affectionis*, such as a statue, a picture, the Pusey horn, or the silver tobacco-box, mentioned subsequently (*i*), when the court will compel the vendor to deliver to the purchaser the very identical article agreed to be sold (*j*), unless it appears that the price given was wholly inadequate, and that the purchaser had taken some unfair advantage of an ignorant vendor (*k*). So, as regards contracts for the sale of stock and shares generally, the court will not decree specific performance in favour of a purchaser who can at once go into the market and buy the shares; but, if the contract was for the sale of certain specific, ascertained or numbered shares, and calls have been made upon those very shares, from payment of which the vendor is entitled to be relieved, or if the remedy by recovery of damages is inadequate (*l*), the court will interfere in favour of the vendor, and compel the purchaser to accept a transfer and complete the bargain (*m*). If the contract is conditional, there can be no decree in favour of a person who has not fulfilled the condition imposed upon him (*n*). The exercise of the jurisdiction of the court is not a matter of right in the party seeking relief, but of discretion in the court, and the conduct of the party applying for relief is always an important element for consideration (*o*). Specific performance will not, in general, be granted unless the

(*e*) 1 Fonbl. Eq., book 1, ch. 1, s. 5; Story, Eq. Jur. s. 717.
(*f*) *Collier* v. *Mason*, 25 Beav. 203.
(*g*) *Flint* v. *Brandon*, 8 Ves. 162; *Wilkinson* v. *Clements*, L.R. 8 Ch. 96; 42 L.J. Ch. 38.
(*h*) *Buxton* v. *Lister*, 3 Atk. 384.
(*i*) *Post*, p. 278.
(*j*) *Post*, p. 278.
(*k*) *Falcke* v. *Gray*, 29 L.J. Ch. 28; 4 Drew. 651.
(*l*) *Oriental Inland Steam Co.* v. *Briggs*, 2 Jo & H. 625; 31 L.J. Ch. 241.
(*m*) *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L.J. Ch. 784.
(*n*) *Weston* v. *Collins*, 34 L.J. Ch. 353; *Finch* v. *Underwood*, 2 Ch D. 310; 45 L.J. Ch. 522.
(*o*) *Lamare* v. *Dixon*, L.R. 6 H.L. 414, 423; 43 L.J. Ch. 203.

court can give full relief to both parties (*p*). But the circumstance that an agreement, of which specific performance is sought, contains stipulations on the part of the plaintiff which could not themselves be specifically enforced, affords no valid objection to making a decree in favour of the plaintiff, if the intention of the parties was that the performance of those stipulations should be secured by covenant only (*q*). Where there is a sale of property in fee simple, but there is no such title, the purchaser may have specific performance for as much as he can get (*r*) with compensation for what he cannot get (*r*). Where the principal agreement cannot be enforced, specific performance of the accessory agreement will not be decreed (*s*), the general rule being that, when the court cannot compel the performance of the agreement in its entirety, it will not compel performance of any particular portion of it (*t*). Possible inconvenience to the public is no ground for refusing specific performance of an agreement (*u*).

Among the various contracts which have been decreed to be specifically performed, are promises by an executor or trustee to leave a legacy to the parties for whom he is trustee, in case they consent to the sale of certain property, where the consent is given, and the trustee dies without making the promised bequest (*x*); contracts for the sale of debts proved under proceedings in bankruptcy (*y*); agreements for the sale of the goodwill of a trade and the exclusive use of a secret therein (*z*) or for the sale of a patent (*a*); contracts to insure against loss by fire (*b*); agreements for the grant of an annuity (*c*), or for the partition or division of joint property, or property held in common (*d*); covenants and agreements in writing by a landlord to grant a lease (*e*), or oral agreements, where the tenant has been let into possession, and has expended money on the faith of the contract (*f*) provided the terms

(*p*) *Blackett* v. *Bates*, L.R. 1 Ch. 117; 35 L.J. Ch. 324; *Ogden* v. *Fossick*, 32 L.J. Ch. 73; 4 De G. F. & J. 426; *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Ry.*, 1 H. & M. 168; 32 L.J. Ch. 677; see *Wylson* v. *Dunn*, 34 Ch.D. 569; 56 L.J. Ch. 855.

(*q*) *Wilson* v. *Hartlepool Harbour Ry.*, 34 L.J. Ch. 241; 2 De G. J. & S. 475.

(*r*) *Barker* v. *Cox*, 4 Ch.D. 464; 46 L.J. Ch. 62.

(*s*) *Scottish N. E. Ry.* v. *Stewart*, 3 Macq. 382.

(*t*) *Merchants' Trading Co.* v. *Banner*, L.R. 12 Eq. 18; 40 L.J. Ch. 515; *Stocker* v. *Wedderburn*, 3 K. & J. 393, 407; 26 L.J. Ch. 713; *Ogden* v. *Fossick*, *supra*.

(*u*) *Raphael* v. *Thames Valley Ry.*, L.R. 2 Ch. 147; 36 L.J. Ch. 209; and see *Lloyd* v. *L. C. & D. Ry.*, 2 De G. J. & S. 568; 34 L.J. Ch. 401.

(*x*) *Ridley* v. *Ridley*, 34 L.J. Ch. 462; 34 Beav. 478.

(*y*) *Adderley* v. *Dixon*, 1 Sim. & St. 610; 2 L.J. (O.S.) Ch. 102.

(*z*) *Bryson* v. *Whitehead*, 1 Sim. & St. 74; 1 L.J. (O.S.) Ch. 42.

(*a*) *Cogent* v. *Gibson*, 33 Beav. 557.

(*b*) Story's Eq. Jur. s. 722.

(*c*) *Wellesley* v. *Wellesley*, 4 Myl. & Cr. 579; 9 L.J. Ch. 21.

(*d*) *Beckley* v. *Newland*, 2 P. Wms. 182.

(*e*) *Martin* v. *Pycroft*, 2 De G. M. & G. 798; 22 L.J. Ch. 94; *Rankin* v. *Lay*, 29 L.J. Ch. 734; 2 De G. F. & J. 65; *Parker* v. *Taswell*, 27 L.J. Ch. 812; 2 De G. & J. 559; *Middleton* v. *Greenwood*, 2 De G. J. & S. 142.

(*f*) *Pain* v. *Coombs*, 3 Sm. & G. 449, 464; *Nunn* v. *Fabian*, L.R. 1 Ch. 35; 35 L.J. Ch. 140.

of the agreement can be distinctly ascertained, and the acts of part performance are referable to that agreement alone (*g*); contracts to renew a lease, where the intended tenant continues solvent (*h*), except where there is a breach of a condition precedent by reason of non-repairs (*i*), and there has been no wilful neglect or refusal, on the part of the tenant, to renew or pay the stipulated or customary fine upon renewal (*k*); contracts for the erection of buildings, where works have been laid out and partially executed, in fulfilment of the contract, which enabled the court to ascertain exactly what was intended to be done (*l*); contracts by a defendant, to make a road, or build a bridge, on the defendant's land for the use of the plaintiff (*m*), or on the plaintiff's land (*n*); and contracts to execute a mortgage with an immediate power of sale (*o*). The court will decree specific performance of an agreement for a lease of an undivided moiety of mineral property (*p*). But the court does not, in general, enforce specific performance of building contracts, or the performance of work, it being considered that a pecuniary compensation, in the shape of damages, is the appropriate remedy (*q*). The court will not grant specific performance of a contract to lend money (*r*). Nor will the courts decree specific performance of a contract for a partnership (*s*) unless there has been a part performance (*t*), or of articles of apprenticeship (*u*) or of an agreement to refer. Nor will the court grant specific performance of an agreement for the building of a house of a certain value, or according to a certain plan to be subsequently approved of, or an agreement to make repairs in a house or to write a book (*x*). Where, however, the agreement is to build a house according to a plan and to take a lease of it, the plaintiff may waive specific performance of that part of the agreement relating to the building of the house, and may have damages for that part and specific performance of the rest of the agreement (*y*). And specific performance of a contract for the purchase of a lease will not be decreed, where, from pend-

(*g*) *Price* v. *Salusbury*, 32 Beav. 446; 32 L.J. Ch. 441.

(*h*) *Neale* v. *Mackenzie*, 1 Keen, 484.

(*i*) *Bastin* v. *Bidwell*, 18 Ch.D. 238.

(*k*) *Chesterman* v. *Mann*, 9 Hare, 206; 22 L.J. Ch. 151.

(*l*) *Price* v. *Penzance Corporation*, 4 Hare, 506; *Oxford* v. *Provand*, L.R. 2 P.C. 135.

(*m*) *Storer* v. *G. W. Ry.*, 2 Y. & C. 53; 12 L.J. Ch. 65; *Wilson* v. *Furness Ry.*, L.R. 9 Eq. 28; 39 L.J. Ch. 19.

(*n*) *Greene* v. *West Cheshire Ry.*, L.R. 13 Eq. 44; 41 L.J. Ch. 17.

(*o*) *Hermann* v. *Hodges*, L.R. 16 Eq. 18; 43 L.J. Ch. 192.

(*p*) *Hexter* v. *Pearce*, (1900) 1 Ch. 341; 69 L.J. Ch. 146.

(*q*) *Moseley* v. *Virgin*, 3 Ves. 184; *Flint* v. *Brandon*, 8 *ib.* 162.

(*r*) *South African Territories* v. *Wallington*, (1897) 1 Q.B. 692; 66 L.J. Q.B. 551.

(*s*) *Scott* v. *Rayment*, L.R. 7 Eq. 112; 38 L.J. Ch. 48.

(*t*) *England* v. *Curling*, 8 Beav. 129.

(*u*) *Webb* v. *England*, 29 Beav. 44; 30 L.J. Ch. 222.

(*x*) *Brace* v. *Wehnert*, 25 Beav. 351; 27 L.J. Ch. 572.

(*y*) *Soames* v. *Edge*, Johns. 669; *London (Mayor, &c.)* v. *Southgate*, 38 L.J. Ch. 141.

ing and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation (*z*). Nor will specific performance of a charter-party be decreed; but the court will restrain the parties from employing the ship in a manner inconsistent with the rights under the charter-party (*a*). It seems doubtful if the court will enforce a contract to sell a medical practice (*b*).

The courts will decree specific performance of all promises of portions, gifts, and settlements made in consideration of marriage; also of covenants by a father, on the marriage of his daughter, to give or bequeath to such daughter an equal share with his other children of any property he may possess at the time of his death (*c*); covenants by a husband to settle after-acquired property upon his wife; deeds or articles of separation (*d*); and covenants made by a husband, on his marriage, to make a provision for his wife, which will be enforced, although the wife at the time she seeks the assistance of the court may be living in notorious adultery (*e*). But a contract which is framed so as to hold out an inducement to married persons to separate is null and void. "All the authorities prove," observes Lord Cottenham, "that, with respect to marriage contracts, there can be no resistance of performance on the part of one, because another contracting party has failed to perform his part of the agreement; and the obvious reason is, that the parties to the contract are not the only persons having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage. Although, therefore, in the case of an ordinary contract, a party who has not performed his part may not be entitled to claim the benefit of it against the other party, it is different in marriage articles, where the two contracting parties reciprocally enter into contracts for the benefit of a third party" (*f*).

Specific performance of oral contracts for the sale or lease of lands will also, in certain cases, be decreed, where there has been a part performance by possession having been taken of the subject-matter of the contract, although the contract is required by the Statute of Frauds to be authenticated by writing (*g*); it being

(*z*) *Pegler* v. *White*, 33 Beav. 403; 33 L.J. Ch. 569.

(*a*) *Post*, p. 280.

(*b*) *May* v. *Thomson*, 20 Ch.D. 705; 51 L.J. Ch. 917.

(*c*) *Fortescue* v. *Hannah*, 9 Ves. 66; *Willis* v. *Black*, 4 Russ. 170; 2 L.J. (O.S.) Ch. 131; *Wellesley* v. *Wellesley*, 4 Myl. & Cr. 579; 9 L.J. Ch. 21; *Graftey* v. *Humpage*, 1 Beav. 46; 8 L.J. Ch. 98; but see *Parkin, In re*, (1892) 3 Ch. 510; 62 L.J. Ch. 55; *Fickus, In re*, (1900) 1 Ch. 331; 60 L.J. Ch. 161.

(*d*) *Wilson* v. *Wilson*, 23 L.J. Ch. 700; 5 H.L. Cas. 540; *Gibbs* v. *Harding*, L.R. 5 Ch. 336; 39 L.J. Ch. 374; *Sanders* v. *Rodway*, 16 Jur. 1005.

(*e*) *Seagrave* v. *Seagrave*, 13 Ves. 444.

(*f*) *Lloyd* v. *Lloyd*, 2 Myl. & Cr. 204; 6 L.J. Ch. 135.

(*g*) *Parker* v. *Taswell*, 2 De Gex & J. 571; 27 L.J. Ch. 812; *Nunn* v. *Fabian*, L.R. 1 Ch. 35; 35 L.J. Ch. 140.

considered fraudulent in either party to withdraw from the contract without the consent of the other, where acts have been done in fulfilment of the contract. Where a father promised the proposed husband of his daughter to give him and his intended wife a house to live in after their marriage, and the marriage was celebrated, and the husband received possession of the house, and treated it as his own, and laid out money upon it in improvements, on the strength of the ante-nuptial promise of the father-in-law, and afterwards the father-in-law died, and the heir claimed the house, the Court of Chancery ordered the ante-nuptial promise to be specifically performed, and compelled the heir to execute a conveyance of the property and carry the intention of the promisor into full effect (*h*).

The courts will not, it seems, decree specific performance of any contract under seal, in the total absence of a consideration. "The court," observes Lord Cottenham, "will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance applies to a covenant or a settlement" (*i*).

Specific performance will not, of course, be decreed when the contract has been made between parties not competent to contract (*k*), or where it is founded upon an illegal or an immoral consideration, or has been procured by misrepresentation, misstatement, or fraud (*l*), or where there has been a clear mistake (*m*), or where it is doubtful whether the defendant meant to contract to the extent to which he is sought to be charged (*n*). Where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him (*o*). But specific performance of an agreement will not be refused merely on the ground that one of the contracting parties has mistaken its legal effect. Thus, where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, it was held that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years determinable at his own option at the end of seven years (*p*). And now under sect. 24, sub-sect. 7, of the Judicature Act, 1873 (*q*), in every case which the Statute of Frauds does not

(*h*) *Surcome* v. *Pinniger*, 22 L.J. Ch. 419; 3 De G. M. & G. 571.

(*i*) *Jefferys* v. *Jefferys*, 1 Cr. & Ph. 141.

(*k*) Story's Eq. Jur. ss. 751, 787; *Vansittart* v. *Vansittart*, 4 K. & J. 62; 27 L.J. Ch. 222.

(*l*) *New Brunswick, &c. Ry.* v. *Muggeridge*, 30 L.J. Ch. 242; 1 Dr. & S. 363.

(*m*) *Wood* v. *Scarth*, 2 K. & J. 33.

(*n*) *Harnett* v. *Gielding*, 2 Sch. & Lef. 554 (Ir.).

(*o*) *Lumley* v. *Ravenscroft*, (1895) 1 Q.B. 683; 64 L.J. Q.B. 441.

(*p*) *Powell* v. *Smith*, L.R. 14 Eq. 85; 41 L.J. Ch. 734.

(*q*) 36 & 37 Vict. c. 66.

bar, the court may rectify a written agreement, upon parol evidence of mistake, and order specific performance of the agreement as rectified (*r*).

If it is provided that, if either party neglects or refuses to fulfil his part of the engagement, he shall pay a sum of money to the other by way of penalty for non-performance, or as liquidated damages, the courts will, nevertheless, decree a specific performance, if that is the appropriate remedy, just as if no such proviso had been inserted; and the defendant cannot, by forfeiting the penalty, get rid of the agreement (*s*). Where persons have entered into an agreement to execute a deed containing certain provisions, the court will order the execution of such deed, without regard to the question whether or not its provisions are such as the court can decree to be specifically performed, the object being to vest in the parties the legal rights which they have mutually agreed to confer on each other (*t*). The Court of Chancery has in many cases decreed the specific performance of agreements which were so far preliminary that they were to be expanded and embodied in larger terms, and were left with a solicitor for that purpose; but, where there are elements of uncertainty about the contract, and it does not appear to have been a complete and concluded bargain, the court will not grant a decree for specific performance (*u*). Where, therefore, on the making of a contract for sale or purchase, it is agreed that the price to be paid shall be fixed by arbitration, and no arbitrators have been appointed, and no price has been fixed, there can be no decree (*v*). But the courts disapprove of vendors endeavouring to retain the power of escaping from their contracts by introducing provisions for valuing some minor part of the subject-matter of the contract, and refusing to appoint a valuer; and in such cases the courts will decree specific performance as to the main subject-matter of the contract (*x*).

The court will not enforce specific performance of an agreement with an auctioneer for the sale by him of books, paintings, and works of art, though a sum of money was paid down by the auctioneer at the time of the execution of the agreement, which money was to be repaid to him out of the proceeds of the sale (*y*); but, if goods are deposited in the hands of an auctioneer or agent, to be sold by him, in order that he may re-pay himself his advances

(*r*) *Otley* v. *Fisher*, 34 Ch.D. 367; 56 L.J. Ch. 208.

(*s*) *Hopson* v. *Trevor*, 1 Str. 533; *French* v. *Macale*, 2 Drur. & War. 269; *Long* v. *Bowring*, 33 Beav. 585.

(*t*) *Slocker* v. *Wedderburn*, 3 K. & J. 403; 26 L.J. Ch. 713.

(*u*) *Tillett* v. *Charing Cross Bridge Co.*, 28 L.J. Ch. 863; 26 Beav. 419; *Ridgway* v. *Wharton*, 6 H.L.C. 288; 27 L.J. Ch. 46; *Taylor* v. *Portington*, 7 De G. M. & G. 328.

(*v*) *Darbey* v. *Whitaker*, 4 Drew. 134, 140; *Milnes* v. *Gery*, 14 Ves. 408.

(*x*) *Richardson* v. *Smith*, L.R. 5 Ch. 648; 39 L.J. Ch. 877.

(*y*) *Chinnock* v. *Sainsbury*, 30 L.J. Ch. 409.

upon them, the authority, being coupled with an interest, cannot be revoked; and the auctioneer or agent may sell for the purpose of re-paying himself his advances, in spite of the prohibition of the principal (*z*); but it is otherwise if the advances have not been made in consideration of the authority to sell (*a*). If the agent has only a lien on goods deposited in his hands, he must resort to the courts for an authority to sell (*b*).

Granting specific performance is a matter entirely in the discretion of the court. It is not, however, an arbitrary discretion, but is regulated by settled rules (*c*). Thus the court will not force a purchaser to take a title where there is a probability that it may be questioned (*cc*).

In certain cases, where a suit has been instituted for a specific performance of a contract, oral evidence has been permitted to be given of a subsequent oral agreement acted upon by the parties inconsistent with the equitable enforcement of the original written contract. Such evidence, it is said, does not in anywise contradict or alter the terms of such original contract, but simply shows, from what has subsequently occurred between the parties, that the plaintiff has no equity for a specific performance (*d*); for, if the defendant can show any circumstance *dehors* the writing, making it inequitable to interpose for the purpose of a specific performance, the court, having satisfactory information upon that subject, will not interpose (*e*). But a mere oral agreement, subsequently entered into and not acted upon in any way, will not be allowed to control, alter, or discharge the original written contract. There must be "such a part performance of the new parol agreement as would enable the court to grant its aid in the case of an original independent agreement; and then, in the view of equity, it is tantamount to a written agreement, and effect will be given to it" (*f*).

Performance sub modo.—In some cases a performance of an agreement will be decreed, not according to the letter of the contract, if that would be unconscientious, but according to the change of circumstances (*g*).

Specific performance of statements and representations forming foundation of contract.—"It is a very old head of equity," observes Lord Eldon, "that, if a representation is made to another person, going to deal in a matter of interest upon the faith of that repre-

(*z*) *Post*, p. 874.
(*a*) *Post*, p. 874.
(*b*) *Post*, p. 874.
(*c*) *Haywood* v. *Cope*, 25 Beav. 151; 27 L.J. Ch. 471.
(*cc*) *Handman, In re*, 71 L.J. Ch. 263.
(*d*) *Legal* v. *Miller*, 2 Ves. sen. 299; *Davis* v. *Symonds*, 1 Cox, 404.
(*e*) *Clowes* v. *Higginson*, 1 Ves. & B. 527.
(*f*) 1 Sugd. V. & P. 165-6 (ed. 14); *Price* v. *Dyer*, 17 Ves. 364.
(*g*) Story's Eq. Jur. s. 775.

sentation, the person making the representation shall be compelled to make it good, if he knows it to be false" (*h*). Thus, the courts will compel parties making representations concerning the fortunes of persons about to be married, knowing them to be false, to make such representations good (*i*). Where, for example, a father represented that his daughter would have a fortune of 10,000*l.* on the death of her parents, and a contract of marriage was entered into on the faith of the representation, the father was compelled to make good the representation he had made (*j*).

Orders for specific delivery of chattels wrongfully detained.—In certain cases, where parties cannot be fully compensated with pecuniary damages for the loss of some peculiar chattel wrongfully detained by another, the courts will give relief by ordering the specific chattel detained to be delivered up to the owner. And, where a chattel of a particular character, not readily to be purchased in the market, or a chattel having certain associations connected therewith, which may give it some peculiar value in the eyes of the owner, has been delivered and accepted upon some express trust, and the depositary retains it in his hand contrary to that trust, he will be compelled to execute the trust reposed in him (*k*). Where the defendant had got into his hand a richly-chased silver tobacco-box belonging to the members of a club, who used the box on festive occasions, and entertained a peculiar regard for it, the Lord Chancellor, at the instance of the club, ordered the box to be delivered up to them, an action for damages being considered a very inadequate remedy (*l*).

Injunction to compel performance, or to restrain breach of contract.—Where there is a contract to abstain from doing a specific thing, and the damage sustained by its violation cannot be precisely or conveniently estimated in money, the courts will, by injunction, restrain a party from doing the thing that he has promised not to do, and thus enforce performance of the contract, or prevent a breach of it (*m*). If a lessee, for example, covenants to use all his hay or manure on the farm, or if he covenants not to let the demised premises for any part of the term, or if a person covenants not to carry on a certain trade within a certain district, the courts will restrain such party from removing the hay or manure, or letting, or assigning, or carrying on the trade (*n*), although there is a proviso for the forfeiture of the lease or the

(*h*) *Evans* v. *Bicknell*, 6 Ves. 183; *Hill* v. *Lane*, L.R. 11 Eq. 215; 40 L.J. Ch. 41.

(*i*) *Hunsden* v. *Cheyney*, 2 Vern. 150; *Beverley* v. *Beverley*, *ib.* 133; *Prole* v. *Soady*, 29 L.J. Ch. 721; 2 Giff. 1.

(*j*) *Bold* v. *Hutchinson*, 24 L.J. Ch. 285; 20 Beav. 250.

(*k*) *Ante*, p. 271.

(*l*) *Fells* v. *Read*, 3 Ves. 71.

(*m*) *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch. 287; 64 L.J. Ch. 216; *Exchange Telegraph Co.* v. *Central News*, (1897) 2 Ch. 48; 66 L.J. Ch. 672.

(*n*) *Greenaway* v. *Adams*, 12 Ves. 400; *Benwell* v. *Inns*, 26 L.J. Ch. 663; 24 Beav. 307.

payment of a penalty or liquidated damages in case of the non-performance of the covenants (*o*).

Where a solicitor sold his business, and covenanted with the purchaser that he would not practise as a solicitor, in any part of Great Britain, for the space of twenty years, without the purchaser's consent, the court granted an injunction to restrain the solicitor from infringing his covenant (*p*). And a penalty imposed upon a solicitor's clerk for breach of an agreement not to practise within a certain distance of his employer's place of business will not prevent the court from granting an injunction (*q*). Where a messuage was granted to the defendant and his heirs, to the intent and purpose that the trade of a baker should not at any time be carried on therein, the court granted an injunction to restrain the defendant, his heirs and assigns, from carrying on such trade (*r*). So, where the lease of a house and the goodwill of the trade of a cheesemonger was sold upon an understanding, by word of mouth, that the vendor would not set up the same trade in the same street, the court, by decree, restrained the vendor from infringing the oral contract (*s*). Where mutual covenants were entered into between a lady and the parson, churchwardens, and overseers of a particular parish, whereby it was covenanted that a new cupola, clock, and bell should be erected by the lady for the benefit of the parish, and that the early morning bell, which was rung at five o'clock, should not be again rung in the lifetime of the lady, and the cupola, clock, and bell were erected, and the bell was silent for two years, when it was again rung, the Court of Chancery decreed an injunction against the ringing of the bell (*t*).

In the case of transfers of shares, where directors have disregarded the forms of their deed of settlement in the mode of transfer they have established, the courts will interfere (*u*), by injunction, to prevent them from annulling their forms and reversing their own regulations to the prejudice of *bonâ fide* purchasers (*x*).

The principle of the jurisdiction is to bind men's consciences to a fair performance of their agreements, not leaving the party with whom the contract has been broken to the chance of what a jury may give in the shape of damages, but enforcing, where it can, the literal performance of the contract. Where there is a

(*o*) *Barrett* v. *Blagrave*, 5 Ves. 555; *Howard* v. *Woodward*, 34 L.J. Ch. 47.

(*p*) *Whittaker* v. *Howe*, 3 Beav. 383; *Giles* v. *Hart*, 5 Jur. N.S. 1381; as to the validity of these contracts, see *ante*, p. 88.

(*q*) *Howard* v. *Woodward*, *supra*.

(*r*) *Hodson* v. *Coppard*, 29 Beav. 4; 30 L.J. Ch. 20; *Johnstone* v. *Hall*, 2 K. & J. 421; 25 L.J. Ch. 462.

(*s*) *Harrison* v. *Gardner*, 2 Mad. 198.

(*t*) *Martin* v. *Nutkin*, 2 P. Wms. 266; *post*, p. 370.

(*u*) *Post*, p. 605.

(*x*) *Bargate* v. *Shortridge*, 5 H.L. Cas. 297; 24 L.J. Ch. 457.

contract containing a positive agreement to do something, accompanied by a negative agreement not to do another thing, and complete justice can be done between the parties, the court will restrain the breach of the negative agreement, although it may be unable to enforce performance of the positive agreement (*y*). Where a young lady agreed to sing at the Queen's Theatre for a certain number of nights, and not to sing anywhere else during the period, but afterwards accepted an engagement, and agreed to sing at a rival theatre, the court, by injunction, restrained her from singing at the rival theatre, although it had no power to compel her to sing at the Queen's Theatre (*z*). And the court has interfered where there was no distinct negative stipulation (*a*). But the court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform (*b*); and where the principal portion of an agreement is incapable of specific enforcement by the court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained which is merely incidental to the general relief sought, although such clause might have been enforced had it stood alone, or had the agreement been in other respects still subsisting and undisputed (*c*). Where a vessel has been engaged under a charter-party for the performance of a particular voyage, the court will, in certain cases, indirectly enforce performance of the contract by restraining the shipowner from employing his vessel in a manner different from that agreed upon (*d*). And, where a landowner has granted an easement, privilege, or incorporeal right, the court will restrain the vendor and all who buy the land burthened with the easement or servitude from preventing the exercise of the privilege. So, where an easement is sold by parol, and has been enjoyed for years, the court will not allow the privilege to be re-called by the vendor or any person claiming under him, unless such person can show that he was a purchaser of the land for value without notice (*e*).

(*y*) *Donnell* v. *Bennett*, 22 Ch.D. 835; 52 L.J. Ch. 414; *Grimston* v. *Cuningham*, (1894) 1 Q.B. 125; *Robinson* v. *Heuer*, (1898) 2 Ch. 451; 67 L.J. Ch. 644.

(*z*) *Lumley* v. *Wagner*, 21 L.J. Ch. 898; 1 De G. M. & G. 604; *Webster* v. *Dillon*, 3 Jur. N.S. 432; *Catt* v. *Tourle*, L.R. 4 Ch. 654; 38 L.J. Ch. 665; as to enforcing contract to take electrical energy, see *Metrop. Elec. Supply Co.* v. *Ginder*, (1901) 2 Ch. 799; 70 L.J. Ch. 862.

(*a*) *Montague* v. *Flockton*, L.R. 16 Eq. 189; 42 L.J. Ch. 677; *Wolverhampton, &c. Ry.* v. *L. & N. W. Ry*, L.R. 16 Eq. 433, 440; 43 L.J. Ch. 131; but see now *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416; 60 L.J. Ch. 428; *Davis* v. *Foreman*, (1894) 3 Ch. 654; 64 L.J. Ch. 187; *Ehrmann* v. *Bartholomew*, (1898) 1 Ch. 671; 67 L.J. Ch. 319.

(*b*) *Fothergill* v. *Rowland*, L.R. 17 Eq. 132; 43 L.J. Ch. 252.

(*c*) *Brett* v. *East India & London Shipping Co.*, 2 H. & M. 404.

(*d*) *De Mattos* v. *Gibson*, 4 De G. & J. 276; 38 L.J. Ch. 502; *Sevin* v. *Deslandes*, 30 L.J. Ch. 457; *Le Blanch* v. *Granger*, 35 Beav. 287.

(*e*) *Hervey* v. *Smith*, 22 Beav. 302; *Fox* v. *Pursell*, 3 Sm. & G. 242; see *Allen* v.

Enforcement of performance of covenants and agreements not to build, plant, or inclose, &c.—A covenant or agreement between a vendor and purchaser on the sale of land, that the purchaser and his assigns shall use, or abstain from using, the land in a particular way, will be enforced, by injunction, against the immediate parties to the contract (*f*), and against all subsequent purchasers who purchase the land with notice of the existence of the covenant (*g*), unless the party entitled to the benefit of the performance of the contract has acquiesced in the non-observance thereof, and slumbered over his rights (*h*). But the court will not enforce a covenant binding only in equity and not running with the land at law, such as a covenant to lay out money in doing certain work upon the land (*i*). The summary remedy by injunction is only granted in those cases where it would be strictly equitable to grant it. "And it often becomes," observes Sir T. Plumer, "a consideration of great importance, with reference to property in the metropolis, how far parties shall be permitted to go back and to revive long antecedent covenants and engagements, and give them an application to the buildings of the metropolis in its present rapidly increasing state." The circumstance that a work undertaken in breach of a valid covenant is one of great public importance is not sufficient to induce the courts to refuse to restrain the breach of covenant (*k*). Covenants restricting the mode of using the land, and perhaps all such as impose such a burden on the land as can be enforced against the land, will be enforced against an assignee who has notice; but a covenant to repair is not one of these (*l*).

If the condition of the property has become entirely changed and altered, and a new set of interests and rights has been created since the covenant was entered into, so that it would be unfair and unjust to enjoin a strict performance of the covenant, the courts

Seckham, 11 Ch.D. 790; 48 L.J. Ch. 611.

(*f*) *Rankin* v. *Huskisson*, 4 Sim. 13.

(*g*) *Tulk* v. *Moxhay*, 18 L.J. Ch. 83; 2 Ph. 774; *Mann* v. *Stephens*, 15 Sim. 377; *Cole* v. *Sims*, 5 De G. M. & G. 1; 23 L.J. Ch. 37; *Patching* v. *Dubbins*, Kay, 1; 23 L.J. Ch. 45; *Clements* v. *Welles*, L.R. 1 Eq. 200; 35 L.J. Ch. 265; *Keates* v. *Lyon*, L.R. 4 Ch. 218; 28 L.J. Ch. 357; *Richards* v. *Revitt*, 7 Ch.D. 224; 47 L.J. Ch. 472; *Luker* v. *Dennis*, 7 Ch.D. 227; 47 L.J. Ch. 174; *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73. As to injunction against occupier, see *Mander* v. *Falcke*, (1891) 2 Ch. 554; 61 L.J. Ch. 3.

(*h*) *Roper* v. *Williams*, 1 Turn. & R. 18; *Child* v. *Douglas*, 2 Jur. N.S. 950; as to circumstances not amounting to acquiescence, see *Mitchell* v. *Steward*, L.R. 1 Eq. 541; 35 L.J. Ch. 393; *Richards* v. *Revitt*, 7 Ch.D. 224; 47 L.J. Ch. 472; *German* v. *Chapman*, 7 Ch.D. 271; 47 L.J. Ch. 250; *Knight* v. *Simmonds*, (1896) 2 Ch. 294; 65 L.J. Ch. 583.

(*i*) *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403; 51 L.J. Q.B. 73; *L. & S. W. Ry.* v. *Gomm*, 20 Ch.D. 562; 51 L.J. Ch. 530; *Austerberry* v. *Oldham Corporation*, 29 Ch.D. 750; 55 L.J. Ch. 633.

(*k*) *Lloyd* v. *L. C. & D. Ry.*, 34 L.J. Ch. 401; 2 De G. J. & S. 568.

(*l*) *Haywood* v. *Brunswick Building Society*, *supra*. See *Hall* v. *Ewen*, 37 Ch.D. 74; 57 L.J. Ch. 95.

will leave the parties to their remedy by recovery of damages, and will decline to interfere by injunction (*m*); and "it must not be supposed," observes Lord Brougham, "that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is inconvenient to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their personal representatives to answer in damages for breach of their obligations; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote" (*n*). All covenants, nevertheless, entered into by vendors or purchasers of lands, providing that the land sold or purchased by them shall be used for the purpose of pleasure and the personal accommodation of the inhabitants of certain houses, and shall not be inclosed or built upon, or injured by the introduction of manufactories, or the carrying on of particular trades and professions, or the conveyance of heavy goods across it, may in general be enforced by injunction against all subsequent purchasers who buy and take possession of the property with notice of the covenant (*o*). Where there was a covenant not to use or occupy houses otherwise than for a private residence and not for any purpose of trade, it was held that using a house for the education and lodging of 100 girls in a charitable institution was a breach (*p*).

If a covenant is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building, it is immaterial whether any damage is consequent on the breach of the covenant; and an assignee of the covenant may obtain an injunction without showing damage (*q*); and the same holds good of an assignee with notice of such a covenant (*r*). For restrictive covenants as between lessor and lessee, see *post*, p. 643.

Where the owner of an estate built several houses upon it, and sold some of them, subject to a covenant on the part of the purchaser, that he would keep the area, in front of the houses, inclosed with open iron pallisades, and would not suffer a single shop window to be put up in them, or carry on any trade, business or

(*m*) *Bedford* (*Duke*) v. *British Museum Trustees*, 2 Myl. & K. 573; 2 L.J. Ch. 129. See *Sayers* v. *Collyer*, 28 Ch.D. 103; 54 L.J. Ch. 1.

(*n*) *Keppell* v. *Bailey*, 2 Myl. & K. 538.

(*o*) *Whatman* v. *Gibson*, 9 Sim. 206; 7 L.J. Ch. 160; *Luker* v. *Dennis*, 7 Ch.D. 227; 47 L.J. Ch. 174.

(*p*) *German* v. *Chapman*, 7 Ch.D. 271; 47 L.J. Ch. 250.

(*q*) *Manners* (*Lord*) v. *Johnson*, 1 Ch.D. 673; 45 L.J. Ch. 404; it was held in this case that a bay window was a "building," and that the making of it was an invasion of privacy, and therefore a "damage."

(*r*) *Richards* v. *Revitt*, 7 Ch.D. 224; 47 L.J. Ch. 472.

calling whatever in them, or upon the adjoining premises, or suffer the same to be used to the annoyance, nuisance, or injury of any of the houses on the estate, it was held that all subsequent assignees and purchasers of the houses who took them with notice of the covenants were bound by them; and an injunction was granted to prevent one of the houses being used as a girls' school: and it was further held that the covenantee had not waived the benefit of the covenant, although he had permitted other houses, held under a like covenant, to be used as schools (*s*); for it does not follow that because a plaintiff has permitted one infringement of a covenant, he is bound to permit another (*t*). But, where a covenant was entered into by purchasers of land for building, that the buildings should all be erected on a general plan, and the covenantee relaxed the covenant, and allowed important deviations from the plan in favour of some of the covenantors, and others, who had not been licensed to deviate, did deviate, and the covenantor did not interfere with promptitude, but allowed the parties to expend a considerable sum of money, and then applied, by injunction, to prevent them from infringing their covenant, the court refused to interfere, saying that it was a proper case for compensation in damages, and not for an injunction (*u*). And the same principle was applied, where the defendant had executed the deed after the breach by the other covenanting parties had been committed, and where the covenant was also a covenant between all the purchasers *inter se* (*x*). An injunction is not in general granted where the plaintiff has acquiesced in the performance of the act he seeks to prohibit. If, with a full knowledge of all the circumstances, he has lain by and made no complaint or objection, when he ought in justice to have warned the wrongdoer, the court will refuse its assistance. But acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended (*y*).

Injunction and specific performance to compel parties to abide by their own statements and representations.—If a man makes a representation on the faith of which another man alters his position, enters into a deed, or incurs an obligation, the man making it is bound to perform that representation no matter what it is, whether it is for present payment or for the continuance of payment of an annuity or to make a provision by a will. That in the eye of

(*s*) *Kemp* v. *Sober*, 1 Sim. N.S. 520; 20 L.J. Ch. 602.

(*t*) *Lloyd* v. *L. C. & D. Ry.*, 34 L.J. Ch. 401; 2 De G. J. & S. 568; *Western* v. *MacDermott*, L.R. 2 Ch. 72; 36 L.J. Ch. 76; *Richards* v. *Revitt*, and *German* v. *Chapman*, *ante*, p. 282.

(*u*) *Roper* v. *Williams*, Turn. & Russ. 22; but see *German* v. *Chapman*, *supra*; as to parties entitled to the benefit of these covenants, see *Schreiber* v. *Creed*, 10 Sim. 9.

(*x*) *Peek* v. *Matthews*, L.R. 3 Eq. 515.

(*y*) *Western* v. *MacDermott*, *supra*.

equity is a contract, an engagement which the man making it is bound to perform (*z*). But in all such cases the man making the representation must be brought face to face with the promisee (*a*). Where the defendant, being possessed of certain leasehold estates, sub-let a part of the demised premises to the plaintiff, on the strength of a representation that he, the defendant, was prevented by the covenants of the lease from building so as to obstruct the sea view, and thereby received an increased price for his land, and stood by whilst the sub-lessee erected houses on the property sub-let, which were valuable by reason of the sea view, and would be almost worthless without it, the court interfered by injunction to prevent the defendant from building so as to obstruct the sea view from the houses so erected (*b*).

Foreign contracts.—A foreign contract, as a general rule, will not be enforced, unless it is valid both by the law of the country in which it was made, and by the law of the country in which it is sought to be enforced (*c*). A debt or liability arising in a foreign country may, of course, be discharged by the laws of that country, and such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim in the courts of this country (*d*).

Injunction where option to take liquidated damages.—It seems that where by the terms of an agreement there is a provision for the payment of liquidated damages for a breach, the parties may have an option whether to sue for liquidated damages or for an injunction, but if a party elects to take liquidated damages, he cannot also get an injunction (*e*).

(*z*) *Dashwood* v. *Jermyn*, 12 Ch.D. 766, 781.

(*a*) *Ib.*

(*b*) *Piggott* v. *Stratton*, 29 L.J. Ch. 1; Johns. 341. See *Spicer* v. *Martin*, 14 App.Cas. 12; 58 L.J. Ch. 309; *Mackenzie* v. *Childers*, 43 Ch.D. 265; 59 L.J. Ch. 188.

(*c*) 2 Spence's Eq. Jur. 13, 14; *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L.J. Ch. 417.

(*d*) *Burrows* v. *Jemino*, 2 Stra. 733; *Potter* v. *Brown*, 5 East, 124; *Odwin* v. *Forbes*, Buck, 57; *Quelin* v. *Moisson*, 1 Knapp, 265; *Gardiner* v. *Houghton*, 2 B. & S. 743; *Phillips* v. *Eyre*, L.R. 6 Q.B. 1; 40 L.J. Q.B. 28.

(*e*) *General Accident Assur. Corporation* v. *Noel*, (1902) 1 K.B. 377; 71 L.J. K.B. 236.

CHAPTER VII.

OF THE PARTIES TO CONTRACTS.

Parties entitled to enforce simple contracts.—The interest in and right of action upon simple contracts is not confined to the parties to the contract (*a*); but the person for whose use, or for whose benefit a simple contract has been entered into, may enforce it, although he is no party to it, and although the contract is not, in express terms, made with him, but with another on his behalf, provided the consideration moves from him. In the ordinary transactions of commerce, a man may sell or purchase in his own name, and yet it does not follow that the contract is exclusively his, but the transaction is open to explanation; and others who do not appear as parties to the contract are frequently disclosed, and step in to demand the benefit of it (*b*).

Except in the case of bills of exchange, promissory notes, and bills of lading, parties cannot annex to their contracts the incident of negotiability, and make them floating contracts payable to bearer. Where, therefore, the owner of a quantity of iron issued a note or undertaking in writing, whereby he promised to deliver on and after a future day 1,000 tons of iron to the party who should lodge the note or undertaking with him, it was held that the instrument was invalid; for the law does not give a floating right of action to any one into whose hands such a writing may come (*c*). But, if a man signs and circulates a promise to pay a certain specified sum of money to any person who shall do a particular act, and the writing is delivered to a party who does the act on the faith of the promise, such party is entitled to the money promised to be paid (*d*).

Strangers to contract.—If the act forming consideration for the promise to A. be performed by some third party, and not by

(*a*) *Carnegie* v. *Waugh*, 2 Dowl. & R. 277; 1 L.J. (O.S.) K.B. 89; *Fitzmaurice* v. *Waugh*, 3 Dowl. & R. 273; *Sutherland* v. *Pratt*, 13 L.J. Ex. 246; 12 M. & W. 16.

(*b*) *Bickerton* v. *Burrell*, 5 M. & S. 386.

(*c*) *Dixon* v. *Bovill*, 3 Macq. H.L. 16; *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1.

(*d*) *M'Kune* v. *Joynson*, 5 C.B. N.S. 218; 28 L.J. C.P. 133; *Williams* v. *Carwardine*, 4 B. & Ad. 621; 2 L.J. K.B. 101. But see *Williams* v. *Lake*, *supra*.

A. himself, nor at his instance or by his procurement, A. is said to be a stranger to the consideration, and cannot enforce the contract (*e*); but if the act has been performed at the instance and procurement of A., the consideration moves from A. so as to enable him to enforce the promise (*f*). Where the defendant promised the father of the plaintiff that, if the plaintiff would marry the defendant's daughter, the defendant would pay to the plaintiff 20*l.*, and the marriage was celebrated, and the plaintiff claimed the 20*l.*, and it was objected that the promise was not made to him but to his father, the court held that the action was properly brought by the plaintiff, who had performed the meritorious act forming the consideration for the promise (*g*). But where, after the marriage, the fathers of the husband and wife agreed together that each should pay a sum of money to the husband, and that the latter should have full power to sue for the money, it was held, nevertheless, that the husband, not being a party to the agreement, could not enforce it (*h*).

If there is a benefit to the defendant, and a loss to the plaintiff, directly resulting from the defendant's promise in favour of the plaintiff, there is a sufficient cause or consideration moving from the plaintiff to enable the latter to maintain an action upon the promise. Where Sir Edward Poole being about to cut down 1,000*l.* worth of timber on his estate, for the purpose of portioning his daughter, the eldest son promised Sir Edward that he would pay his sister 1,000*l.* if he would not fell the timber, and Sir Edward, confiding in his son's promise, allowed the timber to stand, and after his death the land descended to the son, who then refused to fulfil his promise, whereupon the daughter and her husband brought an action against him, it was held that the action was well brought, for the son had the benefit of having the timber, and the daughter had lost her portion by reason of the son's promise (*i*).

An action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master, for a personal injury

(*e*) *Price* v. *Easton*, 4 B. & Ad. 434; 2 L.J. K.B. 51; *Crow* v. *Rogers*, 1 Str. 592; *Bourne* v. *Mason*, 1 Ventr. 6; 2 Keb. 457.

(*f*) *Curtis* v. *Collingwood*, 1 Ventr. 297; *Lampleigh* v. *Brathwait*, 1 Smith's L. C. 136 (ed. 10); Hob. 105; *Townsend* v. *Hunt*, Cro. Car. 480; Denman, C. J., *Eastwood* v. *Kenyon*, 11 Ad. & E. 452; 9 L.J. Q.B. 409; *Martyn* v. *Hind*, Cowp. 437; 1 Doug. 142.

(*g*) *Provender* v. *Wood*, Hetley, 30; *Agacio* v. *Forbes*, 14 Moo. P. C. 171, *post*, p. 302; and see *Garrett* v. *Handley*, 3 B. & C. 462; 3 L.J. (O.S.) K.B. 47; 4 B. & C. 664; 7 Dowl. & R. 144; *Thatcher* v. *England*, 3 C.B. 262; 15 L.J. C.P. 241.

(*h*) *Tweddle* v. *Atkinson*, 1 B. & S. 393; 30 L.J. Q.B. 265.

(*i*) *Dutton* v. *Poole*, 2 Lev. 210; Hardr. 321; 1 Ventr. 318, 334; T. Jones, 102; affirmed in error in the Exchequer Chamber, T. Raym. 392; *Martyn* v. *Hind*, *supra*; *Rookwood's case*, Cro. Eliz. 305; and see Story's Comm. on Eq. Jur. s. 64.

sustained by his servant through their negligence, whereby the master lost the benefit of the services of the servant; the contract from which the duty to carry safely arose being a contract between the company and the servant (*k*). So, also, where a master sent forward his servant by train, with his portmanteau, and it was delivered by the servant and accepted by the company as part of the servant's luggage, nothing being said as to the ownership of the portmanteau, it was held that no action lay against the company by the master for the loss of his portmanteau, on the ground that the contract was between the company and the servant (*l*). And, where a telegraph company negligently mis-sent a message containing an offer for a cargo of ice to the vendor, in consequence of which the vendor incurred expense, it was held that he could not sue the telegraph company, because their contract was with the sender of the message and not with the receiver, although, if the sale had been effected, the vendor would, by the course of the trade, have been bound to re-pay the sender the cost of the message (*m*).

Parties to contracts with bankers, warehousemen, and wharfingers. —If money is sent to a banker for the payment of certain debts, the consideration for a promise by the banker to pay over the money, pursuant to the directions he has received, is said to move from the creditor whose particular debt is to be paid, and who is the object of the remittance; it being considered that the debtor is the agent of the creditor, and that the money is paid indirectly to the banker by the latter (*n*). But in all cases where money is sent to one person to be paid by him to another, to enable the person who is the object of the remittance to maintain an action against the remittee to recover the amount transmitted to him, there must be an express promise or assent on the part of the latter to pay over the money to the former, or to hold it to his use, inasmuch as the mandate is revocable so long as no such assent, promise, or engagement, has been given or entered into (*o*). When, however, the assent has been given, and the attornment made, the order to pay the money, if founded upon a precedent debt or other

(*k*) *Alton* v. *Midland Ry.*, 19 C.B. N.S. 213; 34 L.J. C.P. 292. See further, *Meux* v. *G. E. Ry.*, (1895) 2 Q.B. 387; 64 L.J. Q.B. 657.

(*l*) *Becher* v. *G. E. Ry.*, L.R. 5 Q.B. 241; 39 L.J. Q.B. 122. But it is difficult to understand why the plaintiff was not entitled to recover the value of the portmanteau on the ground that it was his property.

(*m*) *Playford* v. *United Kingdom Telegraph Co.*, L.R. 4 Q.B. 706; 38 L.J. Q.B. 249.

(*n*) *Lilly* v. *Hays*, 5 Ad. & E. 548; 6 L.J. K.B. 5; *Moore* v. *Bushell*, 27 L.J. Ex. 3; *Noble* v. *Nat. Discount Co.*, 5 H. & N. 228; 29 L.J. Ex. 210.

(*o*) *Williams* v. *Everett*, 14 East, 597; *Fisher* v. *Miller*, 7 Moore, 537; *Baron* v. *Husband*, 4 B. & Ad. 611; *Howell* v. *Batt*, 5 B. & Ad. 504; 3 L.J. K.B. 49; *Wedlake* v. *Hurley*, 1 C. & J. 83; *Grant* v. *Austen*, 3 Price, 58; *Brind* v. *Hampshire*, 1 M. & W. 373; 5 L.J. Ex. 197; *Hill* v. *Royds*, L.R. 8 Eq. 292; 38 L.J. Ch. 538.

good consideration, becomes irrevocable (*p*); the creditor looks no longer to the security of his original debtor, but relies on the assent of the remittee, which cannot be retracted (*q*). But, if the amount transmitted be a mere voluntary gift or donation, founded upon no precedent consideration, debt, or duty, the authority may be revoked at any time before the money is actually paid over by the remittee (*r*), just as money, when paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, may be recovered back by the party who has inadvertently transmitted it (*s*). Warehousemen, wharfingers, and bailees of goods, stand in the same situation as bankers and depositaries of money; and when they have accepted a delivery order presented to them by a purchaser, they become the bailees of the party mentioned in such order, and are liable to him upon their promise to hold the goods on his account and at his disposal (*t*).

Parties entitled to enforce contracts under seal.—As a contract under seal requires no consideration to support it, the common law regarded only the instrument itself; and whenever a deed was expressed to be made between certain persons named in the premises of the instrument, or described therein as the contracting parties, those persons only, and their privies claiming through them by blood, representation, or otherwise, could take advantage of it by way of action (*u*). It mattered not that the deed was made for the exclusive benefit or use of other individuals named therein, and contained covenants with them for the performance of certain duties: if they had not been made parties to the contract they could not sue thereon, although they might have sealed and delivered the deed in common with those who were formally described as the parties to the instrument (*x*). And although sect. 5 of 8 & 9 Vict. c. 106, enacted that an immediate estate or interest, and the benefit of a condition or covenant respecting any tenements or hereditaments, might be taken, although the taker

(*p*) *Winter* v. *Foweracres*, 2 Roll. Rep. 39, 40; *Robertson* v. *Fauntleroy*, 8 Moore, 10; 1 L.J. (O.S.) C.P. 55; *Atkin* v. *Barwick*, 1 Str. 165; *Hodgson* v. *Anderson*, 3 B. & C. 842; 5 D. & R. 744; *Walker* v. *Rostron*, 9 M. & W. 411; 11 L.J. Ex. 173; *Griffin* v. *Weatherby*, L.R. 3 Q.B. 753; 37 L.J. Q.B. 280.

(*q*) Best, C.J., *Gibson* v. *Minet*, 9 Moore, 36; 2 L.J. (O.S.) C.P. 99.

(*r*) *Lyte* v. *Peny*, Dyer, 49 a, b, p. 7; *Taylor* v. *Lendey*, 9 East, 54.

(*s*) *Buller* v. *Harrison*, Cowp. 565. Subject to these qualifications, some of the old cases in Rolle's Abridgment, where it has been held that, if 20*l.* be delivered to B. to pay over to C., C. can maintain an action against B. to recover this money, or that, when goods are given by A. to B., under an agreement that B. shall pay 20*l.* to C., that becomes a debt due to C., may still be considered good law: *Starkey* v. *Mylne*, 1 R. Abr. p. 32, pl. 13; *Disborne* v. *Denabie*, *ib.*, pp. 30, 31, Z. pl. 5.

(*t*) *Bryans* v. *Nix*, 4 M. & W. 791; 8 L.J. Ex. 137.

(*u*) *Chesterfield Colliery Co.* v. *Hawkins*, 3 H. & C. 677; 34 L.J. Ex. 121.

(*x*) *Gilby* v. *Copley*, 3 Lev. 138; *Berkeley* v. *Hardy*, 5 B. & C. 355; 4 L.J. (O.S.) K.B. 184; *Southampton* (*Lord*) v. *Brown*, 6 B. & C. 718; 5 L.J. (O.S.) K.B. 253; *Metcalfe* v. *Rycroft*, 6 M. & S. 75.

thereof was not named a party to the same indenture, this enactment was held only to apply to covenants respecting any tenements or hereditaments; and, therefore, where a composition deed was expressed to be made between "the several persons whose names and seals are subscribed and affixed in the schedule hereunder written, being creditors executing these presents as parties of the first part" and other parties, it was held that creditors who did not execute the deed were not parties to it, and could not take advantage of the covenants contained therein, although they were expressed to be made with the parties of the first part and all other creditors (*y*). But where a similar deed was expressed to be made with all the creditors, it was held that all were parties, and could sue on the covenants, which were expressed to be made with each creditor severally (*z*). When a deed was not made reciprocal between parties of the one part and parties of the other part, but was expressed to be made generally "to all" in the nature of a deed poll, then, if any one or more persons contracted or covenanted therein with a stranger, the latter might bring an action upon the deed against the parties so covenanting and contracting, provided they had duly sealed and executed the instrument, as in the case of an ordinary bond or obligation, where "fifty persons may be bound to one who is no party to the instrument, and all are liable to an action at his suit" (*a*).

When there was no formal commencement to a deed describing who were the parties to it, and whose deed it was, it was held to be the deed of those who were named in the instrument as the contracting parties, and who put their seals to it (*b*). But they must have been named or designated in the body of the deed; for no person could maintain an action upon a contract under seal unless he was named therein, either by his own name or by some acquired or adopted name, or was otherwise described therein (*c*); and the contract or covenant must in express terms have been made with him (*d*).

Trustee and cestui que trust.—It was a fixed rule of law that the action upon a contract under seal, whether such contract was a deed *inter partes* or a deed poll, must be brought by the party with whom the contract was in terms made, and not by the person on whose behalf, or for whose benefit it had been made (*e*). In those

(*y*) *Chesterfield Colliery Co.* v. *Hawkins*, *supra*; *Gurrin* v. *Kopera*, 3 H. & C. 694; 34 L.J. Ex. 128.

(*z*) *Gresty* v. *Gibson*, L.R. 1 Ex. 112; 35 L.J. Ex. 74; *Reeves* v. *Watts*, L.R. 1 Q.B. 412; 35 L.J. Q.B. 171; *McLaren* v. *Baxter*, L.R. 2 C.P. 559; 36 L.J. C.P. 247.

(*a*) *Cooker* v. *Child*, 2 Lev. 74.

(*b*) *Nurse* v. *Framton*, 1 Ld. Raym. 28.

(*c*) *Maughan* v. *Sharpe*, 17 C.B. N.S. 443; 34 L.J. C.P. 19.

(*d*) *Sunderland Marine Ins. Co.* v. *Kearney*, 16 Q.B. 935; 20 L.J. Q.B. 421.

(*e*) *Offly* v. *Warde*, 1 Lev. 235; *Barford* v. *Stuckey*, 5 Moore, 23; 2 B. & B. 333.

cases the party to whose use or for whose benefit the contract had been entered into had a remedy in equity against the person with whom it was expressed to be made. The Court of Chancery deemed the latter a trustee for the former, and would compel him to execute his trust according to the apparent intention of the contracting parties. Hence the one was technically said to have the legal and the other the equitable interest in the contract. When, however, no express promise or engagement was entered into with some person or persons in particular, the case was different. If, for example, a man by writing, sealed and delivered, acknowledged generally that he had received a particular sum of money to the use of A., this made him a debtor to A. to the amount specified (*f*). A bill or receipt under seal was couched in the following terms: "Received of A. 40*l.*, to the use of B. & C., equally to be divided between them, to be repaid at such time as shall be most to the profit of B. & C.;" and it was held that this was an engagement with B. & C. to pay the money to them whenever they required it, and that B. & C. might consequently maintain an action for the recovery of the 40*l.* (*g*).

These distinctions have, however, become of less consequence since the passing of the Supreme Court of Judicature Act, 1873, by the operation of which the beneficial interests arising under deeds will be recognised in every court as amply as they were formerly in the Courts of Equity. The rule appears now to be that a third person who is not named as a party to a contract cannot sue either of the contracting parties unless he possesses an actual beneficial right which puts him in the position of a *cestui que trust* under the contract (*h*).

Covenantees omitting to execute deed.—It is not in general necessary that those who have been made parties to a deed *inter partes* should execute the deed to be enabled to sue thereon (*i*). Neither need a grantee under a deed execute, provided he has been made a party to the deed; for the law presumes his assent to the grant in the absence of an express disclaimer (*k*). Where real property, therefore, is conveyed to trustees, parties to a deed, it is not necessary for them to execute, as the legal estate forthwith vests in them unless they disclaim the grant; and, if one of the trustees

(*f*) *Core* v. *Woddye*, Dyer, 23, a.

(*g*) *Shaw* v. *Sherewood*, Cro. Eliz. 729; *Sunderland Marine Ins. Co.* v. *Kearney*, *supra*.

(*h*) *Gandy* v. *Gandy*, 30 Ch.D. 57; 54 L.J. Ch. 1154, explaining *Touche* v. *Metropolitan Ry. Warehousing Co.*, L.R. 6 Ch. 671; *Empress Engineering Co.*, *In re*, 16 Ch.D. 125.

(*i*) *Rose* v. *Poulton*, 2 B. & Ad. 830; 1 L.J. K.B. 5.

(*k*) *Townson* v. *Tickell*, 3 B. & Ald. 31; *Standing* v. *Bowring*, 31 Ch.D. 282; 55 L.J. Ch. 218. The disclaimer of a grant of realty should be made by deed. Fitz. Ab. Joint-Tenancy, pl. 9.

renounces, the whole property vests in those who accept the trust (*l*). When, however, the execution of the deed by one of the parties is necessary to create some estate or interest, the creation of which forms the consideration for the covenants contained in the deed, the party neglecting to execute cannot then maintain an action upon the covenants (*m*). Where tenant for life and remainderman are parties to an indenture, whereby they (so far as they legally can and may, according only to their respective estates and interest) demise their estate for a term of years, and the lessee enters into possession, the tenant for life may sue him for breach of covenant, although the indenture has not been executed by the remainderman (*n*).

Parties liable upon simple contracts.—A person who signs a promissory note or an undertaking on behalf of another (*o*), or who is made a party to an agreement *inter partes*, and signs it in his own name on behalf of another, will himself be personally responsible for the fulfilment of the contract, unless it clearly appears that he executed it as agent only, and that it was not intended that he should be personally liable upon it (*p*). Where the plaintiff agreed with two persons "to pave their streets in Putney," and they, "on behalf of the parish, agreed to pay him" therefor, it was held that, as the parish could not be sued upon such an undertaking, the work must have been taken to have been done upon the personal security and credit of the promisors, and that they were therefore personally liable upon their agreement (*q*). An undertaking by one man on behalf of another may either be the undertaking of an agent, or of a principal and sole contracting party, who comes forward to secure, on his own credit and responsibility, some benefit and advantage for a friend (*r*); or it may be the undertaking and guarantee of a surety, who binds himself for the performance of some act or duty by a third party who is to be primarily liable upon the contract.

One person may, as we have already seen, have the benefit of the performance of the consideration for a simple contract or promise, and another may be liable upon it as the really contracting party: "If A. contracts with B. to make a coat for C., A. must

(*l*) *Small* v. *Marwood*, 9 B. & C. 300; 7 L.J. (O.S.) K.B. 197.

(*m*) *Antram* v. *Chace*, 15 East, 212; *Morgan* v. *Pike*, 14 C.B. 473; 23 L.J. C.P. 64.

(*n*) *How* v. *Greek*, 3 H. & C. 391; 34 L.J. Ex. 4.

(*o*) *Iveson* v. *Conington*, 2 D. & R. 309; 1 B. & C. 160; *Gee, In re*, 10 Jur. 694; *Burrell* v. *Jones*, 3 B. & Ald. 47.

(*p*) *Cooke* v. *Wilson*, 1 C.B. N.S. 164; 26 L.J. C.P. 15; *Lennard* v. *Robinson*, 5 E. & B. 942; 27 L.J. Q.B. 49; *Deslandes* v. *Gregory*, 30 L.J. Q.B. 36; 2 E. & E. 610.

(*q*) *Meriel* v. *Wymondsold*, Hardr. 205; *Watson* v. *Murrell*, 1 C. & P. 307.

(*r*) *Redhead* v. *Cator*, 1 Stark. 14; *Hall* v. *Ashurst*, 1 Cr. & M. 714; 2 L.J. Ex. 295; *Downman* v. *Jones*, 14 L.J. Q.B. 228; *Harper* v. *Williams*, 4 Q.B. 235; 12 L.J. Q.B. 227; *Johnson* v. *Ogilby*, 3 P. Wms. 277.

pay for it, though C. wears it." But, if the plaintiff has made the party to whom the goods have been furnished his debtor, if, for instance, he describes him as such in his books or in letters, he can only treat the other as a surety (*s*). Where the defendant gave a written undertaking to pay the directors of the Manchester Gas Works for "all the gas which may be consumed in the theatre during the time that it is occupied by my brother-in-law, Mr. Neville," it was held that he might be made liable as the primary and sole debtor in an action for goods sold and delivered (*t*).

Where the managers of a particular undertaking, having a public, or corporate, or partnership fund at their disposal, or power to impose assessments or make calls, and create a fund to defray expenses, employ workmen and servants, they will be personally responsible if credit has been given to them and not to the fund at their disposal, for the payment of the parties they employ. But "whether any contract is made, or on what terms it is made, must depend upon the circumstances of each case. If a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand or not, there is no contract" (*u*). If he is to be paid, provided the requisite funds are obtained and not otherwise, there is a conditional contract, which becomes absolute as soon as funds have been received (*x*).

Parties liable upon deeds.—A person not made a party to a deed may render himself liable to be sued thereon by sealing and delivering the deed (*y*). A man may also be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assents to it, and takes a benefit under it, and treats the contract as his deed (*z*). A party who sends forth a deed to the world as his deed, cannot be heard to say, against those who have dealt with him on the strength of it, that it is not his deed, that it was never executed by him, or that it was executed without his sanction or authority (*a*). If, too, he sends forth a deed, and induces others to act upon it, he is estopped from afterwards setting up the invalidity of the instrument (*b*). Where property is assigned by deed to a trustee, who covenants with the

(*s*) *Austen* v. *Baker*, 12 Mod. 250; *Anderson* v. *Hayman*, 1 H. Bl. 121; *Langdale* v. *Parry*, 2 Dowl. & R. 337; 2 L.J. (O.S.) K.B. 70.

(*t*) *Wood* v. *Benson*, 2 Cr. & J. 94; 1 L.J. Ex. 18; *Edge* v. *Frost*, 4 Dowl. & R. 245.

(*u*) *Landman* v. *Entwistle*, 7 Exch. 632; 21 L.J. Ex. 208; *Giles* v. *Smith*, 11 Jur. 334; *Alexander* v. *Worman*, 6 H. & N. 100; 30 L.J. Ex. 198; *Andrews* v. *Dally*, 4 Bing. 566; 6 L.J. (O.S.) C.P. 117.

(*x*) *Higgins* v. *Hopkins*, 3 Exch. 163; 18 L.J. Ex. 113.

(*y*) Holt, C.J., *Salter* v. *Kidgley*, Holt, 210; Carth. 76.

(*z*) *Webb* v. *Spicer*, 13 Q.B. 893; 18 L.J. Q.B. 142.

(*a*) *Straffon, Ex parte*, 22 L.J. Ch. 194; 1 De G. M. & G. 576.

(*b*) *Sheffield & Manchester Ry.* v. *Woodcock*, 2 Rail. Cas. 522.

assignor, the assignor has no equity to proceed against the *cestui que trust* (*c*).

Covenants in feigned names—Estoppel.—Generally speaking, the name of the covenantor or obligor appears in the body of the deed; but there is a sufficient designation of the party to be charged if the name is written at the foot of the instrument (*d*). A man may bind himself by deed either in his own name, or by some acquired or adopted name, title, or description (*e*).

Covenants and obligations by one person on behalf of another.—If an individual in a private capacity, not acting on behalf of the government, covenants in his own name for the act of another, he is personally bound by his covenant, although he describes himself in the deed as covenanting "for and on the part and behalf" of such other person; but when upon the face of the contract it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfilment of the contract, unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done (*f*).

Joint and several agreements and promises.—If there be a joint retainer and employment of another by divers persons to do one thing for the benefit of all, they have a joint legal interest in the fulfilment of the contract by the party employed, although they may have several beneficial interests, and be possessed of separate shares, in the subject-matter of the contract; but, if there be a separate retainer by each, in respect of the separate share of each, then they have separate interests in the fulfilment of the contract (*g*). If, in consideration of certain services to be rendered by the promisees, a promise is made to pay them a sum of money, this is a joint promise in favour of all, in which all are jointly interested; and the pointing out the particular share that each is to receive of the sum so promised to be paid will not create a severance of interest. But if one sum *in solido* is not to be paid in the first instance, and afterwards divided, but separate and independent payments are to be made to each, then their interests are separate (*h*).

(*c*) *Pickering's Claim*, L.R. 6 Ch. 525.

(*d*) *Nurse* v. *Framton*, 1 Ld. Raym. 28; 1 Salk. 214; 4 Ed. 2, cited Cro. Eliz. 57.

(*e*) *Elliot* v. *Davis*, 2 Bos. & P. 339.

(*f*) *Wake* v. *Harrop*, 30 L.J. Ex. 273; 6 H. & N. 768; 31 L.J. Ex. 451; 1 H. & C. 202; *Unwin* v. *Wolseley*, 1 T.R. 674; *Allen* v. *Waldegrave*, 2 Moore, 628; see *post*, p. 332.

(*g*) *Hatsall* v. *Griffith*, 2 Cr. & M. 679; 3 L.J. Ex. 191; *Hill* v. *Tucker*, 1 Taunt. 7; *Ivans* v. *Draper*, 1 Roll. Abr. 31, pl. 9; *Kilham* v. *Collier*, 21 L.J. Q.B. 65; *Lucas* v. *Beale*, 20 L.J. C.P. 134; 10 C.B. 739.

(*h*) *Thomas* v. ——, Styles, 461.

Joint and separate interests in deeds.—If parties take a joint estate under a deed, and a covenant affecting the enjoyment of that estate is entered into with them and "each of them," the covenant is a joint covenant. If, on the other hand, the covenantees have separate estates and interests, then a separate duty arises to each one in respect of their several estates (*i*). If a covenant to do a particular act be entered into with several persons generally, as "with A., B., and C.," they have all *primâ facie* a joint interest in the performance of it (*k*). If a covenant is entered into with divers persons to keep a certain sea-wall in repair, this is, *primâ facie*, a joint covenant; but, if it appears on the face of the deed that the covenantees are so many separate landowners, possessed of separate estates, the covenant shall be construed to be a several covenant, by reason of their several interests.

If any one of several partners or joint adventurers enters into a contract or stipulation with the rest, such as an engagement not to trade on his own account, or not to sell merchandise without the assent of the others, &c., this is a joint contract; for they have a joint interest in the performance of it, and the breach operates as a joint damage to all. A covenant with several persons for the payment to them of a sum of money is a joint covenant with all, in the performance of which they have a joint interest; and the pointing out of the share which each is to take of the entire amount will not create a separation of interests (*l*); but, if a covenant be made with ten persons to pay a distinct sum of money to each of them, a separate duty arises to each; and it is the same in contemplation of law as if a separate and distinct contract had been entered into with each one of the parties separately (*m*).

Rights of tenants in common.—If two tenants in common make a lease reserving one entire rent to themselves, they have a joint interest in the rent, although it is reserved to them "according to their several and respective rights and interests;" but, if there are several demises, and a separate reservation of rent to each tenant

(*i*) *Slingsby's case*, 5 Co. 18 b; *Windham's case*, *ib.* 7 b; *James* v. *Emery*, 8 Taunt. 245; 2 Moore, 195; *Foley* v. *Addenbrooke*, 4 Q.B. 207; 12 L.J. Q.B. 163; *Hopkinson* v. *Lee*, 6 Q.B. 964; 14 L.J. Q.B. 101; *Wakefield* v. *Brown*, 9 Q.B. 209; 15 L.J. Q.B. 373; *Pugh* v. *Stringfield*, 27 L.J. C.P. 34; 3 C.B. N.S. 2; *Haddon* v. *Ayers*, 28 L.J. Q.B. 105; 1 E. & E. 118.

(*k*) *Sorsbie* v. *Park*, 12 M. & W. 156; 13 L.J. Ex. 9; *Bradburne* v. *Botfield*, 14 M. & W. 573; 14 L.J. Ex. 830; *Keightley* v. *Watson*, 3 Exch. 725; 18 L.J. Ex. 339; *Wetherell* v. *Langston*, 17 L.J. Ex. 341; 1 Exch. 634; *Servante* v. *James*, 10 B. & C. 410; 8 L.J. (O.S.) K.B. 64.

(*l*) *Lane* v. *Drinkwater*, 1 C. M. & R. 599; 4 L.J. Ex. 32; *Byrne* v. *Fitzhugh*, 1 C. M. & R. 613, *n.* (a); *English* v. *Blundell*, 8 C. & P. 332.

(*m*) *Withers* v. *Bircham*, 3 B. & C. 254; 3 L.J. (O.S.) K.B. 30; *Shaw* v. *Sherwood*, Cro. Eliz. 729.

in common, they have separate interests (*n*). When an estate in land, with covenants annexed, comes to two persons as tenants in common, their interests are in certain cases joint or several at their election (*o*). If, after a joint demise by tenants in common with a general reservation of one entire rent, one tenant in common dies, the rent is severable, and follows the separate reversions, so that the heir-at-law of the deceased tenant in common is entitled to one moiety of the rent, and may maintain an action against the surviving tenant in common, for receiving more than his share (*p*). A covenant to repair in a joint demise by tenants in common runs with the entire reversion; and all the tenants in common of the reversion at the time of the breach, or their representatives, are jointly interested in it (*q*). Where premises were demised to G. & A., their executors, administrators, and assigns, as tenants in common, and not as joint tenants, at a single yearly rent, and G. & A. covenanted "for themselves, their executors, administrators, and assigns, that they, the said G. & A., or some or one of them, their executors, administrators, or assigns, would pay the rent," it was held that the covenant was in form joint and not several, and that G.'s executors were not liable (*r*). One tenant in common of a reversion is entitled to maintain an action for injury to the reversion without joining his co-tenants as plaintiffs (*s*).

Rights of joint tenants.—If two joint tenants make a lease of their land, reserving rent to one of them, it shall enure to both in respect of the joint reversion (*t*); and the same rule holds good with respect to parceners who have a unity of interest, title, and possession, and together constitute but one heir (*u*).

Joint and separate interests in the case of implied contracts and promises.—In implied contracts and promises, if the consideration moves from several persons jointly, the law raises a corresponding implied promise in favour of all, in which all are jointly interested; but if there be several separate considerations moving from the parties separately and individually, the law implies a separate promise in favour of each, and their interests are separate (*x*). If several persons agree to make a joint purchase, and employ an agent to buy merchandise on their joint account, and the agent goes into the market and makes the purchase in his own name, and the

(*n*) *Powis* v. *Smith*, 5 B. & Ald. 850; *Last* v. *Dinn*, 28 L.J. Ex. 94; *Wilkinson* v. *Hall*, 1 Sc. 675; 4 L.J. C.P. 204.

(*o*) *Midgeley* v. *Lovelace*, Carth. 289; *Kitchen* v. *Buckly*, 1 Lev. 109; *Womersley* v. *Dally*, 26 L.J. Ex. 219.

(*p*) *Beer* v. *Beer*, 12 C.B. 60; 21 L.J. C.P. 124.

(*q*) *Thompson* v. *Hakewill*, 19 C.B. N.S. 713; 35 L.J. C.P. 18.

(*r*) *White* v. *Tindall*, 13 App.Cas. 263; 57 L.J. P.C. 114.

(*s*) *Roberts* v. *Holland*, (1893) 1 Q.B. 665; 62 L.J. Q.B. 621.

(*t*) Co. Litt. 214 a, 180 b.

(*u*) *Decharms* v. *Horwood*, 4 M. & Sc. 400; 3 L.J. C.P. 198.

(*x*) *Coleman* v. *Sherwin*, 1 Salk. 137; *Story* v. *Richardson*, 6 Bing. N.C. 129; 9 L.J. C.P. 43; *Smith* v. *Hunt*, 2 Chit. 142

vendor neglects to fulfil the contract, the employers of the agent are jointly interested in the contract made by their agent (*y*); and if goods and chattels are deposited by several joint owners in the hands of a bailee, they are not claimable by one of them alone; and money paid into a bank to the joint account of several persons cannot be drawn out by one of them alone; but if several joint owners of a sum of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker may treat that as a contract with the one individual dealing with him, and refuse to be accountable to the joint owners of the money.

If a sum of money *in solido* is advanced by several persons, the law raises an implied joint promise of repayment in favour of all; but if several sums be advanced separately by each, the law implies a corresponding separate promise in favour of each (*z*). But, although several persons may contribute severally in equal shares towards one entire amount, yet, if their several contributions are put together and advanced as one sum *in solido*, the implied promise of repayment is a joint promise to all in respect of the entire sum so advanced, and not a several promise to each in respect of their several contributions thereto (*a*). If several persons contribute their several proportions of a sum of money which is to be paid under a special contract to which they are parties, and the money is advanced as a sum *in solido*, and the contract is afterwards abandoned or rescinded, the implied promise to refund the money arises in favour of all (*b*). In a statutory mortgage under the Conveyancing Act, 1881, the implied covenants are joint and several unless the amount is expressed to be secured in distinct shares or sums (*c*). And where in a mortgage or obligation the sum is expressed to be advanced by two or more persons out of money belonging to them on a joint account, the mortgage money due to them is deemed to belong to them on a joint account as between them and the mortgagor or obligor, and the receipt in writing of the survivor or his personal representative is a good discharge (*d*), unless otherwise provided.

Joint and several liabilities ex contractu.—"Each party to a joint contract," observes Parke, B., "is severally liable in one sense; *i.e.*, if sued severally, and he does not plead in abatement,

(*y*) *Cothay* v. *Fennell*, 10 B. & C. 672; 8 L.J. (O.S.) K.B. 302.

(*z*) *Osborne* v. *Harper*, 5 East, 225; *Driver* v. *Burton*, 17 Q.B. 989; 21 L.J. Q.B. 157; *Winterstoke, &c.*, Dyer, 370 a, pl. 59; *Brand* v. *Boulcot*, 3 Bos. & P. 235. By Ord. XVI. r. 1, all persons may be joined as plaintiffs in whom any right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. See also Ord. XVIII. r. 6.

(*a*) *May* v. *May*, 1 C. & P. 44.

(*b*) *English* v. *Blundell*, 8 C. & P. 332.

(*c*) 44 & 45 Vict. c. 41, s. 28.

(*d*) Sect. 61.

he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors" (*e*). It may be laid down as a general rule that, wherever several persons agree to perform a particular act, they are bound jointly and not severally in the absence of express words creating a several liability. If two or more persons covenant generally for themselves, without any words of severance, or that they, or one of them, shall do a particular act, a joint charge is created (*f*). If three are bound in a bond by these words: "We bind ourselves, and each of us jointly," it is a joint obligation; for the word "jointly" makes the obligation joint, which the word "each" cannot make several. Any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the performance of the thing contracted to be done (*g*). If several persons sign a promissory note commencing, "We promise to pay," &c., each is liable for the other, and all are liable for the full amount of the note (*h*). There is no absolute rule of equity that a contract which is in terms joint, and would be so construed at law, is in equity joint and several (*i*). Under the Conveyancing Act, 1881, a covenant, contract, bond, or obligation, under seal, made with two or more jointly to pay money or to make a conveyance, or to do any other act to them or for their benefit, implies an obligation to do the act to or for the benefit of the survivor or any other person to whom the right to sue devolves (*k*).

If two or more persons who have joined together in a contract "covenant severally," or become "severally bound," it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate bond on the same parchment (*l*). When the parties engage for the performance of distinct and several duties, mere words of plurality, such as "we bind ourselves," will not make the contract joint (*m*). Where two persons guaranteed the due payment of an acceptance for 400*l.* "in the proportion of 200*l.* each," it was held that a several liability only was clearly expressed (*n*).

(*e*) *King* v. *Hoare*, 13 M. & W. 505; 14 L.J. Ex. 29; *Addison* v. *Gibson*, 10 Q.B. 106; 16 L.J. Q.B. 165; *Cross* v. *Williams*, 7 H. & N. 675; 31 L.J. Ex. 145.

(*f*) Bacon's Abr. tit. "Obligations."

(*g*) 1 Saund. 291 b, n. 4.

(*h*) *Manley* v. *Boycott*, 2 E. & B. 46; 21 L.J. Q.B. 265.

(*i*) *Kendall* v. *Hamilton*, 4 App.Cas. 504; 48 L.J. C.P. 705.

(*k*) 44 & 45 Vict. c. 41, s. 60. This extends to an implied covenant. It applies unless otherwise provided.

(*l*) *Newton* v. *Blunt*, 3 C.B. 681; 16 L.J. C.P. 121; *Beaumont* v. *Greathead*, 2 C.B. 494; 15 L.J. C.P. 130.

(*m*) *Collins* v. *Prosser*, 1 B. & C. 682; 1 L.J. (O.S.) K.B. 212.

(*n*) *Fell* v. *Goslin*, 7 Exch. 185; 21 L.J. Ex. 145.

If A. lets land to B. and C., and they covenant jointly and severally with the lessor to pay the rent, or the like, they are sureties for each other for the due performance of the contract; and it is as competent for each of them to covenant for the other as it is for a stranger to covenant for both, which is a common thing (*o*). A covenant by two or more persons "for ourselves and each of us," or "for ourselves and every of us," is a joint and several covenant (*p*). It has been held that, where the lessees in the first covenant of a lease "covenant jointly and severally in manner following," the joint and several liability extends to all the subsequent covenants, in the absence of any express words manifesting an intention to the contrary (*q*). If several persons enter into a joint bond or promissory note, or other contract, and in the obligatory part make use of the pronoun *I* instead of *we*, they are jointly and severally bound (*r*).

Where three persons agreed to refer certain disputes between them to arbitration, and "jointly and severally" promised and agreed to perform the award, and the arbitrator awarded that two of them should pay a sum of money to a third, and settled and directed the amount that was to be paid by each, it was held that each was liable for the whole amount awarded, as well as for his individual share (*s*). If a party of friends dine together at a tavern, they are jointly and severally liable for the entire cost of the entertainment, in the absence of circumstances showing an express intention to the contrary (*t*). No certain rule of law, however, can be laid down to regulate the joint or several liability upon implied contracts, as the right of action entirely depends upon the varying facts of each particular case, and the inference a jury may be disposed to draw from them. In a case where provisions were furnished for the use of the officers of a regimental mess in camp, Lord Kenyon seems to have thought that the officers were severally liable only in respect of the articles used and consumed by each (*u*).

Joint and several purchases.—If two persons join in giving an order for an undivided parcel of goods, they are jointly liable for the price of them, unless it be proved that there was a separate contract with each (*x*). If they employ an agent to make the purchase, and he purchases an undivided quantity, they are jointly

(*o*) *Enys* v. *Donnithorn*, 2 Burr. 1190; 1 Wms. Saund. 154, n. 1.

(*p*) *May* v. *Woodward*, 1 Freem. 248; *Bolton* v. *Lee*, 2 Lev. 56.

(*q*) *Northumberland* (*Duke*) v. *Errington*, 5 T.R. 522.

(*r*) *Sayer* v. *Chaytor*, 1 Lutw. 696; *Clerk* v. *Blackstock*, Holt, N.P.C. 474; *Buckley*, *Ex parte*, 14 M. & W. 469; 14 L.J. Ex. 341.

(*s*) *Mansell* v. *Burredge*, 7 T.R. 352.

(*t*) *Forster* v. *Taylor*, 3 Campb. 49.

(*u*) *Brown* v. *Doyce*, cited in a note to *Forster* v. *Taylor*, *supra*; Rolle's Abr. 24, 31.

(*x*) *Gibson* v. *Lupton*, 2 M. & Sc. 371; 2 L.J. C.P. 4.

and severally responsible for the price (*y*). But, if there be no agency in the matter, and the purchaser of an undivided parcel of goods subsequently makes a sub-contract with other parties for the taking by them of particular shares in his purchase, this sub-division of his beneficial interest under the original contract does not render the persons claiming under him jointly responsible with himself for the performance of the original contract (*z*).

Contracts with agents—Rights of principal.—If the agent who makes the contract contracts only in the name of the principal, intending to bind the latter, and not himself, by the contract, he will have no right of action upon it in his own name, unless he has himself an interest in the contract. Where several persons rented a building to be used as a synagogue, and a treasurer was appointed annually by them, whose business it was to let seats and receive the rents for the use of the lessees, it was held, in an action brought by the treasurer for rent due in respect of the seats so let, that the contracts for the occupation of the seats, though in fact made with the treasurer, were, in point of law, made with the lessees who had the title to the synagogue, and that they, and not their servant, the treasurer, were the proper parties to maintain the action (*a*). The rules of the common law, including the law merchant, save in so far as they are inconsistent with the provisions of the Sale of Goods Act, 1893, relating to the law of principal and agent, continue to apply to contracts for the sale of goods (*b*).

Principals contracting as agents.—If a party describes himself on the face of a written contract as agent, but does not disclose who his principal is, he may repudiate the agency, and claim the benefit of the contract as the principal, if he is in reality the principal. Although a man cannot, in strict propriety of speech, be agent to himself, yet in a contract of charter-party he may reserve to himself the right to fill either or both of those characters at his election; he may contract as agent to the freighter, whoever that freighter may turn out to be, and may then, if he pleases, adopt that character himself (*c*).

Concealment of agency — Rights of undisclosed principals. — If there is nothing on the face of a written contract to indicate agency, but one of the contracting parties is in reality an agent contracting on behalf of an unknown and undisclosed principal, the latter may, in general, at any subsequent period, so long as

(*y*) *Gouthwaite* v. *Duckworth*, 12 East, 426.
(*z*) *Coope* v. *Eyre*, 1 H. Bl. 37.
(*a*) *Israel* v. *Simmons*, 2 Stark. 356; *Seignor and Wolmer's case*, Godb. 360; *Pigott* v. *Thompson*, 3 Bos. & P. 147; *Bowen* v. *Morris*, 2 Taunt. 374.
(*b*) 56 & 57 Vict. c. 71, s. 61 (2).
(*c*) *Schmaltz* v. *Avery*, 16 Q.B. 663; 10 L.J. Q.B. 231.

the contract remains executory, come forward and claim the benefit of it: but he is, of course, bound by all the equities raised by his agent whilst dealing apparently as a principal, and can take such rights of action only as the latter possesses at the time that he, the principal, discloses himself (*d*). If, therefore, a factor entrusted with the possession of goods, sells them as his own with the authority of the true owner, and the purchaser deals with the factor as, and believes him to be, the principal in the transaction, in an action by the true owner for the price the purchaser may avail himself of any set-off which has accrued to him against the factor while he believed the factor to be the principal (*e*). This right of the principal to disclose his real character, and require the fulfilment of the contract with himself personally, exists even in the case of factors who have sold goods for the principal in their own names under a *del credere* commission, provided the general balance of accounts between the principal and the factor is at the time in favour of the former (*f*). And no rule or custom of the Stock Exchange can alter the law in this respect, or in anywise control the legal rights of the principal, although the principal was cognizant of the rule at the time he employed the broker (*g*). Inasmuch, however, as the factor has a lien on the price of the goods in the hands of the buyer to the extent of the balance due to him from the principal on the general account, his commission on the sale moneys advanced, &c., he may insist on payment from the buyer to himself in opposition to the principal, to the extent of the moneys so due to him from the latter. In the case of a contract for the sale of land, specific performance has been decreed, although the purchaser was a mere nominal contractor, purchasing on behalf of, or in trust for, an unknown and undisclosed principal (*h*). As soon as a purchaser dealing with an unknown agent discovers that he is an agent, and receives an intimation from the principal that the latter intends to look to him for payment, he is not afterwards justified in settling with the agent (*i*).

In certain cases, however, where a contracting party professes to be a principal in the transaction, those who have contracted

(*d*) *Risbourg* v. *Bruckner*, 28 L.J. C.P. 94; 3 C.B. N.S. 812; *Carr* v. *Hinchcliff*, 4 B. & C. 547; 4 L.J. (O.S.) K.B. 5; *Fish* v. *Kempton*, 7 C.B. 692; 18 L.J. C.P. 206; *Thelps* v. *Protheroe*, 16 C.B. 370; 24 L.J. C.P. 225; *Semenza* v. *Brinsley*, 18 C.B. N.S. 467; 34 L.J. C.P. 161; *Dresser* v. *Norwood*, 17 C.B. N.S. 466; 34 L.J. C.P. 48; *Ramazotti* v. *Bowring*, 7 C.B. N.S. 856; 29 L.J. C.P. 30.

(*e*) *Borries* v. *Imperial Ottoman Bank*, L.R. 9 C.P. 38; 43 L.J. C.P. 3; *Cooke* v. *Eshelby*, 12 App.Cas. 271; 56 L.J. Q.B. 505.

(*f*) *Bonzi* v. *Stewart*, 5 Sc. N.R. 1; 11 L.J. C.P. 228; *Scrimshire* v. *Alderton*, 2 Str. 1182; *Hornby* v. *Lacy*, 6 M. & S. 166; *Drinkwater* v. *Goodwin*, Cowp. 255; *Hudson* v. *Granger*, 5 B. & Ald. 27.

(*g*) *Humphrey* v. *Lucas*, 2 Car. & K. 152.

(*h*) *Hall* v. *Warren*, 9 Ves. 605.

(*i*) *Cornish* v. *Abington*, 4 H. & N. 557; 28 L.J. Ex. 262.

with him as a principal may refuse to fulfil the contract with any other person than the party with whom they have contracted as a principal. Where, for example, on the face of a charter-party for the hire of a vessel, one of two contracting parties was described as the owner of the vessel, and contracted with the other party in that character, it was held that a third person could not come forward and claim the benefit of the contract on the ground that he was himself the principal and owner of the vessel, and that the person described on the face of the contract as owner was not, in truth, the owner, but his agent. The inducement to the one party to enter into the contract may have been the character, credit, and substance of the other party described as the principal; and the former has a right, therefore, to decline performance of the contract with any other person (*k*). So, in the case of a contract for the sale of land, if it appears that the agent treating for the land contracted as a principal in the transaction, and that the agency was designedly concealed because it was known that the vendor, from personal consideration, would not have sold the land to the undisclosed principal, and the vendor has consequently been deceived, the principal cannot come forward and enforce the contract so obtained. So, where a merchant, residing in England, orders goods for a foreigner, the usage of trade is that the credit is given to the home agent, who has apparently contracted as the principal, and that the foreigner is not bound by, and consequently cannot enforce, the contract (*l*).

To entitle a person to enforce a contract, it must be shown that he himself made it, or that it was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him; and the person for whom the agent professes to act must be capable of being ascertained at the time (*m*). A subsequent ratification, however, may be valid, although the principal was ignorant of the transaction until after it took place; and such a ratification may be made after an action has been commenced upon the contract in the name of the principal (*n*). A contract made by a person in his own name but intending to act for a third party in making it, although without authority from the third party, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract (*o*).

(*k*) *Humble* v. *Hunter*, 12 Q.B. 310; 17 L.J. Q.B. 350.

(*l*) *Elbinger Actien-Gesellschaft* v. *Claye*, L.R. 8 Q.B. 313; 42 L.J. Q.B. 151; *Hutton* v. *Bullock*, L.R. 8 Q.B. 331; affirmed L.R. 9 Q.B. 572.

(*m*) *Watson* v. *Swann*, 11 C.B. N.S. 756; 31 L.J. C.P. 210.

(*n*) *Ancona* v. *Marks*, 7 H. & N. 686; 31 L.J. Ex. 163.

(*o*) *Keighley Maxsted & Co.* v. *Durant*, (1901) A.C. 240; 70 L.J. Q.B. 662.

Proof of agency where the contract is in writing.—When the contract is in writing, and the agency is concealed, so that the agent appears on the face of the contract to be the contracting party, and no mention is made of any principal, it has been held that, whilst "it is clear that parol evidence to vary a written contract cannot be received, yet that the parties contracted in the capacities of principals or agents may be explained" (*p*). In all cases where the character in which parties contract is not defined on the face of the writing (*q*), "it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such, in making the contract, so as to give the benefit of the contract to the unnamed principal, and this whether the agreement be or be not expressed in writing" (*r*). But, if the consideration moves from only one of the partners in a firm, such partner may sue alone (*s*); and upon negotiable instruments, such as bills of exchange and promissory notes, none but the parties mentioned by their name or firm can be admitted to sue (*t*).

Purchases in name of one of several joint adventurers.—If several persons send their cattle to a particular salesman, who sells them all to one individual, the only contract is the contract with the salesman alone, and each separate owner cannot bring an action against the purchaser for the price of his cattle (*u*). But, if a number of persons agree to be jointly interested in a purchase which is to be made by one of them separately in his own name, and the contract is made accordingly, all may join in suing for a breach of it (*x*).

Recovery of principal's money paid away by agent.—If the money of the principal has been paid by the agent under circumstances which create a right to recover it back, as for example, by mistake, or on the strength of a false or fraudulent representation, either the agent or the principal may bring an action for "money had and received," and recover the money (*y*). If the money of the principal is lent by the agent, the principal cannot maintain an

(*p*) *Humfrey* v. *Dale*, 26 L.J. Q.B. 137; 7 E. & B. 266; 27 L.J. Q.B. 390; E. B. & E. 1004.

(*q*) *Wilson* v. *Hart*, 1 Moore, 50; Taunt. 295.

(*r*) Parke, B., *Higgins* v. *Senior*, 8 M. & W. 844; *Wake* v. *Harrop*, 30 L.J. Ex. 273; 6 H. & N. 768; 31 L.J. Ex. 451; 1 H. & C. 202; *Bateman* v. *Phillips*, 15 East, 272; *Garrett* v. *Handley*, 3 B. & C. 462; 3 L.J. (O.S.) K.B. 47; 4 B. & C. 664; *Ruppell* v. *Roberts*, 4 N. & M. 31; *Cooke* v. *Seeley*, 17 L.J. Ex. 286; 2 Exch. 746; *Spurr* v. *Cass*, L.R. 5 Q.B. 656; 39 L.J. Q.B. 249.

(*s*) *Agacio* v. *Forbes*, 14 Moore, P.C. 171.

(*t*) *Per* Lord Abinger, *Beckham* v. *Drake*, 9 M. & W. 92; 11 L.J. Ex. 201.

(*u*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 852; 22 L.J. Ex. 355.

(*x*) *Cothay* v. *Fennell*, 10 B. & C. 671; 8 L.J. (O.S.) K.B. 302.

(*y*) 1 Roll. Abr. 38, pl. 12; *Drope* v. *Thaire*, Latch. 126; *Tracy* v. *Veal*, Cro. Jac. 223; *Norfolk* (*Duke*) v. *Worthy*, 1 Campb. 337; *Stevenson* v. *Mortimer*, Cowp. 805; *Smith* v. *Sleap*, 12 M. & W. 585; *Bastable* v. *Poole*, 1 C. M. & R. 410; 4 L.J. Ex. 25; *Holt* v. *Ely*, 1 E. & B. 795; *Archer* v. *Bank of England*, 2 Doug. 637.

action against the borrower to recover it back when the time of repayment arrives, unless it is proved that the principal was in reality the lender; for, if B. lends money to A., and A. makes a further loan of it to C., B. has no right of action against C. to recover it back (*z*). Where a cargo belonging to several joint-owners was sold by their agent, and the money realised by the sale was paid into a bank by such agent in his own name, it was held that the bankers were accountable only to the agent from whom they had received the money (*a*).

Rights of principals upon deeds made by agents.—By an authority in writing under seal, one man may authorise another to enter into, and to execute, contracts under seal in his behalf (*b*); but it depends upon the express terms of such contracts, and upon the mode in which the power given to the agent is exercised, whether the contract, when made, is the contract of the principal or of the agent, or whether it is the contract of neither the one nor the other (*c*). If the principal has, by a written authority, sealed and delivered, authorised the agent to enter into and execute the deed, and the covenants contained in such deed are entered into with the principal in express terms, and the agent merely executes the deed in the name of the principal (*d*), then the contract is the contract of the principal. If, on the other hand, the agent is made a party to the deed on behalf of the principal, and the covenants are entered into with the agent as such, then the contract is the contract of the agent.

Liability of undisclosed principals upon simple contracts.—The extent and nature of the authority of an agent may be defined by writing, by oral instruction, or by the course of dealing between the parties. When the authority of an agent is general, it will be construed liberally, but according to the usual course of business in such matters. When the authority is given by parol, and is ambiguous, it is to be construed according to the course of trade in such matters; and, where it is unexpressed, it is to be ascertained by investigating the course of dealing pursued between the several parties to the transactions. Where an express authority is given, an authority is implied to do all acts which may be necessary for the purpose of effecting the object for which the

(*z*) *Sims* v. *Bond*, 5 B. & Ad. 393; *Calland* v. *Loyd*, 6 M. & W. 26; 9 L.J. Ex. 56; *Cooke* v. *Seeley*, 2 Exch. 746; 17 L.J. Ex. 286.

(*a*) *Sims* v. *Brittain*, 4 B. & Ad. 375; *Pinto* v. *Santos*, 5 Taunt. 447; Martin, B., *Walshe* v. *Provan*, *supra*.

(*b*) Com. Dig. C. 1, C. 5; *Horsley* v. *Rush*, cited 7 T.R. 209; *Harrison* v. *Jackson*, *ib.* 210.

(*c*) *Jung* v. *Phosphate of Lime Co.*, L.R. 3 C.P. 139; 37 L.J. C.P. 73.

(*d*) An agent who has an authority under seal to grant leases should merely execute the lease in the name of the principal. *Frontin* v. *Small*, 2 Raym. 1418; *Combe's case*, 9 Co. 76 b; *M'Ardle* v. *Irish Iodine Co.*, 15 Ir. Com. L.R. 146.

express authority is given. A general parol authority may be enlarged by parol, or even an additional authority superadded to it by the course of employment of the parties known to and acquiesced in by them. For instance, a merchant may authorise a clerk to accept or indorse bills of exchange for him; but this will not of itself authorise his paying or receiving money due on such bills. But, if, in the course of his employment, the clerk has, with the knowledge of the merchant, been allowed to do so, this will constitute a sufficient authority for that purpose, and will discharge the holders of the bill. An agent, employed to negotiate and conclude contracts, is not thereby authorised to pay or receive money which becomes due under such contracts; but the course of employment may justify the agent in so paying or receiving the money, if known to the principal, and not objected to by him (*e*). If a principal employs an agent in a particular trade or business in which there are established usages regulating the powers and duties of agents, the authority of the agent is regulated by such usages (*f*). We have seen that oral evidence is admissible to show that a party contracting in writing was an agent, so as to give the benefit of the contract to an unnamed principal (*ante*, p, 302); it is in like manner admissible to fix the principal as the party really interested in the matter, and make him liable upon the contract (*g*). Thus, where, by a bought note containing the terms of a contract for the sale of wool, and also by the invoice, Read appeared to be the buyer of the wool, oral evidence was admitted to show that Read was in reality the agent of Hart, and that Hart had directed the wool to be delivered at a particular spot, and had there received it; and Hart was accordingly made chargeable upon the contract, although he did not appear upon the face of it as a purchaser (*h*). And in the case of oral agreements, although an agent contracts for the purchase of goods in his own name, and apparently on his own account, so as to make himself personally liable to the vendor for the payment of the price of them, yet the principal, when once discovered, is also liable (*i*). If the vendor, at the time he strikes the bargain, knows that the party he is dealing with is an agent, but does not know who the principal is, and consequently debits the agent in the first instance, he may nevertheless, when he finds out the principal, claim payment of the latter (*k*), provided he

(*e*) *Pole* v. *Leask*, 28 Beav. 562; 29 L.J. Ch. 888.

(*f*) *Sweeting* v. *Pearce*, 7 C.B. N.S. 449; 29 L.J. C.P. 265.

(*g*) *Higgins* v. *Senior*, 8 M. & W. 844; 11 L.J. Ex. 199; *Calder* v. *Dobell*, L.R. 6 C.P. 486; 40 L.J. C.P. 224.

(*h*) *Wilson* v. *Hart*, 7 Taunt. 295; 1 Moore, 50; *Humfrey* v. *Dale*, 27 L.J. Q.B. 390; E. B. & E. 1004.

(*i*) *Armstrong* v. *Stokes*, L.R. 7 Q.B. 598; 41 L.J. Q.B. 253. But see *Irvine* v. *Watson*, 5 Q.B.D. 414; 49 L.J. Q.B. 531; and *Davison* v. *Donaldson*, 9 Q.B.D. 623.

(*k*) *Kymer* v. *Suwercropp*, 1 Camp. 109; *Thomson* v. *Davenport*, 9 B. & C. 78; *Thomas* v. *Edwards*, 2 M. & W. 215.

makes his election so to do within a reasonable time (*l*). And the mere fact of filing an affidavit of proof against the estate of an insolvent agent after the undiscovered principal is known to the creditor is not a conclusive election by the creditor to treat the agent as his debtor (*m*). But, if, at the time the contract of sale is made, the vendor knows that the buyer, though dealing with him in his own name, and pledging his own credit, is in reality an agent, and knows also who the principal is, and, notwithstanding such knowledge, chooses to give credit to the agent, and make him his debtor, he cannot afterwards resort to the principal for payment (*n*). And, if an agent, having made a contract in his own name, has been sued on it to judgment, no second action is maintainable against the principal (*o*). If an agent has borrowed money for his principal, and the amount has been received by the latter, he may be sued in an action of debt by the lender, although the lender, at the time he lent the money, supposed that the agent was the borrower (*p*). The burden of proof of agency is on the person dealing with any one as an agent, through whom he seeks to charge another as principal; he must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it (*q*).

Agent's authority to sign writings for principal.—Except for the purposes described in the first, second, and third sections of the Statute of Frauds, viz., for the purpose of creating leases, estates of freehold, or any uncertain interest in lands, tenements, or hereditaments, other than leases under three years, and except in the case of agents appointed by a corporation to bind the corporate body to certain contracts, a mere verbal authority to the agent will suffice to bind the principal; and, in the great majority of instances, an authority binding one man to the acts of another is raised by implication of law (*r*). Any person who accredits another by employing him in any particular course of dealing is bound by what has been done by such agent in the course of his usual employment, and is responsible to third parties who have dealt with the agent in reliance upon the power and authority with which he was apparently clothed by the principal (*s*). If B.

(*l*) *Smethurst* v. *Mitchell*, 1 E. & E. 623; 28 L.J. Q.B. 241.

(*m*) *Curtis* v. *Williamson*, L.R. 10 Q.B. 57; 44 L.J. Q.B. 27.

(*n*) *Paterson* v. *Gandasequi*, 15 East, 62; *Thomson* v. *Davenport*, *supra*.

(*o*) *Priestley* v. *Fernie*, 3 H. & C. 977; 34 L.J. Ex. 173.

(*p*) *Samuel* v. *Green*, 10 Q.B. 262; 16 L.J. Q.B. 239.

(*q*) *Pole* v. *Leask*, 33 L.J. Ch. 155; 28 Beav. 562.

(*r*) *Ridgway* v. *Wharton*, 6 H.L.C. 296; 27 L.J. Ch. 46.

(*s*) *Whitehead* v. *Tuckett*, 13 East, 408; *Watkins* v. *Vince*, 2 Stark. 368; Holt, C. J., *Anon.*, 12 Mod. 564; *Attwood* v. *Munnings*, 7 B. & C. 278; 6 L.J. (O.S.) K.B. 9.

has repeatedly signed A.'s name to policies of insurance, or to bills or notes, and A. has subsequently recognised and sanctioned such signatures, the law will imply a general warrant from A. to B. authorising the latter to sign in A.'s name, and A. will continue liable upon such contracts made by B. in the name of A., until the determination of the implied general authority has been publicly announced (*t*). From repeated instances of employment the law infers the existence of an implied general authority to the party employed to bind the employer within the limits of the previously recognised dealings (*u*). But an agent employed specially to sign a contract for his principal upon one particular occasion is not impliedly clothed with any general authority to sign contracts for him. And a person whose agency has been strictly confined to bill transactions has no implied authority to give a guarantee. The liability of the principal is always to be measured by the nature and extent of the previous employment of the agent; and it is the duty of parties dealing with a person who professes to be an agent, but is not notoriously so, to ascertain the nature and extent of his authority before they deal with him. If they neglect so to do, and it afterwards turns out that the agent had no authority, or has exceeded his authority, the principal will not be bound, and the only remedy they can have will be against the agent himself who has misled them (*x*). The fact of a landlord employing a steward to let and manage his property does not clothe the steward with a general authority to grant leases, or to enter into agreements for leases, without the sanction of the landlord or contrary to his express directions (*y*). And the agent of an insurance company derives no authority, from the mere fact of his agency, to enter into a contract to grant a policy of insurance without the sanction of the directors (*z*). An agent has, in general, no authority to borrow money on account of the principal so as to render the latter responsible as the borrower, unless it can be proved that the principal has previously sanctioned such a course of dealing on the part of the agent, or has subsequently adopted and ratified the loan (*a*). When an agent has been authorised to accept bills in the name of the principal, he may, it seems, under certain circum-

(*t*) *Neal* v. *Irving*, 1 Esp. 61; *Brockelbank* v. *Sugrue*, 5 C. & P. 21.

(*u*) *Todd* v. *Robinson*, Ry. & M. 217; *Gilman* v. *Robinson*, *id.* 226; *Hazard* v. *Treadwell*, 1 Str. 506.

(*x*) *Smout* v. *Ilbery*, 10 M. & W. 1; 12 L.J. Ex. 357; *Polhill* v. *Walter*, 3 B. & Ad. 114; 1 L.J. K.B. 92; as to these cases, see *per* Kekewich, J., *Halbot* v. *Lens*, (1901) 1 Ch. 344; 70 L.J. Ch. 125; *Oliver* v. *Bank of England*, (1901) 1 Ch. 652; 70 L.J. Ch. 377; as to the revocation of authority by the dissolution of a company represented by a solicitor, see *Salton* v. *New Beeston Cycle Co.*, (1900) 1 Ch. 43; 69 L.J. Ch. 20.

(*y*) *Collen* v. *Gardner*, 21 Beav. 542.

(*z*) *Linford* v. *Provincial Horse Ins. Co.*, 10 Jur. N.S. 1066; 34 Beav. 291.

(*a*) *Hawtayne* v. *Bourne*, 7 M. & W. 599; 10 L.J. Ex. 224. See *Montaignac* v. *Shitta*, 15 App.Cas. 357; *Jacobs* v. *Morris*, (1902) 1 Ch. 816; 71 L.J. Ch. 363.

stances, select the hand of another person to carry the intention into effect without violating the rule "*delegatus non potest delegare*" (*b*).

Special authority.—An agent intrusted with the performance of a particular duty has an implied authority to do all such incidental acts as are usual and necessary for the purpose of carrying the main objects of the principal into effect (*c*). Therefore, an agent employed to get a bill discounted, and not restricted as to the mode of doing it, may endorse it in the name of the principal to facilitate its being cashed, and bind the latter by such indorsement. But, if he is expressly ordered by the principal not to put his name to the bill, and has not been employed by the principal as his general agent to discount and endorse bills, the principal cannot be made liable upon it (*d*). An agent authorised to make contracts of purchase and sale, and as incidental thereto to do certain specified acts, which however did not include the borrowing of money, cannot, it has been held, bind his principal by contract of loan (*e*). Whenever one person is sought to be charged by the acceptance or indorsement of another, in consequence of the latter having, on previous occasions, drawn and accepted, or endorsed, bills in his name, it must be distinctly shown that he knew of, and had sanctioned, such previous acceptances or indorsements (*ee*). The customary mode of indorsement through the medium of an agent is by the agent's signing the name of the principal, adding under it "per procuration, A. B.," the agent writing his own name. The arrangement of the words is quite immaterial, provided they plainly express that the indorsement is made by one man on behalf of another—as A. for B., B. by A. or by procuration of A., &c.; but the name of the principal, whether the bill be drawn, accepted, or endorsed by the agent, must appear on the face of the bill, in order to express that the principal does the act through the medium of his agent; for, if the agent merely signs his own name, the principal cannot be made liable upon it (*f*). Where an agent accepts or endorses a bill "per pro.," the taker is bound to inquire as to the extent of the agent's authority (*g*). When, however, a firm in partnership trade under the name of "A. & Co.," and such partnership name appears

(*b*) *Lord* v. *Hall*, 8 C.B. 630; 19 L.J. C.P. 46.

(*c*) *Rosenbaum* v. *Belson*, (1900) 2 Ch. 267; 69 L.J. Ch. 569.

(*d*) *Fenn* v. *Harrison*, 3 T.R. 757.

(*e*) *Bryant* v. *La Banque du Peuple*, (1893) A.C. 170; 62 L.J. P.C. 68.

(*ee*) *Davidson* v. *Stanley*, 3 Sc. N.R. 49; *Fearn* v. *Filica*, 7 M. & Gr. 513; 14 L.J. C.P. 15.

(*f*) *Barlow* v. *Bishop*, 1 East, 432; *Emly* v. *Lye*, 15 East, 9. See 45 & 46 Vict. c. 61, ss. 25, 26, *post*, p. 1166.

(*g*) *Bryant* v. *La Banque du Peuple*, (1893) A.C. 170; 62 L.J. P.C. 68.

on the face of the bill, all the members of the firm are liable upon it, although their individual names do not appear (*h*).

Contracts by infant agents.—The principal cannot rely upon any personal incapacity on the part of his agent to contract as a defence against an action brought by those who have dealt with such agent; for the principal who has employed and accredited the agent cannot impugn his own act in the choice he has made. Therefore, although a person under age cannot contract so as to bind himself for anything beyond the necessaries of life, he may nevertheless contract so as to bind his employer (*i*).

Subsequent ratification by the principal.—Although no previous authority may have been given, yet, if there be subsequent acts of assent or acquiescence on the part of the principal, he is liable upon the contract: "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*" (*k*). It has been recently held in the House of Lords, that where a contract has been made by a person in the hope and expectation that it will be ratified by a third party, but without disclosing that fact to the other party to the contract, the third party cannot ratify the contract so as to enable him to sue upon it (*l*). If a bill or note be signed without authority by A.'s servant or agent in the name of A., a subsequent promise by the latter to pay the bill is equivalent to a prior authority (*m*); and, if the proceeds of such a bill are applied to A.'s use or for his benefit, with his knowledge, this amounts to a subsequent sanction and ratification of the act of the agent (*n*). An adoption of the agency as to one part of a contract generally operates as an adoption of the whole transaction; for an act cannot be affirmed as to so much as is beneficial and rejected as to the residue (*o*). "The principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority" (*p*). But in order to make it binding, the ratification must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances (*q*). The subsequent ratification of the contract by the principal relates back

(*h*) See 45 & 46 Vict. c. 61, s. 23, *post*, p. 1165.

(*i*) *Watkins* v. *Vince*, 2 Stark. 368.

(*k*) *Soames* v. *Spencer*, 1 Dowl. & Ry. 32; *Maclean* v. *Dunn*, 1 Moo. & P. 761; 6 L.J. (O.S.) C.P. 184; *Fitzmaurice* v. *Bayley*, 27 L.J. Q.B. 143; 8 E. & B. 664.

(*l*) *Keighley, Maxsted & Co.* v. *Durant*, (1901) A.C. 240; 70 L.J. Q.B. 662.

(*m*) *Fenn* v. *Harrison*, 4 T.R. 177.

(*n*) *Bolton* v. *Hillersden*, 1 Ld. Raym. 224.

(*o*) *Hovil* v. *Pack*, 7 East, 166.

(*p*) Tindal, C.J., *Wilson* v. *Tumman*, 12 L.J. C.P. 306; 6 M. & Gr. 236; *Berwick* v. *Horsfall*, 4 C.B. N.S. 450; 27 L.J. C.P. 193; *Fitzmaurice* v. *Bayley*, *supra*. As to the subsequent ratification of the acts of bailiffs and others, where the act was originally a trespass, see *Lewis* v. *Read*, 13 M. & W. 834.

(*q*) Willes, J., *Phosphate of Lime Co.* v. *Green*, L.R. 7 C.P. 43.

to the time when it was made by the agent. And, therefore, where an offer was accepted by an agent, and was withdrawn before the acceptance was ratified by the principal, it was held that since the acceptance was subsequently ratified by the principal, the withdrawal was inoperative (*r*). A principal may, in the absence of fraud on his part, ratify and adopt a contract made by his agent without his authority, notwithstanding that the other parties to it have before ratification repudiated it, and notwithstanding that the agent acted with fraudulent intent (*s*). And in those cases where, by the Statute of Frauds, or the Sale of Goods Act, 1893, the contract is required to be authenticated by writing, such ratification renders the agent an agent duly authorised to bind his principal under the provisions of the statute at the time the contract was entered into (*t*). But ratification can only be by a person ascertained at the time of the act done, that is, by a person then in existence, either actually or in contemplation of law (*u*); and, consequently, a company cannot ratify a contract purporting to have been made on their behalf before they existed as a company (*x*).

Limitation of authority.—If an agent exceeds his authority in cases where it is notorious that the authority of the agent is generally limited, the principal will not be liable beyond the extent of the authority given; and, if the contract is indivisible, the principal will not be liable at all. Thus, where the defendant authorised a broker at Liverpool to underwrite marine policies for him, "not exceeding 100*l.* by any one vessel," and the broker underwrote a policy for 150*l.*, and at Liverpool it is notorious that there is generally a limit fixed between the principal and the broker, though this limit is not disclosed to the public, it was held that the agent had no authority to underwrite for 150*l.*, and that, the contract being indivisible, the assured could recover nothing from the defendant in respect of the policy (*y*).

Publication of revocation of authority.—In order to determine the liability of the principal to third parties who have dealt with the agent in ignorance of the determination of his authority, the principal must make the revocation as notorious to the world at

(*r*) *Bolton* v. *Lambert*, 41 Ch.D. 295; 58 L.J. Ch. 425; as to acceptance by unauthorized agents, see *Dibbins* v. *Dibbins*, (1896) 2 Ch. 348; 65 L.J. Ch. 724.

(*s*) *Tiedemann, In re*, (1899) 2 Q.B. 66; 68 L.J. Q.B. 852.

(*t*) *Maclean* v. *Dunn*, 1 Moo. & P. 761; 6 L.J. (O.S.) C.P. 184.

(*u*) *Kelner* v. *Baxter*, L.R. 2 C.P. 174; 36 L.J. C.P. 94.

(*x*) *Melhado* v. *Porto Alegre Ry.*, L.R. 9 C.P. 503; 43 L.J. C.P. 253; *Empress Engineering Co., In re*, 16 Ch.D. 125; *Gandy* v. *Gandy*, 30 Ch.D. 57; 54 L.J. Ch. 1154; but see *contra*, *Spiller* v. *Paris Skating Rink Co.*, 7 Ch.D. 368, *per* Malins, V.-C., following *Touche* v. *Metropolitan Ry. Warehousing Co.*, L.R. 6 Ch. 671.

(*y*) *Baines* v. *Ewing*, L.R. 1 Ex. 320; 35 L.J. Ex. 194.

large as the existence of the previous general authority and employment. When a person has dealt with a tradesman on credit, it is not sufficient to give notice to the tradesman's servant that he means to pay ready money in future; it must be given to the tradesman himself, unless the servant is a foreman or manager having the general superintendence of the business (*z*). The authority of the agent is determined by the death of the principal (*a*) —as also by the dissolution of a company for whom the agent is acting (*b*)—as soon as the death or dissolution is brought to the knowledge of the parties.

Misrepresentation and fraudulent concealment by agents.—"If," said Lord Abinger, C. B., "the clerk of a merchant or tradesman offers goods for sale to a customer, with a representation very material to their value, which representation his master knows to be false, but the clerk supposes to be true, whereupon the customer gives double the real value of the goods, the contract ought to be dealt with in the same way as if the master himself had made the representation" (*c*). If the representation forms part of the contract, the principal must take the contract in its entirety. "Whatever the previous authority of the agent," further observed Wilde, B., "whatever the principal's own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether. There are, no doubt, many frauds committed by agents which do not bind their principals; but I hold that the statements of the agent which are involved in the contract as its foundation or inducement are in law the statements of the principal" (*d*). False statements made by an agent, being within his authority, may be sufficient to vitiate a contract, and prevent a decree for specific performance (*e*).

Liabilities of principals on contracts under seal.—If, in a contract under seal, the principal is made to covenant in his own name, and not in the name of his agent, and the deed is executed in the name of the principal, and the agent's authority to execute the deed is under seal, the principal is liable upon it just the same as if he had personally sealed and delivered the instrument; but, if the agent

(*z*) *Gratland* v. *Freeman*, 3 Esp. 85.

(*a*) *Smout* v. *Ilbery*, 10 M. & W. 1; 12 L.J. Ex. 357; *Overweg, In re*, (1900) 1 Ch. 209; 69 L.J. Ch. 255.

(*b*) *Salton* v. *New Beeston Cycle Co.*, (1900) 1 Ch. 43; 69 L.J. Ch. 20.

(*c*) *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L.J. Ex. 297; *Schneider* v. *Heath*, 3 Campb. 508; *Everett* v. *Desborough*, 3 Moo. & P. 204; 7 L.J. (O.S.) C.P. 123; Holt, C.J., *Herne* v. *Nicholls*, 1 Salk. 289; Ld. Ellenborough, *Crockford* v. *Winter*, 1 Campb. 127; *Taylor* v. *Green*, 8 C. & P. 316; *Wright* v. *Crookes*, 1 Sc. N.R. 685; *Wheelton* v. *Hardisty*, 8 E. & B. 285; 27 L.J. Q.B. 241.

(*d*) *Udell* v. *Atherton*, 7 H. & N. 172; 30 L.J. Ex. 340; *Bristowe* v. *Whitmore*, 9 H.L.C. 391; 28 L.J. Ch. 801. As to liability of principal for acts of agent, see Addison on Torts, pp. 97, 746 (ed. 7).

(*e*) *Mullens* v. *Miller*, 22 Ch.D. 194; 52 L.J. Ch. 380.

has covenanted in his own name on behalf of the principal, the action may be brought against the agent, who, in such a case, constitutes himself the trustee of the principal (*f*). The principal is not, in any case, liable upon a deed, unless the authority of the agent to make and execute the deed is under seal (*g*); but there is an exception in the case of two joint contractors, one of whom, it has been held, may execute a deed for himself and the other without an authority under seal, provided the execution be made "for himself and the other *in the presence* of that other" (*h*).

Warranties by agents.—It has been held that a buyer who takes a warranty from a known agent, professedly selling on behalf of his principal, takes the warranty at the risk of being able to prove that the agent had the principal's authority for giving the warranty, and that the law clothes a known servant, intrusted to sell, with no implied authority to warrant, unless such servant is the general agent of a tradesman employed in the business of buying and selling (*i*); but, although a vendor who employs an agent to sell gives the latter no authority to warrant, yet, if the agent does warrant, and thereby obtains a largely enhanced price, which never could have been procured if the warranty had not been given, it seems inconsistent with all ordinary principles of law and justice to allow the principal to retain the money and repudiate the warranty by which it was obtained. Finding that the agent had exceeded his authority by giving a warranty, the principal is doubtless entitled to repudiate the transaction altogether; but, if he receives the money, and refuses to return it after he has had notice of the warranty, he surely ought to be held to have ratified and adopted the warranty (*j*). If an agent employed by the indorsee of a bill to get it discounted warrants the bill to be a good bill, and receives cash for it on the strength of the warranty, and hands over the money to his principal, and the bill turns out to be a piece of worthless paper, the principal cannot retain the money (*k*). It was his own fault, as Lord Holt has observed, to repose a trust in unworthy hands, and he ought not to be allowed to derive a profit from the misconduct of his own servant to the prejudice of an innocent purchaser (*l*).

If a person puts goods into the custody of another whose com-

(*f*) Co. Litt. 258, n.; *Anon.*, Moore, 70, pl. 19; *White* v. *Cuyler*, 6 T.R. 176.

(*g*) *Steiglitz* v. *Egginton*, 1 Holt, 141.

(*h*) *Ball* v. *Dunsterville*, 4 T.R. 313.

(*i*) *Brady* v. *Tod*, 9 C.B. N.S. 592; 30 L.J. C.P. 223; *Udell* v. *Atherton*, *ante*, p. 310, qualifying *Alexander* v. *Gibson*, 2 Campb. 555; *Helyear* v. *Hawke*, 5 Esp. 71.

(*j*) Parke, B., *Cornfoot* v. *Fowke*, 6 M. & W. 373; 9 L.J. Ex. 297; *Herne* v. *Nicholls*, *ante*, p. 310; *Armory* v. *Delamirie*, 1 Str. 505.

(*k*) *Fenn* v. *Harrison*, 3 T.R. 177.

(*l*) *Coleman* v. *Riches*, 16 C.B. 120; 24 L.J. C.P. 125; *Cornfoot* v. *Fowke*, *supra*.

mon business it is to sell, he thereby confers upon him an authority to do all that is necessary and usual to be done to obtain a purchaser (*m*); and, therefore, if the servant of a horse-dealer with express directions not to warrant does warrant, the master is bound, because the servant having a general authority to sell is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed (*n*). Here the maxim *respondeat superior* applies; and the principal has his remedy against the agent for his misconduct (*o*). Where a goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an assay then shown, and it appeared that he had forged the assay, and that the ingot was made out of a lodger's plate, which he had stolen, it was held that the master was answerable for the fraud of the apprentice (*p*), on the ground that the sale took place in the course of business in the master's shop (*q*). Where the owners of a vessel, which had once been classed A 1 at Lloyd's, authorised their agent, by power of attorney, to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner in all respects as he should think proper, and generally to represent the owners in relation to her management or sale as fully as if the owners were personally present, and to do all things necessary for that purpose though the same were not especially mentioned, it was held that the agent had authority to enter into a charter-party with a warranty that the ship was at the time of the charter-party A 1 at Lloyd's, though she was not so described in the power of attorney, and though she had ceased to be so classed when the power was given (*r*).

Representations by agents not amounting to a warranty.—It is not every affirmation and representation which will amount to a warranty. If the fact concerning which the representation is made lies as much within the knowledge of the one party as the other, and the agent making the statement merely says what he believes to be true, there is no warranty on the part of the agent of the truth of what he states; it is understood only, under such circumstances, that he does not wilfully state that which he knows to be false, either to mislead or to lull to sleep the vigilance of the other contracting party. And, if there is, under such circumstances, a defect unknown to the party making the statement, which

(*m*) *Dingle* v. *Hare*, 7 C.B. N.S. 145; 29 L.J. C.P. 148.

(*n*) Bayley, J., *Pickering* v. *Busk*, 15 East, 45; *Howard* v. *Sheward*, L.R. 2 C.P. 148; 36 L.J. C.P. 42.

(*o*) Ld. Kenyon, C. J., *Fenn* v. *Harrison*, 3 T.R. 760.

(*p*) *Grammar* v. *Nixon*, 1 Str. 653.

(*q*) Jervis, C. J., *Coleman* v. *Riches*, 16 C.B. 115; 24 L.J. C.P. 125.

(*r*) *Routh* v. *Macmillan*, 33 L.J. Ex. 38; 2 H. & C. 750.

the other party had as good means of discovering as the agent himself, the rule of *caveat emptor* applies (*s*). A servant, serving in a shop, and demanding only the ordinary market price of the wares he sells, may be asked this and that question as to the fitness of the different articles for particular purposes, and his answers to such queries would, in most instances, be considered the mere expression of his own individual judgment and opinion, given by way of guidance and advice to the purchaser, and not as warranties binding the principal to the truth of his representations.

Representations forming no part of contract with principal.—In order to charge the principal, it must not only be shown that the representation was made at the time the contract was entered into, but that it formed part of the foundation on which the contract rests (*t*). Therefore, if an agent employed by his principal to find parties willing to contract, and then to send them to the principal to conclude the bargain with him, makes in the course of conversation with them statements and representations respecting the subject-matter of the contract which are not afterwards included in the contract entered into with the principal himself, the latter will not be bound by them (*u*). Thus, where a house-agent, on going to show a house, was asked if there was anything objectionable about the house, to which he replied "Nothing whatever," and, after this conversation, the parties differed about the rent, and the matter was then referred to the principal, and a contract for the letting and hiring of the house was subsequently entered into with the principal himself, which contract made no mention of the previous representation of the agent, it was held that the principal was not bound by the representation (*x*).

Purchases by servant in name of master.—If a man sends his servant with ready money to buy goods, and the servant buys upon credit, the master is not chargeable. But, if the servant "usually buys for the master upon tick, and the servant buys some things without the master's order, yet, if the master were trusted by the trader, he is liable" (*y*). "If goods," observes Lord Ellenborough, "are taken up by the master, and the money given *afterwards* to the servant to pay, I am inclined to think the master liable, if the servant have not paid over the money; for he has given the servant authority to take up goods upon credit. It is therefore material to see when the money was given. If the servant were always in cash beforehand to pay for the goods, the

(*s*) *Fuller* v. *Wilson*, 3 Q.B. 58; 11 L.J. Q.B. 251; *Collins* v. *Evans*, 5 Q.B. 828; 13 L.J. Q.B. 180.

(*t*) *Helyear* v. *Hawke*, 5 Esp. 73.

(*u*) *Knight* v. *Barber*, 16 M. & W. 69; 16 L.J. Ex. 18.

(*x*) *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L.J. Ex. 297.

(*y*) Holt, C.J., Show. 95; *Southby* v. *Wiseman*, 3 Keb. 625; *Nickson* v. *Brohan*, 10 Mod. 111; *Pearce* v. *Rogers*, 3 Esp. 214.

master is not liable, as he never authorised him to pledge his credit; but if the servant were not so in cash, the master gave him a right to take up the goods on credit, and will be liable if the servant has not paid the plaintiff, though he may have received the money from the defendant, his master" (*z*). The mere relation of master and coachman or groom does not of itself involve, as a matter of law, ostensible authority for the coachman or groom to pledge his master's credit for forage for his horses (*zz*). But where a master sent his coachman wearing his livery to hire horses which the master afterwards used, knowing of whom they were hired, and without ascertaining if his credit had been pledged for them, it was held that the master was bound to pay the hire, although he had contracted with his coachman that he should provide horses, and had paid him a large salary for the purpose (*a*). If the father of a family put his children under the protection of servants, and lives himself at a distance from them, the servants have an implied authority to procure necessary medical advice in case of sudden illness or accident (*b*). But, if the plaintiff has shown a want of due caution, or has trusted the servant to an improper extent, the master will not be liable (*c*).

Authority of foremen and managers.—A foreman entrusted with the general management of a trade or business has an implied general authority from his employer to enter into all such contracts as are usually and necessarily entered into in the ordinary conduct and management of the business (*d*). If the acts of agency have been exercised in so open and public a manner that it may reasonably be inferred that the principal must have been cognizant of them, the principal will be liable, although no express authority can be proved. If the agent has published advertisements, and thereby induced parties to contract with him, the principal will be bound by the publicity of the announcement, although no actual authority has been given. "It is a question between the principal and his agent; and the public has nothing to do with it" (*e*). Wherever the principal, by his conduct, has held out the agent to the parties dealing with him as having a general power to act in the premises, his acts bind the principal; and the liability of the latter upon the contract cannot be qualified by the existence of any private instructions which the agent may have exceeded (*f*).

(*z*) *Rusby* v. *Scarlett*, 5 Esp. 76; *Miller* v. *Hamilton*, 5 C. & P. 433.

(*zz*) *Wright* v. *Glyn*, (1902) 1 K.B. 745; 71 L.J. K.B. 497.

(*a*) *Rimell* v. *Sampayo*, 1 C. & P. 254.

(*b*) *Cooper* v. *Phillips*, 4 C. & P. 584.

(*c*) *Stubbing* v. *Heintz*, 1 Peake, 66.

(*d*) *Summers* v. *Solomon*, 26 L.J. Q.B. 301; 7 E. & B. 879; *Richardson* v. *Cartwright*, 1 Car. & K. 328.

(*e*) *Runquist* v. *Ditchell*, 3 Esp. 64.

(*f*) Ld. Ellenborough, *Pickering* v. *Busk*, 15 East, 42; *Smethurst* v. *Taylor*, 12 M. & W. 554; 14 L.J. Ex. 86; *Smith* v. *M'Guire*, 3 H. & N. 554; 27 L.J. Ex. 465; *Edmunds* v. *Bushell*, L.R. 1 Q.B. 97; 35 L.J. Q.B. 20.

Thus, where J., carrying on business at one place, and having a branch establishment at another, placed the latter under the management and superintendence of B., as his agent, and the branch business was carried on in the name of B. & Co., but B. had no authority to accept bills, and B. nevertheless exceeded his authority by the acceptance of a bill of exchange, it was held that J. was liable thereon, it not being in his power to divest his agent, by any secret reservation, of the powers incidental to the character of principal which he had empowered him to assume (*g*).

Authority of telegraph clerks.—A telegraph clerk is only authorised to transmit a telegraphic message in the terms in which the sender delivers it; and, if he makes a mistake in the transmission of the message, the sender is not bound by it (*h*).

Authority of shipmasters.—Masters of ships have an implied general authority to bind the owners for necessary repairs done or supplies furnished to the vessel under their command; and by the word "necessary" is comprehended such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, might be expected to have ordered (*i*). He may also pledge the credit of the owners for such things as are absolutely necessary for the due prosecution of the voyage (*k*). If it be necessary to pay harbour dues, or pilotage, or the like, in ready money, and the master has not been furnished with the necessary funds, he has an implied authority to borrow money, and to bind the owners by a contract for that purpose. But this authority does not extend to cases where the owner can himself personally interfere, as in a home port, or in a port in which he has beforehand appointed an agent who can do the thing required (*l*). If the vessel is in a foreign port where the owner has no agent, or in an English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, the occasion authorises the master to pledge the credit of the owner and make him liable upon the contract. But in all these cases the things must be absolutely necessary to enable the vessel duly to prosecute the voyage (*m*). The owners will not be bound, if the money is borrowed, not upon their credit, but upon the private credit of the master himself (*n*). The liability of the owner depends, not on his ownership of the vessel merely, but on his

(*g*) *Edmunds* v. *Bushell, supra; Watteau* v. *Fenwick*, (1893) 1 Q.B. 346.

(*h*) *Henkel* v. *Pape*, L.R. 6 Ex. 7; 40 L.J. Ex. 15.

(*i*) *Webster* v. *Seekamp*, 4 B. & Ald. 352; *Weston* v. *Wright*, 7 M. & W. 396; 10 L.J. Ex. 329; *Stainbank* v. *Shepard*, 13 C.B. 441; 22 L.J. Ex. 341; *The Aaltjee Willemina*, L.R. 1 A. & E. 107.

(*k*) *Robinson* v. *Lyall*, 7 Price, 592.

(*l*) *Gunn* v. *Roberts*, L.R. 9 C.P. 331; 43 L.J. C.P. 233.

(*m*) As to home ports, see the 19 & 20 Vict. c. 97, s. 8; *Arthur* v. *Barton*, 6 M. & W. 143; 9 L.J. Ex. 187; *Johns* v. *Simons*, 2 Q.B. 425; *Stonehouse* v. *Gent*, *ib.* 431, n.

(*n*) *Thacker* v. *Moates*, 1 Moo. & R. 79.

having authorised the master to bind him, either expressly, or by his having held out the master as his master, and having thereby induced the vendor to supply the necessaries on the credit of the owner (*o*). The master has also, it seems, authority to settle a claim for demurrage made by him for the detention of the vessel at a foreign port (*p*).

Limitation of authority of shipmasters.—"The authority of the shipmaster is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary those which the shipowner has made" (*q*). He may take up money in foreign ports, and under certain circumstances at home, for necessary disbursements and for repairs, and bind the owners for repayment; but his authority is limited by the necessity of the case; and he cannot make them responsible for money not actually necessary, though he may pretend that it is (*r*). He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight-free. So with regard to goods put on board, he may sign a bill of lading, acknowledging the nature, quality, and condition of the goods; but his authority to give bills of lading is limited to such goods as have been actually put on board. A party, therefore, taking a bill of lading either originally or by endorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it, in order to charge the shipowner upon it (*s*); nor can the master draw bills of lading making the freight payable otherwise than to the shipowner (*t*). The shipmaster has no authority to sell any part of the ship or cargo, except in a case of absolute necessity (*u*), or where the sale is warranted by the law of the country in which it takes place (*x*); nor has he any authority to hypothecate the ship or to borrow money upon the credit of the shipowners, after the work has been done, for the purpose of paying the debt due for it (*y*). The master of a disabled ship has power under certain circumstances to forward the cargo by another ship; but he is not the agent of the owners of the cargo, so as to render them responsible for his act in so doing,

(*o*) *The Great Eastern*, L.R. 2 A. & E. 88; 36 L.J. Adm. 15.

(*p*) *Alexander* v. *Dowie*, 25 L.J. Q.B. 281; 1 H. & N. 152.

(*q*) *Harris* v. *Carter*, 3 E. & B. 559; 23 L.J. Q.B. 295.

(*r*) *Mackintosh* v. *Mitcheson*, 4 Exch. 175; 18 L.J. Ex. 385; *Edwards* v. *Havill*, 14 C.B. 107; 22 L.J. C.P. 8; *Organ* v. *Brodie*, 10 Exch. 450; 24 L.J. Ex. 70.

(*s*) *Grant* v. *Norway*, 10 C.B. 687; 20 L.J. C.P. 93; *Hubbersty* v. *Ward*, 8 Exch. 330; 22 L.J. Ex. 113; *Coleman* v. *Riches*, 16 C.B. 104; 24 L.J. C.P. 125; *Cox* v. *Bruce*, 18 Q.B.D. 147; 56 L.J. Q.B. 121; *Whitechurch* v. *Cavanagh*, (1902) A.C. 117; 71 L.J. K.B. 400.

(*t*) *Reynolds* v. *Jex*, 34 L.J. Q.B. 251; 7 B. & S. 83.

(*u*) *Freeman* v. *E. I. Co.*, 5 B. & Ald. 621; *The Bonita*, 30 L.J. Adm. 145; *The Gipsy*, 33 L.J. Adm. 195.

(*x*) *Cammell* v. *Sewell*, 5 H. & N. 728; 29 L.J. Ex. 350.

(*y*) *Beldon* v. *Campbell*, 8 Exch. 886; 20 L.J. Ex. 342.

where he has the opportunity of communicating with them or their agent, and neglects to avail himself of it (*z*). Where the master of a ship contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs; and the flag of a ship is notice to all the world that his implied authority is limited by the law of that flag (*a*).

When shipowners have appointed a shipmaster and placed him in charge of the vessel, and have been in the habit of paying for stores and repairs ordered by such master, the general authority of the latter cannot be revoked or circumscribed by any private contract between the master and the owners, of which the persons dealing with the master are ignorant (*b*).

Where the ship is let to freight, and the charter-party or contract of affreightment operates as a demise or bailment of the ship to the charterer, so as to clothe him with the possession as well as the use of the vessel, and constitute him the temporary owner, the master becomes the agent of the charterer; and the latter, and not the registered owner, is then responsible for stores ordered for the use of the vessel by the master in the course of his employment by the charterer (*c*). The shipowner, however, is *primâ facie* liable for repairs and stores ordered for his vessel by the master. If, therefore, on looking to the registry, the defendant is found to be the legal owner, a *primâ facie* liability is established against him. But the register is not conclusive; for the question is a pure question of contract and credit, which, like all other questions of goods sold or work done, must be decided by a jury upon consideration of all the circumstances.

If the charter-party operates, as it generally does, merely as a contract for the carriage of merchandise, the shipowner retaining the possession and control of the vessel through the medium of his servants and agents, he cannot repudiate the agency of the master acting as such with his knowledge. Therefore, a shipowner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract contained in a bill of lading signed by the master, such as injury to the goods by improper stowage, if at the time of shipment the shipper had no notice of the charter (*d*). So, where the defendant had never

(*z*) *Gibbs* v. *Grey*, 2 H. & N. 22; 26 L.J. Ex. 286; *Duranty* v. *Hart*, 33 L.J. Adm. 116.

(*a*) *Lloyd* v. *Guibert*, 35 L.J. Q.B. 74; L.R. 1 Q.B. 115; *The Karnak*, L.R. 2 P.C. 505; 38 L.J. Adm. 57; *The Gaetano*, 7 P.D. 137; 51 L.J. P. 67; *The August*, (1891) P. 328; 60 L.J. P. 57.

(*b*) *Rich* v. *Coe*, Cowp. 636; *Preston* v. *Tamplin*, 2 H. & N. 684; 27 L.J. Ex. 192.

(*c*) *Fraser* v. *Marsh*, 13 East, 238; *Briggs* v. *Wilkinson*, 7 B. & C. 34; 5 L.J. (O.S.) K.B. 349; *Reeve* v. *Davis*, 1 Ad. & E. 312.

(*d*) *The St. Cloud*, 1 B. & L. 4; *Sandeman* v. *Scurr*, L.R. 2 Q.B. 86; 36 L.J. Q.B. 58; *The Figlia Maggiore*, L.R. 2

employed the plaintiff himself to do repairs of his vessel, but was the legal owner upon the register, and was in concurrent possession of the ship with a party to whom he professed to have sold it, and was fully aware that the shipmaster who was appointed by the latter was giving orders for repairs, and some of the defendant's servants were on board and in charge of the vessel, it was held that the defendant was responsible for repairs done to the ship by the plaintiff upon the order of the shipmaster (*e*). Where, on the other hand, the shipowner had sold his shares in a vessel, and had ceased to be beneficially interested in the ship, and was not known as a part owner to the party doing the repairs until after the repairs had been ordered and done, but his name continued on the register, it was held that he was not liable for such repairs, unless it could be shown that the master who gave the order for them had an express or implied authority to bind him (*f*). And so where the owner of the ship has so dealt with it as to have given all the rights of ownership for a limited time to some other person who appoints and pays the master, officers, and crew, and gives them orders, the owner is not liable for the loss of goods shipped under bills of lading signed by the captain. In such a case the charterer, during the period of the charter, may be regarded in one sense as the owner of the ship, and, unless the captain has express authority to pledge the credit of the true owner, that owner is not liable (*g*); but where a charter-party contained the following special clause: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under this charter. In signing bills of lading, it is expressly agreed that the captain shall only do so as agent for the charterers, and the charterers hereby agree to indemnify the owners from all consequences or liabilities (if any) that may arise from the captain signing bills of lading," it was held that that stipulation, although valid as between the charterers and the owners, did not affect the true position of the captain and crew, and had no effect at all upon the holder of the bill of lading, although the bill of lading referred in terms to the charter-party (*h*). A part owner of a ship has no implied general authority to bind his co-owners for repairs (*i*). Where a party is mortgagee of a ship only, taking merely the security of the ship with-

A. & E. 106; 37 L.J. Adm. 52; *The Nepoter*, L.R. 2 A. & E. 375; 38 L.J. Adm. 63.

(*e*) *Frost* v. *Oliver*, 2 E. & B. 315; 22 L.J. Q.B. 353.

(*f*) *Curling* v. *Robertson*, 8 Sc. N.R. 19; 13 L.J. C.P. 137; *Mitcheson* v. *Oliver*, 5 E. & B. 444; 25 L.J. Q.B. 39; and see *Hibbs* v. *Ross*, L.R. 1 Q.B. 534; 35 L.J. Q.B. 193.

(*g*) *Baumwoll Manufactur* v. *Furness*, (1893) A.C. 8; 62 L.J. Q.B. 201.

(*h*) *Manchester Trust* v. *Furness*, (1895) 2 Q.B. 539; 64 L.J. Q.B. 766.

(*i*) *Brodie* v. *Howard*, 17 C.B. 118; 25 L.J. C.P. 57.

out intending to incur any of the liabilities incident to ownership, the bare circumstance of his being entitled to the vessel, and to the earnings of the ship, will not make the master his agent so as to bind him in respect of contracts entered into by the master after the date of the mortgage (*k*). A mortgagee in possession of a ship is not liable for necessaries supplied, unless the master in ordering them acted as his agent (*l*). A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action: the creditor has an election to sue either one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other (*m*).

Authority of ship's husband.—A ship's husband who has authority from the owners to make a charter-party by which commission on freight, primage, and demurrage, is to be due to the charterers, has not power to bind the owners by making an agreement to cancel the charter-party, and pay the charterers a sum of money in lieu of commission, although such agreement is for the benefit of the owners (*n*). The procuring of charters and freights is part of his duty and is covered by his remuneration (*o*). His authority extends to the conduct on shore of all that concerns the employment of the ship, and he may therefore bind the owners by orders for the repair, fitting and outfit necessary for such employment (*p*).

Authority of brokers.—One who employs a broker to transact business for him in a general market, as, for instance, upon the Stock Exchange, impliedly authorises him to deal according to the general and known usages and customs of that market, although he may not himself be aware of their existence. But, when an usage or custom is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to be aware of it; and, in order to bind persons who were not aware of it, it must also appear to be a reasonable usage (*q*).

Authority of ship brokers.—If a broker who is authorised to advertise a ship for a voyage, warrants by his advertisement that she shall sail with convoy, the shipowners are bound by the warranty,

(*k*) *Myers* v. *Willis*, 17 C.B. 103; 18 *ib.* 886; 25 L.J. C.P. 39, 255; *Hackwood* v. *Lyall*, 17 C.B. 124; *Mackenzie* v. *Pooley*, 11 Exch. 638; 25 L.J. Ex. 124.

(*l*) *The Troubadour*, L.R. 1 Adm. 302.

(*m*) *Priestley* v. *Fernie*, 34 L.J. Ex. 172; 3 H. & C. 977.

(*n*) *Thomas* v. *Lewis*, 4 Ex. D. 18; 48 L.J. Ex. 7.

(*o*) *Williamson* v. *Hine*, (1891) 1 Ch. 390; 60 L.J. Ch. 123.

(*p*) *The Huntsman*, (1894) P. 214.

(*q*) *Grissell* v. *Bristowe*, L.R. 3 C.P. 112; 38 L.J. C.P. 10; *Maxted* v. *Paine*, L.R. 6 Ex. 132; 40 L.J. Ex. 57; *Nickalls* v. *Merry*, L.R. 7 H.L. 530; *Spooner* v. *Browning*, (1898) 1 Q.B. 528; 67 L.J. Q.B. 339.

although in giving it the broker may have exceeded his authority (*r*).

Authority of counsel.—Counsel retained to conduct a cause is clothed with an apparent authority to do everything belonging to the conduct of it, which, in the exercise of his discretion, he thinks best for the interest of his client; and, if, acting within the limits of this apparent authority, he enters into an agreement with the counsel for the other side as to the cause, this agreement is binding on the client (*rr*), but not if contrary to conditions imposed by the client. But counsel has no right to manage a cause against the will of his client or to make a binding agreement as to it, if the other side is informed that this apparent general authority has been, in fact, limited (*s*).

Authority of solicitors.—The force of a solicitor's retainer is at an end, and his power to bind his client by a compromise ceases, when judgment is recovered (*t*); but if, after judgment, the relation of solicitor and client is continued or re-created, the former will have authority to bind the latter by a compromise (*u*). A solicitor retained to bring an action has no implied authority to compromise the claim before action brought (*x*).

Rights of agents on simple contracts.—Simple contracts entered into by agents, in their representative character, on behalf of a principal whose name is disclosed at the time of contracting, must, as a general rule, be enforced by the principal; and the agent cannot bring an action upon them in his own name (*y*), unless he can show that he has an interest or a special property in the subject-matter of the contract, or unless he has so contracted as to make himself personally responsible for the fulfilment of the contract (*z*). But, if a bill of exchange or a promissory note is made payable to one man for "the use," or "for and on behalf," or for the benefit of another person named on the face of the bill or note, the payee is the proper party to bring an action upon the instrument (*a*). When a written contract has been entered into by an agent on behalf of his principal, and the agent's representative character is not disclosed on the face of such written contract, the agent is entitled to maintain an action thereon, unless the principal interferes to prevent him (*b*). So, if an agent carries on trade for his principal in his own name, and ostensibly on his

(*r*) *Runquist* v. *Ditchell*, 2 Campb. 556, n.

(*rr*) *Neale* v. *Gordon-Lennox*, 71 L.J. K.B. 939; (1902) A.C. 465.

(*s*) *Strauss* v. *Francis*, L.R. 1 Q.B. 379; 35 L.J. Q.B. 133.

(*t*) *Macbeath* v. *Ellis*, 4 Bing. 578.

(*u*) *Butler* v. *Knight*, L.R. 2 Ex. 109; 36 L.J. Ex. 66.

(*x*) *Macaulay* v. *Polley*, (1897) 2 Q.B. 122; 66 L.J. Q.B. 665.

(*y*) *Fairlie* v. *Fenton*, L.R. 5 Ex. 172; 39 L.J. Ex. 107.

(*z*) *Cooke* v. *Willson*, 1 C.B.N.S. 153; 26 L.J. C.P. 15; *Fawkes* v. *Lamb*, 31 L.J. Q.B. 98.

(*a*) *Evans* v. *Cramlington*, Carth. 5; 2 Ventr. 307. See 45 & 46 Vict. c. 61, s. 35, *post*, p. 1116.

(*b*) *Schmaltz* v. *Avery*, 16 Q.B. 659; 20 L.J. Q.B. 228.

own account, he is entitled to maintain an action in respect of goods sold by him in the course of that trade, unless the real principal interferes, and asserts his right to the sum due (*c*). Inasmuch as the agent is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless it can be also shown that he is prohibited from carrying on that action by the person in whose behalf it was made. In such cases the action may be brought either in the name of the person by whom, or of the party for whom, the contract was made (*d*).

Right of action of factors, auctioneers, and policy-holders.—If the agent himself has an interest or a special property in the subject-matter of the contract, he is entitled to maintain an action upon it. Where a broker has advanced money on the credit of a cargo consigned to him by his principal for sale, he is entitled to an action in his own name against the buyer, although the sale note given by the broker mentions the name of the principal (*e*); and the buyer in such a case cannot set off a debt due to him from the principal in an action by the agent. But, if, by the introduction of the name of the principal into the contract, the defendant has been prejudiced, he will be entitled to make use of that circumstance as a defence. So, too, in the sale of goods by a factor, although the principal may be named or known at the time of the sale, yet, as the factor has a claim on the price of the goods in the hands of the buyer for the balance due to him on the general account with his principal, he has a right to require payment of the price, to the extent of such general balance, to himself, and not to the principal (*f*). An auctioneer has a special property in goods which he is employed to sell, with a lien for the charges of the sale, the commission, &c.; and he may, therefore, maintain an action against a buyer for the price of goods sold by him, although the sale was at the house of the principal, and the goods were publicly known to be the property of the latter (*g*). He has a lien also on the proceeds of the sale, as well as on the specific article sold, and seems to be in the same position as a factor who sells goods upon which he has advanced money, so that it is no answer to an action by an auctioneer for the price of goods sold by him to say that before action the defendant paid the price to the principal (*h*). But it is otherwise if the auctioneer's charges have been paid before action, and the purchaser has a good answer to any action by the

(*c*) *Gardiner* v. *Davis*, 2 C. & P. 49.

(*d*) *Sargent* v. *Morris*, 3 B. & Ald. 277; *Clay* v. *Southern*, 7 Exch. 717; 21 L.J. Ex. 202; R. S. C. 1883, Ord. XVI.

(*e*) *Atkyns* v. *Amber*, 2 Esp. 493.

(*f*) *Drinkwater* v. *Goodwin*, Cowp. 255.

(*g*) *Williams* v. *Millington*, H. Bl. 81; *Woolfe* v. *Horne*, 2 Q.B.D. 355; 46 L.J. Q.B. 534.

(*h*) *Robinson* v. *Rutter*, 4 E. & B. 956; 24 L.J. Q.B. 250; *Webb* v. *Smith*, 30 Ch.D. 192.

vendor for the price (*i*); and, if goods are sold, to be paid for at a future period, and are delivered to the buyer, without notice from the agent that he has any lien or claim on the price for duty, commission upon selling, or the like, and the buyer, in the absence of such notice, settles with the principal, the agent's right of action is destroyed (*k*). A policy-broker who effects a policy of insurance in his own name, as agent, at the same time declaring for whose use, benefit, or interest the same is made, is entitled to an action on the policy, inasmuch as, by the usage of trade, he has a lien upon it for the premium, which is generally paid by the broker, also for his commission, and for the general balance due to him on the account between himself and his principal.

Repudiation of contract by principal.—When an agent has entered into a contract of sale for an unnamed and unknown principal, it is no defence to an action brought by the agent upon that contract, to say that the principal afterwards repudiated it (*l*).

Pretended assumption of agency.—When a man has assumed to himself the character of an agent to another, whom he names as his principal, the law will not permit him to shift his situation, and bring an action as the principal and party really interested in the contract, without giving to the defendant previous notice of the situation in which he stands. Having misled the defendant by assuming a character and situation which did not belong to him, he is bound to undeceive him before bringing an action (*m*). But, if the principal is not named on the face of the contract, the party professing to contract as agent for an unnamed principal is not precluded from saying at any time, "I am myself that principal," and from asserting his rights in that character (*n*).

Right of action of agents on contracts under seal.—If the agent contracts under seal in his own name on behalf of his principal, he may sue upon the contract, although his representative character is disclosed on the face thereof; but, if the principal is made to covenant in his own name, and not the agent for him and in his behalf, the agent has then, of course, no right of action at all upon the contract (*o*).

Liabilities of agents on simple contracts.—Whenever an agent contracts in his own name for the fulfilment of a particular act or duty, without any qualification of his liability on the face of the contract, he is personally responsible for the fulfilment of the act

(*i*) *Grice* v. *Kenrick*, L.R. 5 Q.B. 340; 39 L.J. Q.B. 175.
(*k*) *Coppin* v. *Walker*, 7 Taunt. 242.
(*l*) *Short* v. *Spackman*, 2 B. & Ad. 962.
(*m*) *Bickerton* v. *Burrell*, 5 M. & S. 383; *Rayner* v. *Grote*, 15 M. & W. 359; 16 L.J. Ex. 79.
(*n*) *Schmaltz* v. *Avery*, 16 Q.B. 659; 20 L.J. Q.B. 228, *ante*, p. 320.
(*o*) *Ante*, p. 310.

undertaken to be done, although he was known to be acting only as an agent for some third party (*p*), unless it was expressly agreed that he was not to incur any personal liability upon the contract (*q*). Where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal (*r*); and the use of the words "as agent for" in the body of the contract does not prevent the liability of a party who signs as principal (*s*). For the words "as agent" may be merely words of description, but if the words "on account of" are used there is no ambiguity, and the intention to act for another is clear (*t*). So, whenever, in the body of a simple contract in writing, the agent contracts in his own name, and signs his name to the contract, he may render himself personally responsible for the fulfilment of the contract, although he declares that he contracts on behalf of a named principal (*u*), or that he signs by procuration of, or as agent for, a named principal (*x*). If it appears from the general context of the written instrument that the agent himself was to be responsible for the due fulfilment of the contract, the words "for and on behalf" or "as agent for," will be deemed to be mere matter of description, and will not exempt the agent from personal liability; and there is no distinction in this respect between deeds and simple contracts (*y*). Whether he is so liable depends upon the terms of the particular contract, construed in connexion with the surrounding circumstances and the relative situations of the parties at the time the contract was entered into (*z*). If, on the face of the contract, there is an express disclaimer of personal liability on the part of the agent, effect will be given to such disclaimer, although the agent has contracted in his own name on behalf of an unnamed principal; but the agent must have had authority to enter into the contract on behalf of his principal, and must have intended to contract so as to bind the latter (*a*). Where goods were accepted

(*p*) *Reid* v. *Draper*, 6 H. & N. 813; 30 L.J. Ex. 268.

(*q*) *Wake* v. *Harrop*, 1 H. & C. 202; 31 L.J. Ex. 451.

(*r*) *Thomson* v. *Davenport*, 9 B. & C. 78; 2 Sm. L. C. 368 (ed. 10).

(*s*) *Paice* v. *Walker*, L.R. 5 Ex. 173; 39 L.J. Ex. 109; and see *Hough* v. *Manzanos*, 4 Ex.D. 104; 48 L.J. Ex. 398.

(*t*) *Gadd* v. *Houghton*, 1 Ex.D. 357; 46 L.J. Ex. 71.

(*u*) *Parker* v. *Winlow*, 7 E. & B. 942; 27 L.J. Q.B. 49.

(*x*) *Lennard* v. *Robinson*, 5 E. & B. 126; 24 L.J. Q.B. 275.

(*y*) Best, C.J., *Norton* v. *Herron*, 1 Car. & P. 648; Ry. & Mood. 231; *Tanner* v. *Christian*, 4 E. & B. 597; 24 L.J. Q.B. 91.

(*z*) *Downman* v. *Williams*, 7 Q.B. 103; *Spittle* v. *Lavender*, 5 Moo. 270; *Gaby* v. *Driver*, 2 Y. & J. 555.

(*a*) *Oglesby* v. *Iglesias*, E. B. & E. 930; 27 L.J. Q.B. 356.

by an agent under a bill of lading, which made them deliverable to him "for the London Gas Company, or to his assignees, he or they paying freight for the said goods," and the defendant on the delivery of the goods promised to pay the freight, it was held that, as the defendant appeared, upon the face of the bill of lading, to be merely the agent of the London Gas Company, and had received the goods in that character, and not on his own account, the promise must be taken to have been made by him in his character of agent for the company, to pay the freight on their account, and was not a promise to be personally responsible for it (*b*).

Whenever the agent contracts as agent, and signs his name, adding "as agent," or "by procuration," or signs the name of the principal, adding "by A. B., as agent," and the principal is named in the body of the contract, it will require extremely strong words to control the effect of this form of signature, and render the party so signing personally responsible upon the contract (*c*).

Contracts by agents on behalf of foreign principals.—When an English agent is contracting on behalf of a foreign principal, it will, in general, be presumed that the agent was intended to be responsible for the fulfilment of the contract (*d*). In such a case both the agent and the principal are liable upon the contract; but the presumption of liability on the part of the agent may be rebutted by the form and terms of the contract (*e*).

Undisclosed agencies—Oral evidence.—Whenever an agent enters into an agreement or undertaking, and neglects to declare the agency, and to qualify his liability upon the face of the contract, he is personally responsible, and is not, in general, permitted to show, through the medium of oral evidence, that the other contracting party knew him to be merely an agent, and knew who his principal was at the time he signed the contract. Such evidence is admitted, as we have already seen, in order to enable a creditor to get at the real principal, and to charge him with the burthen of the performance of the contract; but not for the purpose of discharging the agent from an agreement or undertaking which is absolute and unqualified upon the face of it, and in which the agent has thought fit to represent himself as the really contracting party (*f*). But, if an agent contracting on behalf of his principal

(*b*) *Amos* v. *Temperley*, 8 M. & W. 805; 11 L.J. Ex. 183.

(*c*) *Deslandes* v. *Gregory*, 30 L.J. Q.B. 36; 2 E. & E. 610; *Green* v. *Kopke*, 18 C.B. 549; 25 L.J. C.P. 297; *Mahony* v. *Kekulé*, 14 C.B. 390; 23 L.J. C.P. 54; *Jenkins* v. *Hutchinson*, 13 Q.B. 744; 18 L.J. Q.B. 274; *Deslandes* v. *Gregory*, 2 E. & E. 602; 30 L.J. Q.B. 36. As to the liability of an agent to the trustee in bankruptcy of the principal, see *Helder, Ex parte*, 24 Ch.D. 389; 53 L.J. Ch. 106.

(*d*) *Wilson* v. *Zulueta*, 14 Q.B. 105; 19 L.J. Q.B. 49; *Cooke* v. *Wilson*, 1 C.B. N.S. 153; 26 L.J. C.P. 15.

(*e*) *Mahony* v. *Kekulé*, *supra*.

(*f*) *Higgins* v. *Senior*, 8 M. & W. 844; *Hanson* v. *Roberdeau*, Peake, 163; *Kendray* v. *Hodgson*, 5 Esp. 228; *De Gelder*

has contracted in writing so as to render himself personally responsible upon the written contract, oral evidence is now admissible to show that at the time the contract was entered into the plaintiff knew the defendant to be only an agent, and that it was expressly agreed that he should not incur any personal liability upon the contract, and that the drawing up the agreement so as to make the defendant personally liable was the result of a mistake, and was contrary to the intention of the parties to the contract (*g*). Although brokers contract as such on the face of their bought and sold notes, yet, if they do not name their principals, they are by the custom of some trades liable to be treated as principals, and sued as such (*h*).

All bills of exchange and promissory notes signed by an agent, without any qualification of his liability, are binding upon the agent; and he cannot discharge himself from liability merely by showing that, at the time he accepted or endorsed the bill, or made the note, he was known to be merely an agent, having himself no interest in, and deriving no benefit from, the transaction (*i*). By the Bills of Exchange Act, 1882 (*k*), s. 26, "(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability. (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

If an agent orders goods, or enters into dealings and transactions in his own name on behalf of an unknown or undisclosed principal, he is, of course, himself personally liable in respect of such transactions, unless the party with whom he has contracted has discovered the principal, and elected to charge him in preference to the agent. "If an auctioneer sells commodities without saying on whose behalf he sells them, the purchaser is entitled to look to him personally for the completion of the contract" (*l*). And even where the name of the principal appears upon the face

v. *Savory*, 2 Keb. 812; *Gray* v. *Gutteridge*, 1 Moo. & R. 618; 6 L.J. (O.S.) K.B. 154; *Franklyn* v. *Lamond*, 16 L.J. C.P. 224; 4 C.B. 664.

(*g*) *Wake* v. *Harrop*, 1 H. & C. 202; 31 L.J. Ex. 451, *ante*, p. 323.

(*h*) *Humfrey* v. *Dale*, E. B. & E. 1004; 27 L.J. Q.B. 390; *Fleet* v. *Murton*, L.R. 7 Q.B. 126; 41 L.J. Q.B. 49. See *Southwell* v. *Bowditch*, 1 C.P.D. 374; 45 L.J. C.P. 630, where a distinction is drawn between the words "bought of you for my principals," and "sold for you to my principals."

(*i*) *Leadbitter* v. *Farrow*, 5 M. & S. 345; *Thomas* v. *Bishop*, 2 Str. 955; *Buckley, Ex parte*, 14 M. & W. 469; 14 L.J. Ex. 341.

(*k*) 45 & 46 Vict. c. 61.

(*l*) *Hanson* v. *Roberdeau*, Peake, 163; *Franklyn* v. *Lamond*, 4 C.B. 644; 16 L.J. C.P. 221.

of the contract, if the contract shows that the auctioneer is dealing personally with the purchaser, the auctioneer will be personally bound by his contract (*m*). But, if the agent contracts in his representative character avowedly as agent, on behalf of a named or known principal, he is not personally responsible upon the contract, unless he has himself some special interest in the subject-matter of the contract, as presently mentioned and described (*n*). Wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent; and there is no foundation for holding him liable unless the goods come to his use in some shape or another (*o*).

Notoriety of agency—Public Officers.—If a person is placed in a situation rendering his character of agent notorious, he cannot be made personally liable in respect of his dealings and transactions in the usual course of his employment (*p*). A witness who has been subpœnaed to give evidence in a cause conducted by a solicitor cannot maintain an action against the latter for his expenses of attendance, as it is notorious that the solicitor is a mere agent, and the witness knows that he attends to give evidence not for him but for his principal (*q*). If, however, the agent himself has any interest in the subject-matter of the contract—if he acts for himself as well as for third parties whom he professes to represent—he cannot escape from liability under a plea of agency. In such a case he is both principal and agent, and is responsible accordingly.

Pretended agencies.—When the agent contracts without authority from the principal on whose behalf he professes to act, the nature and extent of his liability will depend upon the nature and form of the contract. He cannot be sued in any case upon the contract, if he has not contracted therein in his own name (*ante*, p. 324), although he may be liable to the plaintiff for warranting or representing himself to be an agent, and to have authority to make the contract, when he is not the agent and had no such authority (*r*); provided the misrepresentation was a misrepresenta-

(*m*) *Woolfe* v. *Horne*, 2 Q.B.D. 355; 46 L.J. Q.B. 534.

(*n*) *Infra*, and see p. 321.

(*o*) *Owen* v. *Gooch*, 2 Esp. 568.

(*p*) *Pochin* v. *Pawley*, 1 W. Bl. 670.

(*q*) *Robins* v. *Bridge*, 3 M. & W. 118; 7 L.J. Ex. 49.

(*r*) *Collen* v. *Wright*, 8 E. & B. 647; 27 L.J. Q.B. 215; *Simons* v. *Patchett*, 7 E. & B. 568; 26 L.J. Q.B. 195; *Pow* v. *Davis*, 1 B. & S. 220; 30 L.J. Q.B. 257; *Hughes* v. *Græme*, 34 L.J. Q.B. 335; *Cherry* v. *Colonial Bank of Australasia*, L.R. 3 P.C. 24; 38 L.J.P.C. 49; *Richardson* v. *Williamson*, L.R. 6 Q.B. 276; 40 L.J. Q.B. 149; *Weeks* v. *Propert*, L.R. 8 C.P. 427; 42 L.J. C.P. 129; *McCollin* v. *Gilpin*, 6 Q.B.D. 516; *Dickson* v. *Reuter's Telegraph Co.*, 3 C.P.D. 1; 47 L.J. C.P. 1; *Chapleo* v. *Brunswick Building Society*, 6 Q.B.D. 696; 50 L.J. Q.B. 372; *National Coffee Palace Co., In re*, 24 Ch.D. 367; 53 L.J. Ch. 57; *Meek* v. *Wendt*, 21 Q.B.D. 126, affirmed by C.A.; see W.N. (1889) p. 14; *Halbot* v. *Lens*, (1901) 1 Ch. 344; 70 L.J. Ch. 125; *Oliver* v. *Bank of England*, (1902) 1 Ch. 610; 71 L.J. Ch. 388.

tion of fact and not merely of law (*s*). A person who contracts in his own name on behalf of another, but who is really a principal, cannot shelter himself from responsibility by describing himself on the face of the contract as an agent, and providing that he shall not be personally responsible (*t*). Where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it, and a stranger cannot by a subsequent ratification relieve him from that liability (*u*). If the acceptor of a bill of exchange professes to accept per procuration as agent, he is responsible upon the bill, if he was himself the principal, and acted without the authority of the party on whose account he professed to act (*x*). But the burthen of proving that the party describing himself on the face of the contract as agent is in truth the principal falls upon the plaintiff seeking to falsify the contract, and to show that the defendant assumed a false position (*y*).

"One person may," observes Erle, J., "assert he has authority to make a contract on behalf of another, and *bonâ fide* believe it, and yet it may be deceit if he makes the positive assertion without disclosing the grounds on which he erroneously, as it turns out, believes it" (*z*). Where, therefore, the defendant represented himself to be the agent of one Gardner, and as such authorized to let an estate to the plaintiff, and the defendant had no authority to let the property, although he believed that he had, and in consequence of that mistake the plaintiff was induced to lay out money upon the estate, relying on the representation, it was held that the defendant was liable for all the expenses incurred by the plaintiff on the strength of the representation (*a*). "I am of opinion," observes Willes, J., "that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by reason of the assertion of authority being untrue. This is not the case of a bare misstatement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person he has induced to contract is con-

(*s*) *Rashdall* v. *Ford*, L.R. 2 Eq. 750; 35 L.J. Ch. 769; *Beattie* v. *Ebury* (*Lord*), L.R. 7 Ch. 777; 41 L.J. Ch. 804.

(*t*) *Schmaltz* v. *Avery*, 20 L.J. Q.B. 229; 16 Q.B. 659.

(*u*) *Kelner* v. *Baxter*, L.R. 2 C.P. 174; 36 L.J. C.P. 94.

(*x*) *Owen* v. *Van Uster*, 10 C.B. 324; 20 L.J. C.P. 61.

(*y*) *Carr* v. *Jackson*, 21 L.J. Ex. 137; 7 Exch. 382.

(*z*) *Jenkins* v. *Hutchinson*, 13 Q.B. 748; 18 L.J. Q.B. 274; *Randell* v. *Trimen*, 18 C.B. 786; 25 L.J. C.P. 307; *Richardson* v. *Dunn*, 8 C.B. N.S. 655; 30 L.J. C.P. 44.

(*a*) *Collen* v. *Wright*, 8 E. & B. 647; 27 L.J. Q.B. 215.

cerned, in no way aids such person, or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion, believed and acted upon, as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorized, that the authority he professes to have does in point of fact exist" (*b*). Thus, where a person lent money to a building society, and received a receipt signed by two directors, but the society had no power to borrow money, it was held that, by signing the receipt, the directors in effect represented that they had authority to make a valid contract of loan on behalf of the society, and that they were therefore personally liable to repay the money (*c*).

If the authority is of a public nature, or the grounds of it are known to the other contracting party, and the agent does no more than express his own opinion and belief as to the nature and extent of the authority vested in him, and manifests an intention merely to bind the principal if he has power so to do, and guards himself against any positive representation of authority, he will not then be responsible if it should turn out that he had not the power he was supposed to possess (*d*).

A mistake made by an agent in describing the quantity of goods he has bought for his principal, or the time of their delivery, or the price to be paid for them, may render such agent liable to his principal for negligence or for a breach of duty (*e*), but does not render him liable to an action for deceit (*f*); it is otherwise, however, if he knowingly makes a false representation with intent to deceive his employer (*g*).

Contracts by agents of irresponsible principals—Government agents.—If the other contracting party chooses to give credit to a known irresponsible principal, acting through the medium of an agent, taking his chance of payment from such principal, the agent will not, in such a case, be liable upon the contract (*h*). If the

(*b*) *Collen* v. *Wright*, 8 E. & B. 647; 27 L.J. Q.B. 215; *Pow* v. *Davis*, 4 B. & S. 220; 30 L.J. Q.B. 257.

(*c*) *Richardson* v. *Williamson*, L.R. 6 Q.B. 276; 40 L.J. Q.B. 145. See *Cherry* v. *Colonial Bank of Australasia*, L.R. 3 P.C. 24; 38 L.J. P.C. 49; *Leather* v. *Simpson*, L.R. 11 Eq. 398; 40 L.J. Ch. 177.

(*d*) *Macgregor* v. *Deal and Dover Ry.*, 22 L.J. Q.B. 69; 18 Q.B. 618.

(*e*) See, *per* Blackburn, J., *Ireland* v. *Livingston*, L.R. 5 H.L. 395; 41 L.J. Q.B. 201.

(*f*) *Thom* v. *Bigland*, 8 Exch. 729; 22 L.J. Ex. 243.

(*g*) *Pewtriss* v. *Austen*, 6 Taunt. 522.

(*h*) *Lewis* v. *Nicholson*, 18 Q.B. 503; 21 L.J. Q.B. 311; *Wake* v. *Harrop*, 1 H. & C. 202; 31 L.J. Ex. 451.

agent acts in a public employment, and the extent of his authority is as much known to the party contracting with the agent as to the agent himself, and it is manifest that the former intended to rely on the subsequent ratification of the contract by the principal, and was not led into the contract by any misstatement or misrepresentation on the part of the agent respecting his authority in the matter, the agent will not incur any personal liability. Thus the governor of a fort, or of a colony, is not personally answerable for stores ordered by him for the use of government; neither is a military commissary, nor the captain of a troop, liable for forage supplied to the army or to the troop, nor for provisions furnished to the men; nor is the First Lord of the Treasury personally answerable for the expenses incurred by a person employed in raising a regiment for the service of government (*i*); nor is the Secretary of War liable to a retired clerk of the War Office for his retired allowance, although such allowance was included in the yearly estimates drawn for by such secretary, and received by him as applicable to such specific allowance, there being no duty from which the law will imply a promise from the secretary, who is the agent and officer of the Crown, and responsible only to the Crown for the due execution of the trust committed to him (*k*). No action lies against a public servant of the Crown contracting on behalf of the Crown upon any implied warranty of authority to make the contract (*l*). But an action has been held to lie against H.M. Commissioners of Public Works for damages for breach of a contract entered into by them with a builder for the erection of a public building (*m*). In all these cases the nature and extent of the agent's authority are as much known to the party with whom he contracts as to the agent himself; and it is obvious that in these public transactions the individual credit of the agent is not intended to be pledged, but that the parties who contract with him rely on the honour and good faith of the irresponsible principal. The agent of a foreign government cannot be sued upon their bonds (*n*). The clerk of the County Court, giving orders for the fitting up of a building for the holding of the sittings of the court, is not a public officer acting in a public employment, so as to be exonerated from liability in respect of the order so given (*o*).

Money received by agent for principal.—If money be paid to a known agent for the use of his principal, an action for money

(*i*) *Rice* v. *Chute*, 1 East, 579; *Myrtle* v. *Beaver*, *ib.* 135; *Macbeath* v. *Haldimand*, 1 T.R. 180.

(*k*) *Gidley* v. *Palmerston* (*Lord*), 3 B. & B. 275; 7 Moore, 91. See also *Palmer* v. *Hutchinson*, 6 App.Cas. 619; 50 L.J. P.C. 62.

(*l*) *Dunn* v. *Macdonald*, (1897) 1 Q.B. 555; 66 L.J. Q.B. 420.

(*m*) *Graham* v. *Public Works Commissioners*, (1901) 2 K.B. 781; 70 L.J. K.B. 860.

(*n*) *Twycross* v. *Dreyfus*, 5 Ch.D. 605; 46 L.J. Ch. 510.

(*o*) *Autey* v. *Hutchinson*, 17 L.J. C.P. 304; 6 C.B. 266.

had and received cannot be sustained against the agent if it appears that the principal has the least colour of right to the money; for the courts will not try the right of the principal to the money in an action against the agent (*p*). The agent having received the money on behalf of the principal, and for his use, is accountable to the latter for it. The maxim, *respondeat superior*, therefore, applies; and the agent, whether he has paid over the money, or whether he has not, is answerable to the principal alone (*q*). But, if the payment to the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it over, or settled for it in account with his principal, at the time he receives notice of the mistake. Thus, if money, through a mistake of fact, is paid to an agent, and placed by him to the account of his principal, but not paid over, an action lies against him for the recovery of the money; and the mere passing such money in account, making rests without any new credit given, fresh bills accepted, or further sum advanced to the principal in consequence of it, is not equivalent to a payment of it over (*r*). But if he has paid it over or settled for it in account with his principal, he cannot be compelled to refund it (*s*). If, however, he misleads the plaintiff by giving him to understand that he has not paid over the money, and thereby induces the plaintiff to sue him for its recovery, he is then precluded from insisting on the defence of payment over (*t*).

Money wrongfully and illegally received by agent.—The doctrine, that the receipt of the agent is the receipt of the principal, does not extend to the case of a wrong-doer, so that if an agent gets money into his hands by his own fraudulent or illegal act, he cannot discharge himself from liability by paying it over to his principal (*u*).

Receipt of money by agents to be paid over to stranger.—The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes, as we have already seen (*x*), no liability upon the agent to such third

(*p*) *Sadler* v. *Evans*, 4 Burr. 1985; *Greenward* v. *Hurd*, 4 T.R. 553.

(*q*) *Dixon* v. *Hamond*, 2 B. & Ald. 313; *Hardman* v. *Wilcock*, 9 Bing. 382, n.; *Stephens* v. *Badcock*, 3 B. & Ad. 354; 1 L.J. K.B. 75; *White* v. *Bartlett*, 9 Bing. 378; 2 L.J. C.P. 43; *Goodall* v. *Lowndes*, 6 Q.B. 464.

(*r*) *Buller* v. *Harrison*, Cowp. 565; *Bishop* v. *Eagle*, 10 Mod. 23; *Cox* v. *Prentice*, 3 M. & S. 344; *Horsfall* v. *Handley*, 2 Moore, 5; 8 Taunt. 136; *Holland* v. *Russell*, 32 L.J. Q.B. 297; 4 B. & S. 14; *Newall* v. *Tomlinson*, L.R. 6 C.P. 405.

(*s*) *Holland* v. *Russell*, *supra*; *Shand* v. *Grant*, 15 C.B. N.S. 324.

(*t*) *Edwards* v. *Hodding*, 5 Taunt. 816.

(*u*) *Townson* v. *Wilson*, 1 Campb. 397; *Anon.*, *ib.* 398, n.; *Clark* v. *Johnson*, 3 Bing. 426; *Miller* v. *Aris*, 1 Selw. N.P. 90, n.; Addison on Torts, p. 97 (ed. 7).

(*x*) *Ante*, p. 287.

person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received; and the mere receipt of the money by the agent is no evidence of an implied assent to apply it to the purposes for which it was professedly remitted to him. He holds the money for the use of the remitter: the privity of contract is between him and his principal, and not between the agent and such third party, until by some act done, or by some engagement entered into with the person who is the object of the remittance, the agent has consented to appropriate the money to his use (*y*).

Liability of agent on contracts under seal.—The liability in the case of deeds is always confined to the person who has contracted therein in his own name, and who has sealed and delivered the deed, and does not extend to the person on whose behalf, and for whose benefit, the contract is expressed to be made. When, therefore, an individual acting in a private capacity, and not on behalf of the government, covenants in his own name, under his own hand and seal, for the act of another, he is personally bound by his covenant, although he describes himself in the deed as covenanting "for and on the part and behalf" of such other person; for "a man may bind himself for the act of another, and to pay out of a fund not his own, and will be liable in either case" (*z*). A proviso totally inconsistent with any personal liability, where no fund is pointed out or provided for the payment of the money, has been held to be repugnant and void (*a*); but a proviso limiting but not destroying the liability is valid (*b*); it has also been held that an agent may contract for a principal on the express terms that he is himself to incur no personal liability, whether the principal is, or is not, bound by the contract (*c*).

Exemption of public officers—Contract under seal.—When upon the face of a contract under seal it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfilment of the contract, unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done; for it would be detrimental to the public service to hold that governors and commanders-in-chief were

(*y*) *Moore* v. *Bushell*, 27 L.J. Ex. 3; *Hill* v. *Royds*, L.R. 8 Eq. 290; 38 L.J. Ch. 538; *New Zealand Land Co.* v. *Watson*, 7 Q.B.D. 374; 50 L.J. Q.B. 433. See *Kaltenbach* v. *Lewis*, 10 App.Cas. 617; 55 L.J. Ch. 58.

(*z*) *Appleton* v. *Binks*, 5 East, 148; *Talbot* v. *Godbolt*, Yelv. 137; 5 Bacon's Abr. 372; *Hancock* v. *Hodgson*, 12 Moore, 504; 5 L.J. (O.S.) C.P. 170.

(*a*) *Furnivall* v. *Coombes*, 5 M. & Gr. 736; 12 L.J. C.P. 265.

(*b*) *Williams* v. *Hathaway*, 6 Ch.D. 544.

(*c*) *Wake* v. *Harrop*, 6 H. & N. 678; 30 L.J. Ex. 273; in err. 1 H. & C. 202; 31 L.J. Ex. 451.

personally responsible upon contracts entered into by them in the execution of their duty, unless the intention of the contracting parties that they should be liable was plainly manifested upon the face of the contract (*d*).

Execution of deeds by agents not rendering them personally liable.—There is a wide distinction between entering into a deed for and on behalf of another, and merely executing it in his behalf. If an agent is duly authorized by power of attorney under seal to enter into and execute a deed for his principal, and the principal is made to contract in his own name, and the agent merely executes the deed for him, the principal, and not the agent, is bound by the execution of the deed. In such a case it is usual to denote by some form of words that the deed is executed by an agent on behalf of the principal; the agent either signs his own name, adding, "for B." (the principal), or he signs the name of B., adding "by A., his attorney." When the principal himself is made to covenant, and the agent appears merely as the executing party, if the agent has not an authority under seal to warrant his acts, there is no binding contract at all; the principal cannot be bound, as he has not legally sanctioned the contract, and the agent cannot be made liable upon it, as he has not contracted in his own name.

Rights of partners upon contracts with third parties.—The law upon the subject of partnership has been declared and consolidated in an Act called the Partnership Act, 1890 (*e*), which came into operation on the first day of January, 1891. The Act does not exhaust the whole subject of the law of partnership; and by sect. 46 the rules of equity and of common law applicable to partnership are to continue in force, except so far as they are inconsistent with the provisions of the Act.

If a contract is entered into with one partner in his individual capacity, and apparently on his own account, but in reality on behalf of the firm of which he is a member, and the joint interest and joint consideration are not disclosed upon the face of the writing, the partner so contracting stands in the position of an agent dealing on behalf of an undisclosed principal; and either the partner with whom the contract is so made, or the firm, as the parties really interested in it, may enforce it (*f*), the defendant being entitled, in the latter case, to set up against the firm any defence that he would have had to an action brought by the one partner alone (*g*). Thus, if a written contract for the sale of

(*d*) *Wake* v. *Harrop*, *supra*; *Unwin* v. *Wolseley*, 1 T.R. 674; *Allen* v. *Waldegrave*, 2 Moore, 628.

(*e*) 53 & 54 Vict. c. 39.

(*f*) *Alexander* v. *Barker*, 2 Cr. & J. 133; 1 L.J. Ex. 40.

(*g*) *Stracey* v. *Deey*, 7 T.R. 361, n.; *Gordon* v. *Ellis*, 13 L.J. C.P. 179; 2 C.B. 821.

goods, the joint property of several partners, be entered into by one of them in his own name only, all the partners may enforce it, although the purchaser had at the time no knowledge that there were other persons interested in the transaction besides the one he had contracted with (*h*).

Implied contracts and promises with firms in partnership.—If a service or benefit, in respect of which the law implies a promise, moves from a firm in partnership, the promise is a joint promise in favour of all the partners (*i*). If, on the other hand, it moves from one partner separately and individually on his own account, it is a private contract in which the partnership has no concern (*k*). Whenever the services have been rendered by the one partner on the partnership account, and the remuneration for such services belongs to the joint purse, all the partners are jointly interested in the consideration (*l*). When the money of the partnership has been lent by the one partner alone, there is an implied promise of repayment in favour of all the partners (*m*); but, if they permit one partner to deal with the partnership property in his own name, as the sole owner of it, or as the sole party interested, they cannot stand in a better situation than the one partner who has been permitted so to act (*n*). And when one partner lends money in his own name, and nominally on his own account, but really on account of, and as the loan of, the firm, the firm, if it sues for the money, must show clearly and distinctly that the advance was made on its account, and as a loan from the partnership, although the fact might at the time be unknown to the borrower; for, as we have before seen, "If B. lends money to A., and A. makes a further loan of it to C., B. would have no right of action against C. to recover it back" (*o*).

Trust services by partners.—If one of the partners is a trustee, and work is done by the firm in the execution of the trust, the firm cannot charge for their trouble and services (*p*).

Contracts with trustees or directors of co-partnership (*q*).—In order to obviate the inconvenience arising from deaths and changes in a firm, when a large number of persons are associated together in partnership, recourse has been had to trustees, who have been appointed to conduct the business of co-partnerships, and enter into contracts for the general benefit of the concern (*r*). When a

(*h*) *Skinner* v. *Stocks*, 4 B. & Ald. 437.
(*i*) *Bond* v. *Pittard*, 3 M. & W. 357; 7 L.J. Ex. 78; *Lambert's case*, Godb. 244; and see *post*, p. 335.
(*k*) *Brandon* v. *Hubbard*, 4 Moore, 367.
(*l*) *Arden* v. *Tucker*, 4 B. & Ad. 815; 2 L.J. K.B. 137.
(*m*) *Alexander* v. *Barker*, *supra*.
(*n*) *Lucas* v. *De la Cour*, 1 M. & S. 249; *Gordon* v. *Ellis*, 2 C.B. 821; 13 L.J. C.P. 182; *Robson* v. *Drummond*, 2 B. & Ad. 303; 9 L.J. (O.S.) K.B. 187.
(*o*) *Sims* v. *Bond*, 5 B. & Ad. 389.
(*p*) *Mathison* v. *Clark*, 3 Drew. 3; 24 L.J. Ch. 202.
(*q*) And see *post*, p. 344.
(*r*) *Metcalf* v. *Bruin*, 12 East, 404—406; *Clay* v. *Southern*, 21 L.J. Ex. 202; 7 Exch. 717.

number of persons are associated together in partnership in this manner, the trustees have the general conduct and management of the co-partnership, and form the acting partners of the concern, whilst the others contribute merely their capital, and receive accruing profits in proportion to their interests, and stand, consequently, in the position of dormant partners. All simple contracts entered into with the co-partnership by name, or with one or more of the trustees are, in contemplation of law, entered into with all of them jointly, as the acting partners performing the ostensible acts of the co-partnership (*s*). They are also, as the acting partners, jointly interested in all implied contracts arising out of partnership transactions (*t*).

Liabilities of partners upon simple contracts.—Where partners simply agree to carry on a partnership of which the term is not fixed, one of those partners has no authority to take a lease so as to bind the others (*u*). But every one of the partners in a general trading partnership is, in contemplation of law, in the absence of any known controlling stipulation between them, clothed with an implied authority to enter into simple contracts on behalf of the firm in furtherance of the ordinary business of the co-partnership, and to use the trading name of the firm in all such contracts and in all dealings and transactions in respect of which partners in such trade usually have authority to bind one another; and each of the partners is individually liable for the performance of such contracts in the same manner as if they had been entered into personally by himself (*x*). But this implied general authority is confined to general partnerships in trade, where the partners are jointly interested in the capital stock of the business, as well as in the profits accruing therefrom, and does not extend to partnerships in particular transactions, or to limited partnerships in profits, where the partner has no interest in the capital stock. Thus, where an author and publisher agree to publish a work for their mutual profit, upon the understanding that the author is to write the book, and the publisher to print and publish it at his own expense, there is no implied authority from the author to the publisher to contract for the supply of paper, or for the printing, or for any other matter necessary for the publication of the work, so as to render the author responsible for the price of the paper, or for printing or advertisements, or anything else ordered by the publisher for the purposes

(*s*) *Phelps* v. *Lyle*, 10 Ad. & E. 113; 8 L.J. Q.B. 236.

(*t*) *Lefevre* v. *Boyle*, 3 B. & Ad. 880; 1 L.J. K.B. 199; *Megginson* v. *Harper*, 2 Cr. & M. 322; 3 L.J. Ex. 50.

(*u*) *Sharp* v. *Milligan*, 22 Beav. 610.

(*x*) *Ernest* v. *Nicholls*, 6 H.L.C. 418; *Cox* v. *Hickman*, 8 H.L.C. 268; 30 L.J. C.P. 125; *Kilshaw* v. *Jukes*, 3 B. & S. 847; 32 L.J. Q.B. 320. See 53 & 54 Vict. c. 39, *post*, p. 335.

of the publication (*y*). Where several coach proprietors agree to undertake the carriage of passengers and parcels on a certain line of road for their mutual profit, and divide the road into districts, and each proprietor horses and conveys the coach over his own district, finding his own horses, harness and servants, stables, hay, straw, and horse-keepers for the execution of his share of the undertaking, one has no authority to bind the others by contracts for the employment of servants, or for the purchase of horses, hay, straw, or any other thing necessary for the carriage of the passengers (*z*). But they are each clothed with an implied authority to enter into all customary and reasonable contracts with the passengers for their conveyance, and all, consequently, may be bound thereby (*a*); and, if one of them, whose business it is to hire coaches, contracts with a coachmaker for the supply of coaches to run throughout along the whole line of road, and not merely for his particular district, this is a contract with the whole partnership, and all are jointly responsible upon it (*b*).

Inchoate and incomplete partnerships.—If several persons agree to unite together in partnership, and to raise a joint stock, and one borrows money, and another procures goods, to make up his share of the joint contribution, the one is not liable for the debt contracted by the other, as the partnership is not fully formed, and the partner is not acting in discharge of the ordinary functions of the co-partnership, but on his own private account (*c*). But, as soon as the partnership has begun business on the joint account, all those of the intended partners who assent to the commencement of the trading operations for their common benefit, or take an active part in promoting them, become complete partners in the undertaking, and impliedly accord to each other all such powers as are reasonably necessary to enable them to carry the common object into effect.

Extent of power of partner to bind the firm.—By sect. 5 of the Partnership Act, 1890 (*d*), every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to

(*y*) *Wilson* v. *Whitehead*, 10 M. & W. 503; 12 L.J. Ex. 43.
(*z*) *Barton* v. *Hanson*, 2 Taunt. 49.
(*a*) *Helsby* v. *Mears*, 8 Dowl. & R. 289; 4 L.J. (O.S.) K.B. 214.
(*b*) *Arthur* v. *Dale*, Collyer, Part. 330.
(*c*) *Saville* v. *Robertson*, 4 T.R. 725; *Smith* v. *Craven*, 1 Cr. & J. 500; *Greenslade* v. *Dower*, 7 B. & C. 638; 6 L.J. (O.S.) K.B. 155; *Heap* v. *Dobson*, 15 C.B. N.S. 460.
(*d*) 53 & 54 Vict. c. 39.

be a partner (*e*). By sect. 7, where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner. By sect. 8, if it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement. By sect. 9, every partner in a firm is liable jointly (*f*) with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Admission by one partner.—By sect. 15, an admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Notice to one partner.—By sect. 16, notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Execution for separate debt of one partner.—Formerly, a creditor who had obtained judgment for the separate debt of one partner, could levy execution upon the property of the firm, although under such execution he could only obtain the separate partner's share in the property; but it is provided by sect. 23, sub-sect. 1, that after the commencement of the Act a writ of execution shall not issue against any partnership property, except on a judgment against the firm; and by sub-sect. 2, the Court may, on the application of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property with payment of the amount of the judgment debt, and may also appoint a receiver of that partner's share of profits and of any

(*e*) By sect. 6, *post*, p. 344, an act or instrument done in the name of the firm and intended to bind the firm is binding, subject to a proviso as to deeds and negotiable instruments. By sect. 10, partners are made liable for wrongs or omissions of any partner; and by sect. 11 for misapplication of money, and by sect. 12 they are made so liable jointly and severally. By sect. 13, a partner being a trustee who employs the trust property in the business improperly, is personally liable to the *cestui que trusts*, but this does not affect a partner with notice of breach of trust, nor prevent the trust money from being followed if still under the control of the firm.

(*f*) By agreement, it is presumed, the liability may be made joint and several.

other money which may be coming to him in respect of the partnership (*g*). If goods are supplied to A. and B. (who are partners) after notice by A. that he will not be answerable for any goods subsequently sent, it is incumbent on the plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of A. or that he has derived benefit from the goods (*h*).

Dealings by one partner in fraud of co-partnership.—Every one of the partners is responsible for things done within the scope of their implied authority, although they be done in fraud of the partnership, unless the plaintiff who seeks to charge the co-partnership upon the fraudulent dealing of the single partner was himself a party, or in any way privy, to the fraud. If a simple contract concerning the partnership affairs and business is entered into by one of several partners in the trading name of the firm, or on behalf of the firm, or in his own name without mention of the co-partnership, all the partners are individually liable upon the contract, whether their names do or do not appear upon the face of the written instrument. They stand in the same position as an undisclosed principal who has entered into a simple contract in writing in the name of an agent (*i*). But this liability is confined to contracts made in the execution of the ordinary business of the co-partnership, as one partner is not liable upon the contracts of another partner made by him for his own individual benefit alone, and which ought to have been known by the plaintiff at the time not to be a partnership transaction (*k*). But a bill accepted in the name of a firm in the hands of a *bonâ fide* holder for value is valid against the firm, although the partner who accepted had no authority to do so, and his doing so was fraudulent (*l*).

Transactions out of ordinary course of business.—If the trading name of the firm, or an adopted or an acquired name, is used in dealings and transactions out of the ordinary scope and business of the co-partnership, such a user of the name will not bind the other partners unless they have expressly assented thereto. In the case of professional partnerships, for example, where it is not usual or necessary for the purpose of carrying on the trading business of the firm, that bills or notes should be made, accepted or negotiated, one partner has no implied authority to pledge the

(*g*) See *Brown, Janson & Co.* v. *Hutchinson* (No. 1), (1895) 1 Q.B. 737; 64 L.J. Q.B. 359; *Same* v. *Same* (No. 2), (1895) 2 Q.B. 126; 64 L.J. Q.B. 619.

(*h*) *Willis* v. *Dyson*, 1 Stark. 164.

(*i*) *Ante*, p. 303; *Trueman* v. *Loder*, 11 Ad. & E. 594; 9 L.J. Q.B. 165; 2 Smith's L. C. 396 (ed. 10); *Drake* v. *Beckham*, 11 M. & W. 315.

(*k*) *Darlington Joint Stock District Banking Co., Ex parte, Riches, In re*, 34 L.J. Bankr. 10.

(*l*) *Wiseman* v. *Easton*, 8 L.T. 637. See sects. 23, 24, 29, 54 of 45 & 46 Vict. c. 61, *post*, Bk. II., Ch. VI.

name and credit of the co-partnership upon bills and notes (*m*). One joint tenant of a farm "has no power to bind the others by drawing or accepting bills, because it is not necessary or usual for the purpose of carrying on the farming business that bills should be drawn or accepted" (*n*). Nor can one of two partners bind the other by consenting to a reference or to an order for judgment in an action against himself and his co-partner (*o*). There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name (*p*).

Bills and notes in the name of the firm, given by one partner to secure his private debt, cannot be enforced against the partnership by the party taking the security (*q*) unless he can show that the partner from whom he took it had the authority of his co-partners to pay his own private debt with the acceptance of the firm (*r*). But, if the bill passes into the hands of a *bonâ fide* holder, the latter may enforce payment from the firm (if it be a trading firm) without giving any such evidence (*s*).

Liabilities of dormant and secret partners.—Every person who secretly connects himself with a firm in partnership, furnishing capital, labour, and skill, and secretly participating in the profits of the business, stands in the position of an undisclosed principal (*ante*, p. 303) who has contracted in the name of an agent, and is liable for the performance of the contracts of the co-partnership, except in the case of bills and notes not drawn or made in the name of the firm. Sects 5—9 of the Act (*ante*, pp. 335, 336) fix his liability by statute. The secret partner may be sued, although the contract is made in the name of one only of the partners, and the firm has not previously recognized any contracts made in his name alone as partnership contracts (*t*); but the existence of an actual partnership must be proved so as to confer on the one an authority to bind the other (*u*).

(*m*) *Hedley* v. *Bainbridge*, 3 Q.B. 316; 11 L.J. Q.B. 293.

(*n*) Littledale, J., *Dickinson* v. *Valpy*, 10 B. & C. 138, 139; 8 L.J. (O.S.) K.B. 51; Holroyd, J., *Greenslade* v. *Dower*, 7 B. & C. 639; 6 L.J. (O.S.) K.B. 155.

(*o*) *Hambidge* v. *De La Crouée*, 3 C.B. 745; 16 L.J. C.P. 85.

(*p*) *Alliance Bank* v. *Kearsley*, L.R. 6 C.P. 433; 40 L.J. C.P. 249.

(*q*) *Shirreff* v. *Wilks*, 1 East, 51; *Jones* v. *Yates*, 9 B. & C. 532; 7 L.J. (O.S.) K.B. 217; *Ridley* v. *Taylor*, 13 East, 182; *May* v. *Chapman*, 16 M. & W. 355; see sect. 23 of 45 & 46 Vict. c. 61, *post*, p. 1165.

(*r*) *Leverson* v. *Lane*, 13 C.B. N.S. 278; 32 L.J. C.P. 10. As to whether a reasonable belief by the creditor that the partner had such authority is sufficient, see *Kendal* v. *Wood*, L.R. 6 Ex. 243, 248; 39 L.J. Ex. 167. It would seem on principle that such belief is not sufficient unless it has been induced by the acts of the other partners. See also *Hogarth* v. *Latham*, 3 Q.B.D. 643; 47 L.J. Q.B. 339.

(*s*) *Wiseman* v. *Easton*, 8 L.T. 637; see *per* Bramwell, L.J., in *Hogarth* v. *Latham*, *supra*, at p. 648; *Garland* v. *Jacomb*, L.R. 8 Ex. at p. 219. See sect. 30 of 45 & 46 Vict. c. 61, *post*, pp. 1119, 1120.

(*t*) *Drake* v. *Beckham*, 11 M. & W. 315.

(*u*) *Kilshaw* v. *Jukes*, 3 B. & S. 847; 32 L.J. Q.B. 220.

Private agreements between parties exempting dormant partners from liability.—The liability of persons who have participated as principals in the joint speculations of a joint adventure cannot in any way be controlled or affected by the secret contracts of the joint adventurers *inter se*. If, therefore, the joint adventurers expressly agree not to be partners *inter se*, such an agreemeut cannot in any way affect their position as regards the public. If several partners agree that the trade shall be carried on by one or more of them in their own names as the ostensible and acting partners, and that certain secret partners who contribute capital, skill, or labour shall not be liable for losses beyond a certain amount, the operation of the agreement cannot affect the liability of such secret partners as regards the public and third persons, unless the limitation of liability is established and made notorious, in the mode presently pointed out (*post*, pp. 355, 360). And it matters not whether the party participates in and receives, or bargains for, a share in the accruing profits for his own benefit, or as a trustee or executor for others. Equally indifferent is it whether his share be large or small (*x*).

Persons suffering themselves to be held out to the world as partners.—By sect. 14 of the Act of 1890—(1.) Everyone who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made. (2.) Provided that where, after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death.

Permitting their names to be used in the business or exhibited over a shop-window, or to be written in invoices or prospectuses, or to be published in advertisements as the names of members of the firm, has been held sufficient to render persons chargeable as partners, although they are not in point of fact partners, and have no share or interest in the business (*y*). But it must appear that the partnership was actually formed and in operation, and was not merely a projected joint adventure (*z*). If a person holds himself out to the world as a partner with another in

(*x*) *Wightman* v. *Townroe*, 1 M. & S. 412.

(*y*) *Guidon* v. *Robson*, 2 Camp. 304.

(*z*) *Bourne* v. *Freeth*, 9 B. & C. 640, 641; 7 L.J. (O.S.) K.B. 292.

a particular line of business only, he does not thereby render himself liable as a partner in other transactions not within the course of that business (*a*). And, if a plaintiff has contracted with a firm in partnership, knowing at the time that the defendant, whose name appeared in the name of the firm as an ostensible partner, was not in fact a partner, and had no share or interest in the partnership, he cannot afterwards make the defendant responsible upon the contract which he entered into with notice of that fact (*b*). If a man's name is used without his knowledge and consent, he cannot be made responsible as a partner upon the strength of such false representation (*c*). A man may, however, be fixed with the liabilities of a partner through the medium of his own express admissions or representations (*d*); but a plaintiff seeking to found an action upon them must prove that he knew of, and acted upon, such representations, and dealt with, and credited, the firm, under the belief that they were true (*e*). No mistaken supposition of a party as to his being a partner will make him liable as such, unless it were communicated to the plaintiff so as to mislead him (*f*).

Liabilities of incoming and retiring partners—Novation.—By sect. 17—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner. (2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement. (3.) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

An incoming partner cannot, for instance, be made responsible upon bills or notes accepted or made by his co-partners before he became a member of the firm; but, if a bill be accepted on account of a debt which was incurred partly before, and partly after, such partner joined the firm, he is liable for so much of the debt for which the bill was accepted as accrued subsequently to his accession to the partnership (*g*). An incoming partner cannot be charged with the payment of the price of goods sold to the co-partnership before he

(*a*) *De Berkom* v. *Smith*, 1 Esp. 29.

(*b*) *Alderson* v. *Pope*, 1 Camp. 403, n.; and see now 53 & 54 Vict. c. 39, s. 14, *supra*.

(*c*) *Fox* v. *Clifton*, 4 Moo. & P. 713; 9 L.J. (O.S.) C.P. 257.

(*d*) Parke, J., *Dickinson* v. *Valpy*, 10 B. & C. 140; 8 L.J. (O.S.) K.B. 51; Ld. Kenyon, 1 Esp. 30; and see now sect. 14 (1), *supra*.

(*e*) *Carter* v. *Whalley*, 1 B. & Ad. 14; 8 L.J. (O.S.) K.B. 340.

(*f*) *Vice* v. *Anson* (*Lady*), 7 B. & C. 411; 6 L.J. (O.S.) K.B. 24.

(*g*) *Wilson* v. *Lewis*, 2 Sc. N.R. 118.

became a member of it, although they may have been delivered subsequently thereto (*h*). "When a banking firm," observes Parke, B., "makes payments professedly on account of a customer without his authority, and those payments are entered to the debit of the customer in the books of the firm, parties who afterwards become partners in that firm are not to be considered as agreeing to impose upon themselves a liability for anything more than that which by the books themselves, which are handed over to the new firm, appears to be due to the customer. In order to render the new firm liable for the amounts which do not so appear upon the books, it is necessary to show that the old firm have ceased to be liable and are discharged; and in order to do so you must show an agreement between the old and the new firm and the customer, that the new firm is considered to be substituted as the debtor in lieu of the old, for the amount sought to be recovered. There may be cases in which the new firm agrees to become liable for the actual, not the apparent, balance" (*i*). The transfer of the accounts from the old to the new firm, and the acceptance by the creditor of a new simple contract security from the new firm for the debt due to him, is not of itself sufficient to discharge a retiring partner. There must be an agreement, either express or fairly to be inferred, to discharge the old firm (*k*). Two bankers, partners, gave deposit notes to depositors who, when the amounts on deposit were increased or diminished, gave up their old notes, and received fresh ones. Two other partners were admitted, and notice given to the depositors. The first two partners died, and the depositors knew it, and made no claim against their estates. The business was carried on under the old name by the new partners, and the depositors received interest from them. Some retained their old notes, and some took fresh ones. The new partners being bankrupt the depositors proved for the amounts due on their notes as money "advanced and lent" to the bankrupts. It was held that there was a complete novation, and that none of the depositors were entitled to prove against the old firm (*l*). If the creditor elects to sue the new firm he cannot afterwards sue a retired partner (*m*). Where a firm was newly constituted, but no alteration was made in the business, and the accounts were continued in the old books, and the existing liabilities were discharged from the assets of the old firm or from the funds of the new firm indis-

(*h*) *Wilson* v. *Bailey*, 9 Dowl. 20; 10 L.J. C.P. 17; *Whitehead* v. *Barron*, 2 M. & Rob. 248.

(*i*) *Craufurd* v. *Cocks*, 6 Exch. 291; 20 L.J. Ex. 169.

(*k*) *Harris* v. *Farwell*, 15 Beav. 31; *Brown* v. *Gordon*, 16 Beav. 302; 22 L.J. Ch. 65; *Kirwan* v. *Kirwan*, 2 Cr. & M. 617; 3 L.J. Ex. 187.

(*l*) *Bilborough* v. *Holmes*, 5 Ch.D. 255; 46 L.J. Ch. 446.

(*m*) *Scarf* v. *Jardine*, 7 App.Cas. 345; 51 L.J. Q.B. 613.

criminately, it was held that this was cogent evidence that the new firm had assumed the liability to pay the debts of the old firm (*n*). Where creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receive payment of part of the debt out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor (*o*).

Notice of retirement of partners, and of dissolution of copartnership.—If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as a partner, and he is bound by that representation (*p*).

By the Partnership Act, 1890, s. 36, (1) where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change; (2) an advertisement in the *London Gazette* as to a firm whose principal place of business is in England or Wales, in the *Edinburgh Gazette* as to a firm whose principal place of business is in Scotland, and in the *Dublin Gazette* as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised; (3) the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

The retirement of an ostensible partner ought to be made as notorious as the fact of his connexion with the firm. A notice in the *London Gazette* is insufficient, except in the case mentioned in sect. 36 (2), *supra*, unless there is a reasonable presumption that the paper has been seen and read by the parties dealing with the firm (*q*). And, even if the advertisement is inserted in a paper which a plaintiff who is suing a retired partner is in the habit of reading, the insertion, unless it has been frequently repeated, is of itself very meagre evidence of the plaintiff's knowledge of the fact (*r*). The only certain and secure way of putting an end to the continuing liability is to insert frequent advertisements of the retirement of the partner in all the papers having the greatest circulation in the immediate neighbourhood of the place where the business of the co-partnership is carried on, and to send express

(*n*) *Bank of Australasia* v. *Flower*, L.R. 1 P.C. 27; 35 L.J. C.P. 13.
(*o*) *Ibid.*
(*p*) *Goode* v. *Harrison*, 5 B. & Ald. 157.
(*q*) Ld. Kenyon, *Graham* v. *Hope*, Peake, 208.
(*r*) *Jenkins* v. *Blizard*, 1 Stark. 420.

notice to every person residing at a distance who has been in the habit of dealing with the partnership during the time that the retiring partner was a member of the firm (*s*). A partnership having been dissolved by mutual consent, and proper notices of the dissolution given, the mere fact that the retiring partner allows the continuing partner to carry on business in the old firm-name is not such a "holding out" of the former as a partner as will render him liable for a debt of the firm contracted after the dissolution with a person who had not dealt with the old firm, and who had no knowledge of the dissolution (*t*).

Retirement of dormant partners.—Dormant and secret partners may release themselves from all further liability by a simple relinquishment of their share in the profit and loss of the business. They continue responsible upon all executory contracts and transactions in actual operation at the time of their withdrawal; but they are not liable upon the subsequent contracts of the firm and the debts and liabilities incurred after their retirement (*u*). But, if they are not strictly secret as well as dormant partners, notice of the termination of their connection with the co-partnership must be given (*x*).

Directors of trading associations.—When a partnership or trading association is under the management of trustees or directors, the common law power of one partner to bind another existing in ordinary trading partnerships ceases; and notice to a party that there are trustees or directors is notice to him that he is not dealing with an ordinary partnership (*y*). The shareholders or partners are liable only upon contracts made by the trustees or directors in the ordinary course of business, in the same manner as dormant partners in any ordinary partnership. But no private agreement between the shareholders and directors, restricting the apparent general authority of the latter to bind the former by their contracts, or qualifying and limiting the liability of the shareholders upon such contracts, will be of any avail as against the claims of creditors of the partnership who have dealt with the directors in ignorance of the particular limitations and restrictions placed upon their apparent general authority (*z*).

Authority of committeemen.—Where a review was established by an association of shareholders, who passed certain written resolu-

(*s*) *M'Iver* v. *Humble*, 16 East, 169; *Newsome* v. *Coles*, 2 Campb. 617; *Hart* v. *Alexander*, 2 M. & W. 490; 6 L.J. Ex. 129; *Barfoot* v. *Goodall*, 3 Campb. 148; *Lacy* v. *Woolcott*, 2 Dowl. & R. 460; 1 L.J. (O.S.) K.B. 145.

(*t*) *Central Bank of London, Ex parte, Fraser, In re*, (1892) 2 Q.B. 633.

(*u*) *Carter* v. *Whalley*, 1 B. & Ad. 11; 8 L.J. (O.S.) K.B. 340.

(*x*) *Farrar* v. *Deflinne*, 1 Car. & K. 580.

(*y*) *Hallett* v. *Dowdall*, 21 L.J. Q.B. 105; 18 Q.B. 2.

(*z*) *Hawken* v. *Bourne*, 8 M. & W. 709; 10 L.J. Ex. 361; *Rex* v. *Dodd*, 9 East, 527; *Walburn* v. *Ingilby*, 1 Myl. & K. 61, 76.

tions for its regulation and management, and appointed a committee of shareholders "to assist the editor in promoting the prosperity and circulation of the review, and to obtain literary contributions," it was held that this resolution did not empower one of the committee to contract with any person for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the review (*a*).

Liabilities of partners upon deeds.—In order to make a partner liable upon a deed, it must be shown that he actually sealed and delivered the deed in person, or that it was done by another for him, in his presence, and by his commandment (*b*); or, if executed by one partner on behalf of the firm generally, as the deed of the partnership, it must be shown that the partners sued upon it authorised their co-partner to execute the deed by a power of attorney under seal, and the authority under seal, when it exists, must be produced and proved (*c*). Where one of two partners caused a bond to be made out in the name of the firm, "Davis and Marsh," and sealed and delivered it as the deed of the partnership, it was held that it could not bind the other partners, as they had given their co-partner no authority under seal to enter into and execute deeds in their behalf, or on behalf of the firm (*d*). But the bond, being joint and several, would bind the partner who signed it (*e*); and a deed purporting to be made by all the partners of the firm, and only signed by one, binds that one, although the other partners afterwards decline to sign it (*f*). A general partnership agreement, though under seal, does not authorise the partners to execute deeds for each other, unless a particular power be given for that purpose (*g*). And now by sect. 6 of the Act of 1890 (*h*), an act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners. Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Corporations aggregate.—The effect of a general and unqualified incorporation of two or more persons, at common law, is to create an aggregate body politic, or legal entity, with rights and liabilities completely separate and distinct from the individual existence, rights and liabilities of its members. This legal entity is, as it

(*a*) *Heraud* v. *Leaf*, 17 L.J. C.P. 57; 5 C.B. 157.
(*b*) *Ball* v. *Dunsterville*, 4 T.R. 313, *ante*, p. 18.
(*c*) *Steiglitz* v. *Egginton*, Holt, N.P.C. 141.
(*d*) *Elliot* v. *Davis*, 2 Bos. & P. 338.
(*e*) *Elliot* v. *Davis*, *supra*.
(*f*) *Bowker* v. *Burdekin*, 11 M. & W. 128; 12 L.J. Ex. 329; *Cumberledge* v. *Lawson*, 1 C.B. N.S. 709; 26 L.J. C.P. 120.
(*g*) *Harrison* v. *Jackson*, 7 T.R. 210.
(*h*) 53 & 54 Vict. c. 39.

has been sagely remarked, without soul or conscience, and without any visible or outward form, and cannot, therefore, be either excommunicated, or outlawed, or arrested. It could only in former times be compelled to answer in an action at law by a *distringas* against its goods and chattels, and could only appear by attorney appointed under its common seal; and, if it had neither lands nor goods, there was no way of bringing the corporate body either into a court of law or a court of equity. Its debts are, at common law, its own debts, and not the debts of the individual members thereof; and the latter, consequently, are not answerable either in their persons or property for the corporate debts; and, if there are no corporate effects whereon to levy judgments and executions obtained against the body corporate, the creditors must go unpaid (*i*). Amongst the powers and privileges possessed by the body corporate from the mere act of incorporation, and without any special provision or stipulation in the charter, is the power of making bye-laws for the government of the body politic, subject to the laws of the realm and subordinate thereto (*k*), and the power (in the case of ancient corporations) of electing its own members at corporate meetings and appointing its own officers; of suing and being sued in the corporate name; of holding and enjoying property in such name; of purchasing and parting with its possessions; of compromising claims against it (*l*); and of acting and speaking through a common seal, which is said to be "its hand and mouth-piece." Corporations cannot lawfully purchase or hold lands without the licence of the Crown, or the authority of Parliament (*m*); and they cannot, consequently, lawfully enter into or enforce real contracts concerning lands without a licence or authority to hold lands.

Contracts with corporations.—All contracts of importance entered into by corporations must, with some exceptions presently noticed, be made under the common seal of the body corporate, and in the corporate name. If the contract is made in the name of the head of the corporation, or in the names of the individual members thereof, the corporate body cannot in general sue or be sued upon the contract, although the common seal has been affixed to it (*n*). If a covenant is made with a corporation by name, it is sufficient if the name and description inserted in the deed are "the same in substance with the true name; it need not be the same in words or syllables" (*o*). There is a difference between ancient corporations

(*i*) Bro. Abr. fol. 183—186; fol. 265, pl. 82; *Edmunds* v. *Brown*, 1 Lev. 237.

(*k*) *Reg.* v. *Wood*, 5 E. & B. 49.

(*l*) *Bath's case*, 8 Ch.D. 334; 47 L.J. Ch. 601; *Hesketh's case*, 13 Ch.D. 693; 49 L.J. Ch. 288.

(*m*) Co. Litt. 92, a, 2, b.

(*n*) Bro. Abr. CORPORATIONS, pl. 31; 15 E. 4, 1; Com. Dig. Franchises, F. 19.

(*o*) *Rex* v. *Haughley*, 4 B. & Ad. 655; 2 L.J. M.C. 56; *Sidney Sussex College* v. *Davenport*, 1 Wils. 184; *Croydon Hosp.* v. *Farley*, 6 Taunt. 467.

and corporations made of late times; for ancient corporations may by usage have divers and several names, and leases, grants, &c., by any of them will be good enough (*p*). If, moreover, a corporation adopts any particular name or seal different from its true name or seal, and uses it in making contracts, it may be estopped from showing that the name and seal so adopted and used are not its true name and seal (*q*).

Want of mutuality of obligation.—If an executory simple contract, founded upon mutual promises and a mutuality of obligation and liability, is not binding upon a corporation by reason of its not being under the seal of the body corporate, it cannot, on the other hand, be enforced by the corporation by reason of the absence of reciprocity or mutuality of obligation and liability (*r*).

Incapacity.—Infancy in the mayor, bailiff, or other head of a corporation, or any incapacity to contract on the part of individual members thereof, does not in any way affect the rights and liabilities of the corporation in respect of corporate acts (*s*).

An act done by the members of a municipal corporation in the absence of the head is not the act of the corporation. Thus, if a bond be given by the commonalty in the absence of the mayor, the body corporate is not bound. But, if a mayor *de facto*, together with such other members of the corporation as are empowered to bind the whole by their act, put the common seal to an obligation, this shall bind the corporation, though he be not *de jure* mayor; for, being in fact appointed to the office, and permitted to act in it by the corporation who might have removed him, all judicial and ministerial acts done by him are valid. Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, as much as an individual is by his own deed. But, where corporations are created by Act of Parliament for particular purposes, with special powers, then their deed, though under their corporate seal, regularly affixed, will not bind them, if it plainly appears that the deed is *ultra vires* (*t*). If the common seal has not been affixed to the contract, the general rule is, that the contract is not the contract of the corporation, but of the individual members concerned in the making of it, who can alone sue and be sued thereon (*u*). But this rule has been subjected to numerous exceptions, and has been almost superseded in practice in the case of trading corporations, the end and object of whose

(*p*) *Mayor, &c. of Lynne*, 10 Co. 123, a.

(*q*) *Elliot* v. *Davis*, 2 Bos. & P. 338.

(*r*) *Copper Miners of England* v. *Fox*, 20 L.J. Q.B. 176; 16 Q.B. 229.

(*s*) 1 Kyd. 312; *Rex* v. *Carter*, Cowp. 220, 225; Bro. Abr. Corporations, 63.

(*t*) *Payne* v. *Brecon* (*Mayor*), 3 H. & N. 579; 27 L.J. Ex. 495.

(*u*) Bro. Abr. Corporations, pl. 47, 49, 50, 56, 63; 1 Roll. Abr. 514.

existence could never be accomplished, if every corporate act was required to be authenticated under the common seal.

Implied contracts with corporations—Contracts not under seal.—If a person has had the benefit of the fulfilment of a contract which could not have been enforced against a corporation whilst it remained executory, the law will raise an implied promise in its favour, upon which it may sue in its corporate character (*x*). Where, for example, a party has enjoyed all the benefit and advantage of a parol contract entered into with a corporation, he will not be permitted to discharge himself from the ordinary liability on the ground that the contract was not entered into under the common seal of the corporate body (*y*). A municipal corporation, therefore, may sue for the use and occupation of tolls not granted to the occupier under the common seal (*z*); and for the use and occupation of houses and lands, the property of the corporation, where the tenant has actually occupied and taken and enjoyed the profits of the land (*a*). And one who enters upon, occupies, and pays rent for corporate property under a demise for a term of years made on behalf of the corporation, but not sealed with their common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy (*b*), and the corporation may distrain for the rent (*c*). The corporation is in like manner responsible upon the ordinary implied promise in respect of the use and occupation of houses and lands, during the period it actually occupied (*d*), but no longer, as it cannot be bound by an executory contract for an interest in land not made under its common seal (*e*). So, if there has been part performance of a contract for a lease by a corporation, specific performance will be decreed, though the contract was not under the corporate seal (*f*).

Where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed under circumstances which render the equitable doctrines of part performance applicable, the contract will bind the corporation; but in other cases it is extremely

(*x*) *Beverley* v. *Linc. Gas Co.*, 6 Ad. & E. 839; 7 L.J. Q.B. 113; *Aust. R. M. St. N. Co.* v. *Marzetti*, 11 Exch. 228; 24 L.J. Ex. 273.

(*y*) *Fishmongers Co.* v. *Robertson*, 5 M. & Gr. 192; 12 L.J. C.P. 185; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139; 28 L.J. Ex. 122; *Melbourne Banking Corporation* v. *Brougham*, 4 App.Cas. 156; 48 L.J. P.C. 12.

(*z*) *Carmarthen* (*Mayor*) v. *Lewis*, 6 Car. & P. 608.

(*a*) *Rochester* (*Dean*) v. *Pierce*, 1 Campb. 466; *Stafford* (*Mayor*) v. *Till*, 12 Moore, 260; 5 L.J. (O.S.) C.P. 77; Vin. Abr. CORPORATIONS, K. p. 41.

(*b*) *Ecclesiastical Commissioners* v. *Merral*, L.R. 4 Ex. 162; 38 L.J. Ex. 93.

(*c*) *Wood* v. *Tate*, 2 B. & P.N. R. 247.

(*d*) *Lowe* v. *L. & N. W. Ry.*, 18 Q.B. 362; 21 L.J. Q.B. 361.

(*e*) *Finlay* v. *Bristol and Ex. Ry.* 7 Exch. 416; 21 L.J. Ex. 117.

(*f*) *Steeven's Hospital* v. *Dyas*, 15 Ir. Ch. R. 405; *Crook* v. *Seaford Corporation*, L.R. 19 Eq. 680; *ib.* 6 Ch. 551.

doubtful whether the mere fact that a contract, not otherwise binding upon the corporation, has been wholly or partly performed, renders the corporation liable to be sued either on the contract or on a *quantum meruit* (*g*).

A corporation with a head, such as a municipal corporation, may also transact trifling matters of business, and enter into such ordinary contracts as are of constant recurrence, and the making of which forms part of its customary and usual functions, without the employment of its common seal (*h*). It was laid down as a general rule of law by the Court of Queen's Bench that, wherever the purposes for which a corporation is created render it necessary that work should be done and goods supplied, to carry such purposes into effect, and orders are given at a board regularly constituted, and having general authority to make contracts for such work or goods, and the work is done and the goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that, though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed, or the affixing the seal, were wanting (*i*). It may hire the ordinary servants of the corporation, such as a butler, cook, bailiff, &c., and may contract for the purchase of trifling articles without deed. "So, if the regular servant of the corporation make a purchase, and apply it to the use of the corporation, it would seem that the corporation is bound" (*k*). If a municipal corporation has wrongfully got possession of the money of a stranger, or the money of one of its own members, the law raises an implied promise from the corporate body to refund the amount, just the same as in the ordinary case of the receipt of money by a private individual which the latter has no right in conscience or equity to retain (*l*). But in all matters of consequence and importance, and in respect of acts and contracts not coming within the scope of its ordinary, everyday functions, the corporation is not bound by the act done, unless

(*g*) *Hunt* v. *Wimbledon Local Board*, 3 C.P.D. 208; 47 L.J. C.P. 540; *per* Lindley, J., where the authorities are collected; and 4 C.P.D. 48; 48 L.J. C.P. 207. See also *Young* v. *Corporation of Leamington*, 8 App.Cas. 517; 52 L.J. Q.B. 713; *Scott* v. *Clifton School Board*, 14 Q.B.D. 500.

(*h*) *De Grave* v. *Monmouth* (*Mayor*), 4 Car. & P. 111; *Wells* v. *Kingston-upon-Hull* (*Mayor*), L.R. 10 C.P. 402; 44 L.J. C.P. 257.

(*i*) *Pauling* v. *L. & N. W. Ry.*, 8 Ex. 867; 23 L.J. Ex. 105; *Sanders* v. *St. Neots Guard.*, 8 Q.B. 810; 15 L.J. M.C. 104; *Clarke* v. *Cuckfield Un.*, 1 Bail. C.C. 85; 21 L.J. Q.B. 349; *Henderson* v. *Austral. St. Nav. Co.*, 5 E. & B. 409; 24 L.J. Q.B. 322; *Reuter* v. *Elect. Tel. Co.*, 6 E. & B. 341; 26 L.J. Q.B. 46; *Haigh* v. *North Bierley Un.*, E. B. & E. 873; 28 L.J. Q.B. 66; *Nicholson* v. *Bradfield Union*, L.R. 1 Q.B. 620; 35 L.J. Q.B. 176; *Scott* v. *Clifton School Board*, 14 Q.B.D. 500.

(*k*) 1 Kyd. 313, 314, citing *Longo Quinto*, (ed. 4), 70—74.

(*l*) *Hall* v. *Swansea* (*Mayor*), 5 Q.B. 547; 13 L.J. Q.B. 112.

it is a corporate act authenticated by writing under the common seal (*m*).

At a meeting of the town council of a municipal corporation, a resolution was entered in the corporation books, to the effect that the salary of the town clerk should be increased; but it was held that the corporate body was not bound by this resolution, as it had not been made under the common seal (*n*). So, where the London Dock Company accepted by parol, through their clerk, a tender by a contractor to cleanse the docks for a year for a certain sum, and the contractor refused to fulfil his engagement, it was held that the company could not enforce the contract, as the offer had not been accepted under their common seal (*o*). And, where the guardians of a union, a corporate body by statute, entered into a contract under their common seal with the plaintiff for the making of a survey and map of one of the parishes in the union, which contract was duly fulfilled, and, subsequently, in consequence of a reduced plan being directed to be made, the plaintiff prepared an outline map on a reduced scale, which was received and used by the guardians, but no contract was entered into by them under their common seal to pay the price thereof, it was held that they were not responsible in their corporate capacity for the payment for this outline map, inasmuch as the preparing of a plan in order to have a parochial assessment made was no part of the duty of the guardians, and was not essential for the carrying out of the purposes or objects for which they were incorporated (*p*). So the contract for the engagement of a clerk to the master of a workhouse by a board of guardians, must, in order to bind the guardians and render them liable for a wrongful dismissal, be under their seal (*q*).

The appointment of an attorney to conduct important suits affecting the rights and property of a municipal corporation must in general be under seal, except in the case of the city of London, who appoint an attorney by warrant of attorney in the Queen's Bench every year, without either sealing or signing, and are estopped by the record to say it is not their act (*r*).

Corporations remain always the same as to debts and rights, so

(*m*) *Ludlow* (*Mayor*) v. *Charlton*, 6 M. & W. 815.

(*n*) *Reg.* v. *Stamford* (*Mayor*), 6 Q.B. 433; as to orders for the payment of money out of the borough fund, see *Reg.* v. *Warwick* (*Mayor*), 15 L.J. Q.B. 306; 8 Q.B. 926.

(*o*) *London Dock Co.* v. *Sinnot*, 1 E. & B. 347; 27 L.J. Q.B. 129; *Oxford* (*Mayor*) v. *Crow*, (1893) 3 Ch. 535.

(*p*) *Paine* v. *Strand Union*, 8 Q.B. 326; 15 L.J. M.C. 89; *Lamprell* v. *Billericay Union*, 3 Exch. 307; 18 L.J. Ex. 282; *Smart* v. *West Ham Union*, 10 Exch. 875; 24 L.J. Ex. 201.

(*q*) *Austin* v. *Bethnal Green Guardians*, L.R. 9 C.P. 91; 43 L.J. Ex. 44.

(*r*) *Mayor of Thetford's case*, 1 Salk. 192; 3 Salk. 103; 2 Raym. 848; *Arnold* v. *Poole* (*Mayor*), 5 Sc. N.R. 776; 12 L.J. C.P. 97.

that, if an old corporation is incorporated by a new name, it may recover in its new name debts contracted with the old corporation (*s*). A corporation revived by a new charter has all its rights revived and put in action, and is entitled to the credits of the old corporation, and may therefore sue on a bond given to the old corporation. Where a corporation is created by an Act of Parliament for particular purposes and with special powers, its deed, though under the corporate seal regularly affixed, does not bind it, if it plainly appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, that is, that the legislature meant that such a deed should not be made (*t*). But a corporation is fully capable of binding itself by any contract, except where the statutes by which it is created or regulated, expressly or by necessary implication, prohibit such contract between the parties (*u*).

Contracts with trading corporations.—Where corporations "have been established for the purpose of carrying on trading speculations, and the nature of their constitution has been such as to render the drawing of bills, or the making of any particular sort of contracts, necessary for the purposes of the corporation, the courts have held that they would imply, in those who are, according to the provisions of the charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist" (*x*), and to do which it was expressly called into existence. The wants and necessities of a body incorporated for the purposes of trade are, of course, materially different from those of an institution established for municipal purposes and the government of towns and colleges, or local boards or urban authorities (*y*); and, if a trading corporation were unable to contract in the ordinary course of its trade, except under the common seal, its usefulness for trading purposes would be destroyed, and it would be utterly unable to accomplish the object of its existence. It has been held, therefore, that a trading corporation may maintain actions for goods sold and delivered in the usual course of its trade, and may sue upon executory contracts for the supply of goods, for the manufacture and supply of which

(*s*) *Scarborough* (*Mayor*) v. *Butler*, 3 Lev. 237; *Colchester* (*Mayor*) v. *Brooke*, 15 L.J. Q.B. 173; 7 Q.B. 339.

(*t*) Parke, B., *South York Ry.* v. *G. N. Ry.*, 22 L.J. Ex. 314; 9 Exch. 84.

(*u*) *Scottish N. E. Ry.* v. *Stewart*, 3 Macq. 382; *Newcastle* (*Mayor*) v. *Att.-Gen.*, (1892) A.C. 568; 62 L.J. Q.B. 72.

(*x*) *Ludlow* (*Mayor*) v. *Charlton*, 6 M. & W. 821; *South of Ireland Colliery Co.* v. *Waddle*, L.R. 4 C.P. 617; 38 L.J. C.P. 338.

(*y*) *Hunt* v. *Wimbledon Local Board*, 4 C.P.D. 48; 48 L.J. C.P. 207; see also the case of *Eaton* v. *Basker*, 7 Q.B.D. 529; 50 L.J. Q.B. 444, where under the Public Health Act, 1875, s. 200, a contract which was intended to be under 50*l.* turned out more, and it was held not necessary to be under seal.

the company was incorporated, or for the non-acceptance of goods sold, and the non-delivery of goods purchased, by the corporation (*z*). It may also draw and accept bills of exchange and promissory notes (*a*).

Contracts by the officers of trading corporations are not binding upon the corporation, unless they are within the scope of their regular employment (*b*). A station-master, guard, or clerk of an incorporated railway company, for example, has no implied authority to employ surgeons and procure medical attendance for injured passengers (*c*); but the company are liable where their credit is pledged for such services by the general manager (*d*). A clerk charged with the payment of wages, or a secretary or law agent of a company, has no power to bind the company by statements or representations, acts or proceedings, beyond the scope of his regular employment (*e*). Where a contract for the performance of work and the supply of materials was entered into under the common seal, and extra work, not included in the contract, was performed it was held that the company was not responsible for the payment of such extra work, as it could not be inferred they had ordered it (*f*).

Contracts with registered joint-stock companies.—The Companies Act, 1862 (*g*), enables seven or more persons, by subscribing their names to a memorandum of association, and complying with the requisitions of the Act in respect of registration, to form themselves into an incorporated company, with unlimited liability, or with liability limited by shares or by guarantee (*h*), and prohibits more than ten persons from carrying on in partnership the business of banking, and more than twenty persons from carrying on any other business having gain for its object (*i*), unless they are registered as a company under that Act, or under some previous Act (*k*), or authorised so to carry on business by Act of Parliament, or letters patent, or are engaged in working mines within, and subject to the jurisdiction of, the stannaries. The leading purpose of this

(*z*) *City of Lond. Gas Co.* v. *Nicholls*, 2 Car. & P. 365; *Church* v. *Imp. Gas Co.*, 6 Ad. & E. 859; 6 L.J. Q.B. 118; *East India Co.* v. *Glover*, 1 Str. 612; *Gibson* v. *East India Co.*, 5 Bing. N.C. 270, 271; 8 L.J. C.P. 193.

(*a*) *R.* v. *Bigg*, 3 P. Wms. 419; *Edie* v. *East India Co.*, 2 Burr. 1216. See sect. 22 of 45 & 46 Vict. c. 61, *post*, p. 1165.

(*b*) *Williams* v. *Chester & Holyhead Ry.*, 15 Jur. 828; *Cope* v. *Thames Haven, &c. Co.*, 3 Exch. 841; 18 L.J. Ex. 345.

(*c*) *Cox* v. *Mid. Counties Ry.*, 3 Exch. 273; 18 L.J. Ex. 65.

(*d*) *Walker* v. *G. W. Ry.*, L.R. 2 Ex. 228; 36 L.J. Ex. 123.

(*e*) *Burnes* v. *Pennell*, 2 H.L.C. 479; *Olding* v. *Smith*, 16 Jur. 497.

(*f*) *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Exch. 137; 20 L.J. Ex. 193; *Lamprell* v. *Billericay Union*, 3 Exch. 283; 18 L.J. Ex. 282.

(*g*) 25 & 26 Vict. c. 89.

(*h*) An unlimited company may register as a limited and a limited company may re-register under 42 & 43 Vict. c. 76.

(*i*) *Moore* v. *Rawlins*, 6 C.B. N.S. 289; 28 L.J. C.P. 247; farming and grazing are businesses having gain for their object: *Harris* v. *Anery*, L.R. 1 C.P. 148; 35 L.J. C.P. 89.

(*k*) *Wormersley* v. *Merrit*, L.R. 4 Eq. 695; 37 L.J. Ch. 19.

statute is to enable a permanent company consisting of changing members to make binding contracts, and sue and be sued and do all the usual acts necessary for carrying on trade. The first part provides for the formation of the company through the medium of a memorandum and articles of association, the essential requisites of which relate almost exclusively to the rights and duties of directors and members *inter se*, regulating the name of the company, the objects for which the company is established, the limited or unlimited liability of the members, the amount of the capital, the number and amount of the shares, the transfer of shares, the registration of members, and the meetings and proceedings of the company. After registration of the memorandum of association, a certificate of the incorporation of the company is to be granted; and thereupon, by sect. 18, the company becomes incorporated, having perpetual succession and a common seal, with power to hold lands.

The certificate of incorporation is conclusive evidence that all the requisitions of the Act in respect of registration have been complied with (*l*).

An assignment of future calls is bad; for calls should be made at the discretion of the directors; and an assignment of future calls prevents the exercise of such a discretion, but an assignment of a call already made although not collected is good (*m*).

Requisites of contracts with registered joint-stock companies.—Contracts on behalf of a joint-stock company registered under the Companies Act, 1862, may be made as follows (*n*):—Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing, under the common seal of the company, and may in the same manner be varied or discharged. If it is such a contract as is required by law to be in writing, and signed by the parties to be charged therewith, it may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and may in the same manner be varied or discharged. If it would by law be valid as between private persons, although made by parol, and not reduced into writing, it may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and may in the same manner be varied or discharged. All contracts so made are binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators.

(*l*) *Oakes* v. *Turquand*, L.R. 2 H.L. 325; 36 L.J. Ch. 949; *Peel's case*, 36 L.J. Ch. 757; L.R. 2 Ch. 674.

(*m*) *Sankey Brook Coal Co., In re*, L.R. 9 Eq. 721; 39 L.J. Ch. 223; *Sankey Brook Coal Co., In re* (No. 2), L.R. 10 Eq. 381.

(*n*) 30 & 31 Vict. c. 131, s. 37.

The company may, by instrument in writing under their common seal, employ any person (*o*), either generally, or in respect of any specified matters, as their attorney, to execute deeds on their behalf in any place not situated in the United Kingdom; and every deed signed by such attorney on behalf of the company, and under his seal, is binding on the company to the same extent as if it were under the common seal.

Contracts by agents.—Where a company, through their directors, hold out an officer of the company as their agent for a particular purpose, they cannot afterwards dispute acts done by him within the scope of such agency (*p*); but, where an advance has been made on the personal responsibility of the agents of the company, a subsequent adoption of their acts by the directors will not make the company liable (*q*).

Contracts in violation of provisions of articles of association.—Parties dealing with the directors of a joint-stock company are bound to take notice that they are dealing with parties having limited authority; and they are bound by the limitation of authority contained in the registered articles of association (*r*), unless the company at large, or the general body of the shareholders, have sanctioned acts and transactions by the directors in excess of the powers conferred upon them. If, on the other hand, the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, the person contracting with the directors is not bound to see that all those preliminaries have been observed, but is entitled to presume that the directors are acting lawfully in what they do (*s*). The ratification of a particular contract which has been entered into by the directors without authority is a different thing from altering the articles, and such contract may be ratified by an ordinary resolution of a general meeting (*t*). Unless the memorandum and articles of association of a company contain in plain terms an express power

(*o*) 30 & 31 Vict. c. 131, s. 55.

(*p*) *Wilson* v. *West Hartlepool Ry.*, 2 De G. J. & S. 475; 34 L.J. Ch. 241.

(*q*) *Scott* v. *Ebury* (*Lord*), L.R. 2 C.P. 255; 36 L.J. C.P. 161.

(*r*) *Balfour* v. *Ernest*, 5 C.B. N.S. 624; 28 L.J. C.P. 170; *Shrewsbury* (*Earl*) v. *North Staffordshire Ry.*, L.R. 1 Eq. 593; 35 L.J. Ch. 596; *Pooley Hall Co., In re*, 18 W.R. 201; *Hambro* v. *Hull and London Fire Insurance Co.*, 3 H. & N. 789; 28 L.J. Ex. 62; see *English Channel Co.* v. *Rolt*, 17 Ch.D. 713.

(*s*) *Royal British Bank* v. *Turquand*, 6 E. & B. 327; 25 L.J. Q.B. 317; *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869; *Irvine* v. *Union Bank of Australia*, 2 App.Cas. 366; 46 L.J. P.C. 87; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629; 64 L.J. Ch. 451; *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93; 65 L.J. Ch. 536. Where by the articles "the business is to be conducted by not less than" a specified number, the condition is imperative: *Bottomley's case*, 16 Ch.D. 681; 50 L.J. Ch. 167.

(*t*) *Grant* v. *United Kingdom Switchback Co.*, 40 Ch.D. 135; 58 L.J. Ch. 311.

enabling the company to purchase their own shares, such purchase is *ultra vires* although the company may be empowered to deal in shares of joint-stock companies generally (*u*). If a company has no power to do a particular thing, that power cannot be added to the company by the agreement of the shareholders (*x*); but, if a company has power to do a thing, and there be only requisite a particular formality, such as the consent of a general meeting, in order to warrant the exercise of the power, then acquiescence may be inferred from delay, and a knowledge of the transaction imputed to every shareholder (*y*); and an agreement originally *ultra vires* cannot be impeached after the lapse of considerable time (*z*). There may be a breach of duty on the part of the directors, in neglecting to comply with certain formalities, in respect of which they are responsible to the shareholders; but it does not follow that the contract is void as against the company (*a*).

The power of giving a bill of sale as a security for debts is incident to a trading company, although it is not expressly conferred by the articles of association (*b*). So also is the power of raising money or giving security for a past debt by deposit of title deeds (*c*).

Parties who have contracted with the directors of a registered joint-stock trading company, in matters relating to the co-partnership business, are not bound, when seeking to enforce their contracts against the company, to show that the directors were authorised by the articles of association to enter into them. *Primâ facie* the directors have the necessary authority; and the burden of proving that the directors were restrained by the regulations of the company from making the particular contract sought to be enforced, and from binding the company thereby, lies upon the defendants. If managers, secretaries, or directors are appointed to carry on the business of a trading company, parties dealing with the company are not bound to enquire whether their agents or officers are properly appointed or not. If they exercise the duties of their office

(*u*) *London, Hamburg, and Continental Exchange Bank, In re, Zulueta's claim*, L.R. 5 Ch. 444; 39 L.J. Ch. 598.

(*x*) *Ashbury Carriage Co.* v. *Riche*, L.R. 7 H.L. 653; 44 L.J. Ex. 185; *Ashbury* v. *Watson*, 30 Ch.D. 376; 54 L.J. Ch. 985.

(*y*) *British Provident Life and Fire Ins. Soc., In re*, 32 L.J. Ch. 326; 1 De G. J. & S. 488; but see *Brotherhood's case*, 31 L.J. Ch. 861; 31 Beav. 365; *Prince of Wales Assur. Co.* v. *Harding*, E. B. & E. 216; 27 L.J. Q.B. 307.

(*z*) *Smallcombe's case*, L.R. 3 H.L. 249; 37 L.J. Ch. 793; *Holdsworth* v. *Evans*, L.R. 3 H.L. 263; 37 L.J. Ch. 800; see however *Spackman's case*, L.R. 3 H.L. 171; 37 L.J. Ch. 752; *Stanhope's case*, L.R. 1 Ch. 161; 35 L.J. Ch. 296.

(*a*) *Agar* v. *Athenæum Life Assur. Soc.*, 3 C.B. N.S. 725; 27 L.J. C.P. 95; *Bonelli's Telegraph Co., In re*, L.R. 12 Eq. 246; 40 L.J. Ch. 567; *Jortin* v. *S. E. Ry.*, 6 De G. M. & G. 270; 24 L.J. Ch. 343; *Prince of Wales Assur. Co.* v. *Harding*, E. B. & E. 183; 27 L.J. Q.B. 297.

(*b*) *Shears* v. *Jacobs*, L.R. 1 C.P. 513; 35 L.J. C.P. 241.

(*c*) *Patent File Co., In re*, L.R. 6 Ch. 83; 40 L.J. Ch. 190; see also *English Channel Steamship Co.* v. *Rolt*, 17 Ch.D. 715.

notoriously, and order goods which are received and used by the company in the ordinary course of its business, the company is responsible for repayment thereof (*d*). But, if the contract sued upon has no relation to the business carried on by the company, and is not within the scope of any implied authority given for the purpose of managing and conducting the business thereof, the plaintiff is bound to prove affirmatively that the directors who profess to bind the company by the contract were duly authorised so to do. This may be done by showing that any particular course of dealing has been sanctioned by the directors and acquiesced in by the shareholders, or that the unusual contract has been sanctioned by a board meeting at which the requisite number of directors was present (*e*). Where a company has power to enter into a contract for the purchase of goods, it is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although this fact may be known to the person with whom the contract is entered into (*f*). But, whenever a party dealing with a joint-stock company knowingly combines with the directors to do any act *ultra vires* to the prejudice of the shareholders, then the shareholders may very fairly deny their liability (*g*).

Liability of company and its officers.—Every company limited under the Act, whether limited by shares or by guarantee (sect. 41), must keep its name painted or affixed in a conspicuous position, and in letters easily legible, on the outside of its office or place of business, and must have its name in legible characters on its seal, and on all its notices, advertisements, and official publications, and in all its bills, notes, endorsements, cheques, orders, bills of parcels, invoices, receipts, and letters of credit. All officers of the company, and persons acting on its behalf, disobeying the statute, are subjected (sect. 42) to various personal liabilities in respect of their contracts and proceedings in the matter (*h*). If the company carries on business for a period of six months, after the number of the members has been reduced to seven, every person who is a member during that period is liable (sect. 48) for the whole debts of the company then contracted.

Effect of winding-up order.—*Bonâ fide* dispositions of property of a company in the ordinary course of its trade, made after

(*d*) *Smith* v. *Hull Glass Co.*, 11 C.B. 897; 21 L.J. C.P. 110; *Allard* v. *Bourne*, 15 C.B. 468; *Levy* v. *Metrop. Cab Co.*, 23 L.T. (O.S.) 67; *Green* v. *Nixon*, 3 Jur. N.S. 994; 27 L.J. Ch. 819.

(*e*) *Ridley* v. *Plymouth Baking Co.*, 2 Exch. 716; 17 L.J. Ex. 252; *Flitcroft's case*, 21 Ch.D. 519; 52 L.J. Ch. 217.

(*f*) *Contract Corporation, In re*, L.R. 8 Eq. 14.

(*g*) *Prince of Wales Assur. Co.* v. *Harding*, E. B. & E. 217; 27 L.J. Q.B. 297.

(*h*) *Penrose* v. *Martyn*, 28 L.J. Q.B. 28; E. B. & E. 499.

the presenting of a petition for winding up, and completed before the winding-up order, will, in the exercise of the discretion given to the court by the Companies Act, 1862, sect. 153, be confirmed (*i*). Where, however, such dispositions are incomplete, and rest in contract at the time of the winding-up order, the court has no discretionary power to order the contract to be fulfilled; and the person with whom it was entered into, though he has paid his money, has only a general claim as a creditor for damages in respect of the breach of contract (*k*). An agreement for a general lien on the goods of a company is determined by the winding-up order, at all events as to after-acquired property (*l*). Where a customer of a trading company had *bonâ fide* ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices, after the presenting of the petition, but before the winding-up order, it was held that the disposition of the property was complete before the winding-up order, and the goods were ordered to be delivered to the customer (*m*).

By sect. 131 of the Companies Act, 1862, a company which is being wound up voluntarily shall from the date of the commencement of such winding up cease to carry on its business except in so far as may be required for the beneficial winding up thereof (*n*).

Contracts with official and other liquidators are regulated by the Companies Act, 1862 (*o*). A liquidator appointed under a resolution to wind up voluntarily is not personally responsible to the solicitor employed by him on the affairs of the liquidation for any of the costs of such liquidation (*p*). Where a company is being voluntarily wound up, and there are four liquidators, one of them cannot, in the absence of any authority from the company, and solely upon the strength of a general resolution of his co-liquidators, accept bills on behalf of the company (*q*). The appointment of a receiver on the liquidation of a company operates to discharge the servants of the company (*r*), even though the liquidator, without continuing the business, employs the servants in analogous duties with a view to the reconstruction of the company (*s*).

(*i*) 25 & 26 Vict. c. 89, s. 153. See *Ince Hall Mills Co.* v. *Douglas Forge Co.*, 8 Q.B.D. 179; 51 L.J. Q.B. 238.

(*k*) *Wiltshire Iron Co., In re, Pearson, Ex parte*, L.R. 3 Ch. 443; 37 L.J. Ch. 554. See *Oriental Bank Co., In re*, 28 Ch.D. 634; 54 L.J. Ch. 322.

(*l*) *Wiltshire Iron Co.* v. *G. W. Ry.*, L.R. 6 Q.B. 101, 776; 40 L.J. Q.B. 43, 776.

(*m*) *Wiltshire Iron Co., In re, supra.*

(*n*) See *Hire Purchase Furnishing Co.* v. *Richens*, 20 Q.B.D. 387.

(*o*) 25 & 26 Vict. c. 89, ss. 99 and 133.

(*p*) *Trueman's Estate, In re, Hooke* v. *Piper*, L.R. 14 Eq. 278; 41 L.J. Ch. 585.

(*q*) *London and Mediterranean Bank, In re, Birmingham Banking Co., Ex parte*, L.R. 3 Ch. 651; 36 L.J. Ch. 807; *Agra and Masterman's Bank, Ex parte, Bolognesi's case*, L.R. 6 Ch. 206; 40 L.J. Ch. 26.

(*r*) *Reid* v. *Explosives Co.*, 19 Q.B.D. 264; 56 L.J. Q.B. 388.

(*s*) *MacDowall's case*, 32 Ch.D. 366; 55 L.J. Ch. 620.

Contracts with railway companies.—Where a public Act of Parliament limits and defines the authority of a railway company, and provides for the application of all the funds that come into the hands of the corporation or the directors, a contract for the accomplishment of objects not sanctioned by the Act of Parliament is illegal and void (*t*); and the assent of all the shareholders to such a contract, though it may make them all personally liable to perform the contract, will not bind them in their corporate capacity, or render liable the corporate funds (*u*). Incorporated railway companies have no existence independently of the Acts which create them; and they are created by Parliament with special and limited power and for limited purposes. When, therefore, they exceed, or attempt to exceed, their powers, they are acting in contravention of the law which established them, and in opposition to what courts of justice are bound to consider to have been the intention of Parliament in their creation (*x*).

A railway company incorporated by a special Act of Parliament, containing the usual clauses inserted in such statutes, cannot draw, accept, or endorse bills of exchange (*y*).

Contracts by the promoters of a railway made before incorporation, for the purpose of procuring the act of Incorporation and establishing the undertaking, cannot be enforced against the company (*z*), if they are *ultra vires* of the company (*a*); but, if not *ultra vires*, they may be enforced, if they have been adopted and acted upon by the company after it has obtained its act of Incorporation (*b*), or if the engagement is embodied in the Act itself.

The power of directors and committees of directors to make contracts on behalf of the company may be lawfully exercised as follows:—With respect to any contract, which, if made between private persons would be by law required to be in writing and under seal, the committee or the directors may make such contract on behalf of the company in writing and under the common seal of the company, and in the same manner may vary and discharge the same. With respect to any contract which, if made by private persons, would be by law required to be in writing, and signed by the

(*t*) *Taylor* v. *Chichester and Midhurst Ry.*, L.R. 2 Ex. 356; 36 L.J. Ex. 201; *Att.-Gen.* v. *G. N. Ry.*, 1 Drew. & Sm. 154; 29 L.J. Ch. 794; *Att.-Gen.* v. *G. E. Ry.*, 5 App.Cas. 473.

(*u*) *Colman* v. *Eastern Counties Ry.*, 10 Beav. 1; 16 L.J. Ch. 73.

(*x*) *Shrews. and Birm. Ry.* v. *L. & N. W. Ry.*, 22 L.J. Ch. 682; 4 De G. M. & G. 115; *East Angl. Ry.* v. *Eastern Counties Ry.*, 11 C.B. 775; 21 L.J. C.P. 23; *Norwich (Mayor)* v. *Norfolk Ry.*, 4 E. & B. 397; 24 L.J. Q.B. 105.

(*y*) *Bateman* v. *Mid-Wales Ry.*, L.R. 1 C.P. 499; 35 L.J. C.P. 205.

(*z*) *Caledonian & Dumb. Ry.* v. *Helenburgh Magistrates*, 2 Macq. 409.

(*a*) *Shrewsbury (Earl)* v. *North Staff. Ry.*, L.R. 1 Eq. 593; 35 L.J. Ch. 156.

(*b*) *Williams* v. *St. George's Harbour Co.*, 27 L.J. Ch. 691; 2 De G. & J. 547.

parties to be charged therewith, the committee or the directors may make such contract on behalf of the company, in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary and discharge the same; and with respect to any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, the committee or the directors may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary and discharge the same (*c*). Directors exercising the powers given by these enactments must act together and as a board (*d*); but the enactments are affirmative only, and do not preclude the enforcement against a company of the ordinary equity based on part performance (*e*).

Informal contracts for services by railway companies.—By sect. 91 of the Companies Clauses Consolidation Act, 1845, "the determination as to the remuneration of the auditors, treasurer, and secretary, shall be exercised only at a general meeting of the company." If, however, the company does not think fit to make its determination known at a general meeting, and the directors contract with a secretary to give him a certain salary, and the secretary serves the company under the contract, it is no answer to an action against the company for the stipulated remuneration to say that the remuneration he is to receive has never been determined by a general meeting of the company (*f*).

Contracts with co-partnerships and associations authorised to sue and be sued in name of secretary, treasurer, or public officer.—In order to obviate inconveniences ensuing from changes in the members, and technical objections arising from the non-joinder as plaintiffs in an action upon a contract of all who were partners at the time the contract was entered into, Acts of Parliament have from time to time been procured, empowering certain banking, trading, insurance, and other companies and co-partnerships, to sue and be sued in the name of their managing officer, or their treasurer or secretary for the time being, and providing that the actions so brought shall not abate or be discontinued by the death or removal of such nominal plaintiff whilst the action is pending. The right of action of the public officer is not affected by a change in the name of the firm, or the accession of new partners or shareholders (*g*); and it is in general absolutely vested in him, so that the action upon all contracts entered into with the directors and trustees *must* be

(*c*) 8 & 9 Vict. c. 16, s. 97.
(*d*) *D'Arcy* v. *Tamar, &c. Ry.*, L.R. 2 Ex. 158; 36 L.J. Ch. 37.
(*e*) *Wilson* v. *West Hartlepool Ry.*, 34 L.J. Ch. 241; 2 De G. J. & S. 475.
(*f*) *Bill* v. *Darenth Valley Ry.*, 1 H. & N. 305; 26 L.J. Ex. 81.
(*g*) *Wilson* v. *Craven*, 8 M. & W. 584; 10 L.J. Ex. 448.

brought in his name, and not in the names of those who are the actual parties to the contract (*h*). Therefore, where a covenant was entered into with several of the co-partners of such a co-partnership *nominatim*, it was held that the action upon the covenant must nevertheless be brought by the public officer, and that the covenantees could not sue in their own names upon the covenant, the words "shall and may" in the Acts creating these co-partnerships and vesting the right of action in the public officer being obligatory and not merely permissive (*i*). But the power of entering into contracts on behalf of the company is not transferred to such treasurer, secretary, or public officer, but continues to reside with the directors in whose hands the management of the co-partnership is placed. The extent of the right of action of the public officer generally depends upon the construction of the Acts of Parliament, the words of which are sometimes very large, vesting in him the right to sue upon all contracts in which the company is "concerned or interested," or which have been entered into "with any person in trust for the company," or "with any person for the use or benefit of the company" (*k*).

Liability of public officer.—The secretary, clerk, or public officer of a company authorised by Act of Parliament to be sued in the name of a clerk, secretary, public officer, or other nominal defendant, is not in general personally responsible upon a judgment obtained against him (*l*), unless he is a member of the company, and responsible as such upon the judgment (*m*).

Contracts with managers and shareholders of mining companies.—Shareholders in mining companies carried on on the cost-book principle are co-adventurers together; but they are not clothed with the ordinary liabilities of co-partners. One shareholder, for example, has no power of binding another by contract, unless he has been appointed a manager of the mine. The shareholders, moreover, are not liable upon bills or notes drawn, accepted, or made by the purser, or managers, or directors of the company, or for money borrowed by them or their resident agent or manager, for the purpose of paying the wages of servants or workmen, or for the general purposes of the association (*n*). And there is not, it seems, as between the managers and directors of the company, any

(*h*) *Steward* v. *Greaves*, 10 M. & W. 719; 12 L.J. Ex. 109.

(*i*) *Chapman* v. *Milvain*, 5 Exch. 61; 19 L.J. Ex. 228; *Wills* v. *Sutherland*, 4 Exch. 211; 18 L.J. Ex. 450; as to the death or removal of the officer during the pendency of an action, see *Barnewall* v. *Sutherland*, 9 C.B. 380; 19 L.J. C.P. 298.

(*k*) *Skinner* v. *Lambert*, 5 Sc. N.R. 197; 11 L.J. C.P. 237; *Smith* v. *Goldsworthy*, 4 Q.B. 430; 12 L.J. Q.B. 192.

(*l*) *Wormwell* v. *Hailstone*, 4 Moo. & P. 512; 6 Bing. 668; *Harrison* v. *Timmins*, 4 M. & W. 510; 8 L.J. Ex. 94.

(*m*) *Harwood* v. *Law*, 7 M. & W. 203; 10 L.J. Ex. 30.

(*n*) *Hybart* v. *Parker*, 4 C.B. N.S. 209; 27 L.J. C.P. 120.

implied authority from one manager to another to draw or accept bills or make promissory notes for the purposes of the company, so as to bind the other managers without their knowledge and express concurrence (*o*). But a manager who accepts bills of exchange for the company will himself be responsible upon the acceptance, if he has accepted without any authority from the company on whose behalf he professed to act (*p*). Those persons, also, who take an active part in the management of the mine, who personally give orders for the supply of machinery, or who are present at meetings when machinery is ordered, or who receive a share of the profits of the mine, or who agree to furnish capital and receive profits, if profits are realised, are responsible for the payment of the price of things ordered and consumed in the ordinary business of the company (*q*).

Who is a shareholder.—A written acceptance of shares in a mining company signed by the defendant is evidence against him of his being a shareholder (*r*). If his name is entered in the books of the company amongst the names of the shareholders with his knowledge and concurrence, or if he has admitted that he is a shareholder, there is proof against him of his being a shareholder, although it cannot be shown that he has actually received profits or obtained any dividend upon his shares (*s*). If, however, no share in the mine, or right to share in the profits thereof, has been actually transferred to him, and he is not in reality a holder of shares, and has no legal interest in the concern, and has not acted as an ostensible partner, he will not be responsible as a partner; and no acknowledgment made under a mistaken supposition of his own that he is a shareholder when he is not a shareholder, will make him liable, unless it were communicated to the plaintiff so as to mislead him (*t*). Although the property in mining shares may pass by delivery of the certificates of proprietorship, yet the holder of the certificates does not, in general, become a shareholder until his name is entered in the share register book; and the vendor of mining shares is not, in general, discharged from liability as a shareholder until his name has been expunged from the book (*u*).

(*o*) *Ricketts* v. *Bennett*, 17 L.J. C.P. 19; 4 C.B. 686; *Hawtayne* v. *Bourne*, 7 M. & W. 595; 10 L.J. Ex. 224; *Brown* v. *Byers*, 16 M. & W. 252; 16 L.J. Ex. 112; *Dickinson* v. *Valpy*, 10 B. & C. 128; 8 L.J. (O.S.) K.B. 51; *Burmester* v. *Norris*, 6 Exch. 796; 21 L.J. Ex. 43; *Cunningham & Co., In re*, 36 Ch.D. 532; 57 L.J. Ch. 169.

(*p*) *Owen* v. *Van Uster*, 10 C.B. 318; 20 L.J. C.P. 61.

(*q*) *Ellis* v. *Schmœck*, 3 Moo. & P. 220; 7 L.J. (O.S.) C.P. 231; *Steigenberger* v. *Carr*, 3 Sc. N.R. 466; *Tredwen* v. *Bourne*, 6 M. & W. 465; 9 L.J. Ex. 220; *Hawken* v. *Bourne*, 8 M. & W. 703; 10 L.J. Ex. 361; *Peel* v. *Thomas*, 15 C.B. 714; 24 L.J. C.P. 86.

(*r*) *Toll* v. *Lee*, 4 Exch. 230; 18 L.J. Ex. 364.

(*s*) *Ralph* v. *Harvey*, 1 Q.B. 845; 10 L.J. Q.B. 337.

(*t*) *Vice* v. *Anson* (*Lady*), 7 B. & C. 411; 6 L.J. (O.S.) K.B. 24.

(*u*) *Humby, Ex parte*, 28 L.J. Ch. 875.

Insurance companies are frequently constituted, and the policies issued by them framed, upon the terms that a certain specified, subscribed capital, and the stocks, funds, securities, and property of the company, shall alone be liable to make good claims arising upon their policies, that the directors signing the policies shall not be responsible to any greater extent than the funds or property in their hands or power shall be competent to discharge, and that no proprietor shall, in any event whatever, be liable beyond the amount of the unpaid part of his share in the subscribed capital stock of the company. When this limitation of liability is made an express term of the contract entered into between the company and third parties, these last are of course bound thereby (*x*); but it is otherwise when the third parties have no notice of the limitation (*y*). So long, however, as the shareholders have not paid up the whole of their shares, and the capital stock is not all expended, the directors who seal or sign the policy are liable thereon; and they must provide funds by making calls on the shareholders (*z*). Where certain directors of an insurance company, by policy under seal, ordered, directed, and appointed that the capital, stock, and funds of the company should stand charged with, and be liable to pay, 500*l.* to the plaintiff, it was held that this was a personal covenant on the part of the directors to pay if the funds proved adequate, and that they were individually liable thereon, unless they could show that the company was insolvent (*a*). In a contract of this kind the whole body are not made joint contractors; but each individual of the company is bound to make good the loss in the same proportion as his share bears to the total capital, in the nature of a separate underwriter; and the individual proprietors are not responsible for any others than themselves (*b*). A policy under the seal of the company cannot be avoided merely by showing that some of the formalities required by the deed of settlement, in order to render the contract binding on the company, have not been complied with (*c*). But an ordinary local agent of an insurance company is not, without special authority, authorised to bind the company by a contract to grant a policy (*d*).

(*x*) *Halket* v. *Mercht. Trad. Ins. Assoc.*, 13 Q.B. 960; 19 L.J. Q.B. 59; *Hassell* v. *Mercht. Trad. Ins. Assoc.*, 4 Exch. 525; 19 L.J. Ex. 183; *Hickman* v. *Cambrian, &c. Ins. Co.*, 28 L.J. Ex. 379; *Prince of Wales Assur. Co., In re, Athenæum Soc., Ex parte*, 28 L.J. Ch. 335; 3 De G. & J. 660.

(*y*) *Gordon* v. *Sea Fire Assur. Soc.*, 1 H. & N. 599; 26 L.J. Ex. 202; *State Fire Ins. Co., In re*, 32 L.J. Ch. 300.

(*z*) *Andrews* v. *Ellison*, 6 Moore, 199.

(*a*) *Gurney* v. *Rawlins*, 2 M. & W. 87; 6 L.J. Ex. 7; *Dawson* v. *Wrench*, 3 Exch. 359; 18 L.J. Ex. 229.

(*b*) *Hallett* v. *Dowdall*, 18 Q.B. 2; 21 L.J. Q.B. 98; *Reid* v. *Allan*, 4 Exch. 326; 19 L.J. Ex. 39.

(*c*) *Prince of Wales Assur. Co.* v. *Harding*, E. B. & E. 217; 27 L.J. Q.B. 307.

(*d*) *Linford* v. *Provincial Horse Ins. Co.*, 34 Beav. 291.

Contracts with banking co-partnerships.—The mere shareholders of a co-partnership under the management of trustees or directors have no authority to contract for one another, or to pledge the credit of the co-partnership (*e*); but the directors appointed to carry on the business have impliedly all such of the ordinary powers of partners in a common mercantile partnership as are necessary for carrying on the business for which the company is formed; and, where a banking co-partnership is established, the directors are considered the agents of the shareholders to borrow money for the ordinary purposes of the business, and to give securities in the ordinary form for the money borrowed, unless the power is excluded by the express provisions of the deed of settlement. They have authority, therefore, to give promissory notes, or to accept bills of exchange, so as to bind themselves and the other shareholders; and, if there is any objection in point of form to the validity of the bills or notes, the money obtained upon them by the directors may be recovered as money lent to the company. If there is any irregularity in the transaction, and the shareholders lie by and acquiesce in the irregularity, they will be deemed to have subsequently ratified the acts of the directors (*f*). If the manager of the bank is intrusted with a general power of accepting, making, and indorsing bills and notes, an innocent indorsee will not be prejudiced by any irregularity in his mode of exercising it; but, if he has only a special and limited authority, and the indorsement conveys an express intimation to that effect, the indorsee must, at his peril, make inquiry as to whether or not the authority has been properly exercised, before he advances his money upon, or gives credit to, the indorsement (*g*).

Banking co-partnerships established under 7 Geo. 4, c. 46, are authorised (sect. 9) to sue and be sued in the name of one of the public officers as the nominal plaintiff or defendant; and every judgment and decree obtained against the public officer is to operate (sect. 12) as a judgment against the co-partnership, and execution may be issued thereon (sect. 13) against any co-partner for the time being; and, if the judgment is not satisfied, it may then be issued against any person who was a member of the co-partnership at the time when the contract on which such judgment was obtained was entered into, or became a member at any time before such contract was executed, or was a member at the time

(*e*) *Burnes* v. *Pennell*, 2 H.L.C. 479, 521.

(*f*) *Maclae* v. *Sutherland*, 3 E. & B. 1; 23 L.J. Q.B. 229; *Bank of Australasia* v. *Bank of Australia*, 12 Jur. 189.

(*g*) *Alexander* v. *Mackenzie*, 6 C.B. 766; 18 L.J. C.P. 94; *Eyre* v. *Macdowell*, 14 Ir. C.L.R. 332; *Stagg* v. *Elliott*, 12 C.B. N.S. 373; 31 L.J. C.P. 260.

such judgment was obtained, provided leave is granted by the court in which the judgment was obtained, after notice to the person sought to be charged, and before the expiration of three years from the time such person shall have ceased to be a member of the co-partnership (*h*).

Liabilities of provisional directors and committeemen.—All persons who take an active part in working out a project, render themselves in general jointly responsible for the orders so given (*i*). Every person, also, who holds himself out as one of the acting committeemen or managers of a projected company, may become chargeable to parties who, subsequently to such holding out, have dealt with the managing committee; and all the actual and publicly reputed managers may become responsible for the acts of the managing committee, but not for things done pursuant to orders given before they became acting members or managers, or after they have ceased to be so (*k*). Where the plaintiff and the defendants were desirous of starting a company to take the plaintiff's premises and stock-in-trade, and the plaintiff sent a written proposal to the defendants for the sale of his extra stock, and they sent the plaintiff a written acceptance thereof, and the proposal was directed to and accepted by the defendants "on behalf of the proposed G. R. A. H. Co. (Limited)," it was held that, as the company was non-existent at the time of the agreement, the defendants were personally liable, and that parol evidence was inadmissible to show a contrary intention (*l*).

One member of a managing committee has, in general, no authority to bind another member. If the business of the company has always been transacted through the medium of resolutions passed by a managing committee, and through orders given by some accredited officer of the committee, one committeeman would not be responsible for the private and individual orders and contracts of a co-committeeman, or of any of the projectors, or of the officer made without the knowledge of the board, and of which

(*h*) *Dodgson* v. *Scott*, 2 Exch. 457; 17 L.J. Ex. 321. 7 & 8 Vict. c. 32, s. 26, as to banking co-partnerships carrying on business within sixty-five miles of London. See also 27 & 28 Vict. c. 32, as to banks which have discontinued the issue of their own bank notes.

(*i*) *Braithwaite* v. *Skofield*, 9 B. & C. 401; 7 L.J. (O.S.) K.B. 274; *Lake* v. *Argyll* (*Duke*), 6 Q.B. 477; 14 L.J. Q.B. 73; *Glenester* v. *Hunter*, 5 Car. & P. 65; *Kerridge* v. *Hesse*, 9 Car. & P. 200; *Burls* v. *Smith*, 5 Moo. & P. 735; 7 Bing. 705.

(*k*) *Bailey* v. *Macaulay*, 13 Q.B. 827; 19 L.J. Q.B. 73; *Horsley* v. *Bell*, Amb. 770; 1 Br. C.C. 101, n.; *Maudslay* v. *Le Blanc*, 2 Car. & P. 409, n.; *Doubleday* v. *Muskett*, 4 Moo. & P. 760; *Barnett* v. *Lambert*, 15 M. & W. 489; 15 L.J. Ex. 305; *Beale* v. *Mouls*, 16 L.J. Q.B. 410; 10 Q.B. 976; *Newton* v. *Belcher*, 12 Q.B. 921; *Maitland*, *Ex parte*, 23 L.J. Ch. 140.

(*l*) *Kelner* v. *Baxter*, L.R. 2 C.P. 174; 36 L.J. C.P. 94; *Northumberland Avenue Co.*, *In re*, 33 Ch.D. 16; *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, (1901) 1 Ch. 196; 70 L.J. Ch. 128; but see *Howard* v. *Patent Ivory Co.*, 38 Ch.D. 156; 57 L.J. Ch. 878.

he has known nothing until a claim is made upon him in respect thereof. The act of a secretary not authorised by the board does not bind the board; and, if authorised by it, it binds only those members who were present and concurred in giving authority to the secretary (*m*). A committeeman is not responsible for things ordered by the solicitor of the company, unless it be proved that the solicitor acted under an express authority from the committee (*n*). If an authority to contract on behalf of the company or a committee is vested in eight persons, those who delegated to them the particular authority are not bound by the acts and contracts of six out of the eight (*o*). The mere attendance of a party at a meeting called to consider the advisability of a scheme, and not to carry it into effect, and at which meeting no orders are given for expenses to be incurred, or for anything to be done for the purpose of working out the project, will not render the party responsible upon orders given at subsequent meetings which he has not attended. And, if parties employed by the managing committee or directors are expressly told that they must look to the deposits for remuneration for their services, and that the members of the committee will not hold themselves personally responsible for payment, these last will then be protected from personal liability (*p*). But, if an advance is made on the personal responsibility of the promoters, the subsequent adoption of their acts by the directors, after the company has been formed, will not relieve them from liability (*q*). Where the defendant and others, as provisional directors of a projected company, resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose, and the secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to enquire under what authority the secretary was acting) he showed the prospectus and the above resolutions, it was held that there was evidence, that the directors who were parties to the resolutions were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him and that they would incur no liability, there being nothing to show that the secretary, in giving the orders, or in communicating to the plaintiff the resolu-

(*m*) *Burnside* v. *Dayrell*, 3 Exch. 224; 19 L.J. Ex. 46; *Rennie* v. *Wynn*, 4 Exch. 697; 19 L.J. Ex. 2.

(*n*) *Cooke* v. *Tonkin*, 16 L.J. Q.B. 153.

(*o*) *Brown* v. *Andrew*, 18 L.J. Q.B. 153.

(*p*) *Giles* v. *Smith*, 11 Jur. 334; *Rennie* v. *Clark*, 5 Exch. 292; 19 L.J. Ex. 278; *Landman* v. *Entwistle*, 7 Exch. 632; 21 L.J. Ex. 208.

(*q*) *Scott* v. *Ebury* (*Lord*), L.R. 2 C.P. 255; 36 L.J. C.P. 161.

tions of the directors, had acted beyond the scope of his actual or apparent authority as secretary (*r*). But, where A. consented to his name being inserted in a prospectus as a director of a projected company, and on the prospectus being sent to him by the secretary of the company suggested alterations, and also that the company should be advertised in a particular newspaper, it was held that there was no evidence that he authorised the secretary to pledge his credit for all the expenses of advertising the company (*s*).

Powers and responsibilities of provisional committeemen.—An association of persons who have agreed to act together as provisional committeemen is not a co-partnership ; and one committeeman is not impliedly the agent of another for the purpose of carrying the common object into effect. The mere fact, therefore, of a person's having agreed to become a member of a provisional committee of a projected undertaking will not render him responsible upon the contracts and for the debts and engagements of such committee ; and the mere announcement of the fact in printed papers and prospectuses, issued by his authority, will not make him liable. "If not responsible as being one of the committee, in fact, he cannot become so by the representation of that fact" (*t*). A provisional committeeman, who has not himself received the deposit paid on an allotment of shares, and who has taken no part in the management of the undertaking, is not responsible for the application of the deposits by the managers (*u*). But, if the general management of the business of the company is vested in a provisional committee of management, every member of such committee who takes an active part in the management will be responsible upon the contracts entered into by such committee (*x*). If there is both a provisional committee and a managing committee co-existing, the members of the latter are not in general the agents of the former, and their contracts do not bind the members of the provisional committee in the absence of express proof of agency (*y*). But, if a company starts with a provisional committee of management, consisting of a great number of persons, all of them taking a more or less active part in the management, and then another smaller managing committee is formed, so that there is both a provisional committee and a managing committee co-existing, and the provisional committee has the

(*r*) *Maddick* v. *Marshall*, 16 C.B.N.S. 387 ; 17 C.B. N.S. 829 ; *Riley* v. *Packington*, 36 L.J. C.P. 204 ; L.R. 2 C.P. 536 ; *Collingwood* v. *Berkeley*, 15 C.B. N.S. 145.

(*s*) *Burbidge* v. *Morris*, 3 H. & C. 664 ; 34 L.J. Ex. 131.

(*t*) *Reynell* v. *Lewis*, 15 M. & W. 517 ; 16 L.J. Ex. 30 ; *Barker* v. *Stead*, 3 C.B. 946 ; 16 L.J. C.P. 160 ; *Patrick* v. *Reynolds*, 1 C.B. N.S. 727.

(*u*) *Burnside* v. *Dayrell*, 3 Exch. 224, 227 ; 19 L.J. Ex. 46.

(*x*) *Bailey* v. *Macaulay*, 13 Q.B. 815 ; 19 L.J. Q.B. 73.

(*y*) *Williams* v. *Pigott*, 2 Exch. 201 ; 17 L.J. Ex. 196 ; *Dawson* v. *Morrison*, 16 L.J. C.P. 240.

appointment of, and the control over, the managing committee, the members of the latter may become the agents of the former, authorised to act for them as well as on their own account (*z*).

Contracts with committees of clubs and eleemosynary institutions.—The members of the managing committee of a club or charity are personally responsible upon contracts, for the benefit of the club made by order of the committee, as the credit is deemed to have been given to the committee, rather than to the subscribers at large, who are a constantly fluctuating body, unknown individually to the persons contracting (*a*). Subscribers who pay an entrance fee on admission to a club, and an annual subscription afterwards, for the purpose of forming a fund for defraying the expenses of the establishment, and who appoint a committee to administer such fund, are not themselves responsible upon the contracts of such committee (*b*), unless it can be shown that they individually concurred in, or assented to them. As the members of the committee, therefore, in these cases, do not bind the subscribers at large by their contracts, or give to the persons whom they have employed a tangible third party to proceed against, they are themselves the only persons who can be sued, and are in fact principals in the transaction (*c*). If the managing committee allow an officer, or any one of the members of the committee, to discharge the functions of the whole body, they make him their general agent, and clothe him with an implied authority to pledge their credit for the payment of the things ordered, and of the people employed by him, within the limits of the ordinary course of dealing, unless they have beforehand furnished him with sufficient funds for the purpose, and never permitted him to deal on credit (*d*). But members of a club are not responsible upon bills of exchange, or for the repayment of money lent, unless they have expressly sanctioned the drawing or acceptance of bills, or the borrowing of money (*e*); nor are they responsible upon contracts made by their secretary or one of their members out of the ordinary course of business, without their knowledge. It is a question for the jury to determine whether goods ordered by one only of the committee were furnished upon his individual credit, or on the credit of the whole body of persons managing the institution (*f*).

Contracts with trustees and commissioners of public works.—

(*z*) *Tanner, Ex parte*, 21 L.J. Ch. 212; 5 De G. & S. 182.

(*a*) *Queensbury* (*Duke*) v. *Cullen*, 1 Br. P.C. 396, 404.

(*b*) *Flemyng* v. *Hector*, 2 M. & W. 172; 6 L.J. Ex. 43.

(*c*) *Burls* v. *Smith*, 7 Bing. 705; 5 Moo. & P. 735; *Glenester* v. *Hunter*, 5 Car. & P. 65.

(*d*) *Cockerell* v. *Aucompte*, 26 L.J. C.P. 194; 2 C.B. N.S. 440.

(*e*) *Mountcashel* (*Earl*) v. *Barber*, 15 C.B. 512; 24 L.J. C.P. 43.

(*f*) *Todd* v. *Emly*, 7 M. & W. 427; 10 L.J. Ex. 161; 8 M. & W. 505; 10 L.J. Ex. 262; *ante*, pp. 363, 365.

Commissioners and trustees acting in the execution of statutory powers are generally exempted from all personal liability whilst acting within the scope of the statute they are authorised to execute, but are liable to be sued in the name of their clerk or treasurer for the time being; and the public funds in their hands, derived from rates they are authorised to impose, are subjected to the payment and satisfaction of claims proved against them (*g*).

But although trustees and commissioners of public works have a public fund at their disposal, or may be authorised to impose tolls or make rates and assessments, and so collect money for their purposes, they may nevertheless pledge their own personal credit. If they have borrowed money not in conformity with their borrowing powers, or have exceeded their borrowing powers, and have failed consequently to charge the fund at their disposal with the re-payment of the loan, and have given the lender no remedy against the rates, tolls, or assessments they are authorised to levy, they may become personally liable, either on the ground that the money was borrowed on their own personal credit, and not on the credit of the fund (*h*), or that they falsely represented to the borrower that they had funds at their disposal for the re-payment of the loan (*i*), or that they undertook to provide funds for the purpose. They may also contract under circumstances giving rise to an irresistible presumption that the personal credit of those who made

(*g*) If a contract made by them is within the scope of the Act to be executed by them, the procedure for the breach of such contract must be against the clerk, and the amount recovered must be paid out of the public moneys in the hands or under the control of the commissioners. *Hall* v. *Taylor*, 1 E. B. & E. 107; 27 L.J. Q.B. 311. If judgment is recovered against the officer authorised to be sued, and the commissioners neglect to satisfy the judgment, they may be compelled by *mandamus* to make a rate and apply it in satisfaction and discharge of the judgment debt. *Reg.* v. *Rotherham Local Board*, 27 L.J. Q.B. 156; 8 E. & B. 906; *Ward* v. *Lowndes*, 29 L.J. Q.B. 40. Where a debt is due, the creditor is entitled to judgment, although there may be no funds for the payment of it, and the creditor may consequently never be able to enforce his judgment by execution. *Bush* v. *Martin*, 2 H. & C. 311; 33 L.J. Ex. 17. Where, by the Lunatic Asylums Act (8 & 9 Vict. c. 126, repealed by 16 & 17 Vict. c. 97, s. 1, since repealed by 53 & 54 Vict. c. 5, Sched. V.), a select number of justices, called "the committee of visitors," were empowered to contract for plans for the erection of a lunatic asylum, and were enabled to sue and be sued in the name of their clerk, and provisions were made for raising funds by subscriptions and by rates, and resolutions were passed at meetings of the committee offering premiums for plans, specifications, and drawings, and appointing an architect, it was held that the committee might be sued in the name of their clerk upon the contracts authorised by these resolutions (*Kendall* v. *King*, 17 C.B. 483; 25 L.J. C.P. 132; *Cane* v. *Chapman*, 5 Ad. & E. 647; 6 L.J. K.B. 49), but that the members of the committee could not be made personally liable upon such contracts (*Allen* v. *Waldegrave*, 8 Taunt. 566; 2 Moore, 621), nor could execution upon a judgment recovered against the clerk be issued against him. *Wormwell* v. *Hailstone*, 8 L.J. (O.S.) C.P. 264; 6 Bing. 668; but see *Cobbett* v. *Wheeler*, 30 L.J. Q.B. 64; 3 E. & E. 358. As to loans for Public Works, see 38 & 39 Vict. c. 89, amended by 39 & 40 Vict. c. 31, extended by 41 Vict. c. 18; 42 & 43 Vict. c. 77; 43 & 44 Vict. c. 1. As to County Councils, see 51 & 52 Vict. c. 41, ss. 64—72.

(*h*) *Parrott* v. *Eyre*, 10 Bing. 283; 3 L.J. C.P. 3.

(*i*) *Higgins* v. *Livingstone*, 4 Dow, 355; *Eaton* v. *Bell*, 5 B. & Ald. 34, 41.

the contract was pledged, and that the other party to the contract looked to them for payment, and not to the funds they were authorised to collect (*k*).

Salaries of public officers.—Public officers appointed by trustees and commissioners of public works, under the authority of Acts of Parliament, which provide that their salaries shall be paid out of the rates to be raised under the authority of the Act, cannot render the persons who make the appointment personally responsible for the payment of the salary, unless they have expressly contracted to pay it (*l*). The only claim of such officers is against the rates; and, these failing, they must go unpaid (*m*). When commissioners of public works, authorised by statute to appoint an officer, are directed to pay him a salary, they impliedly contract, on making the appointment, to pay the salary out of the funds they are directed to administer, so as to give the officer who has accepted the appointment a right to sue them in the name of their clerk or treasurer (*n*), and to proceed to obtain payment out of the appointed fund; but the commissioners do not incur any personal liability by virtue of the appointment, unless they have entered into an express contract to pay the salary. Whenever a public body is invested with a discretionary power respecting the amount of remuneration to be paid for a particular service, and no express contract has been entered into by the board to pay any particular sum, the court cannot interfere with the exercise of their discretion.

Contracts with Metropolitan Borough Councils.—By sect. 4 (1) of the London Government Act, 1899 (*o*), the powers and duties of every elective vestry and district board in the county, as well as their property and liabilities, were transferred to the council of the borough comprising the district within which those powers were exercised. Amongst the powers so transferred is the power to enter into contracts in their corporate capacity, and such contracts would have to be under seal in compliance with the common law doctrine which requires, subject to certain exceptions already referred to, *ante*, p. 345, contracts made by corporations to be under seal. In the case of Metropolitan borough councils exercising the powers of administrative vestries or district boards, and entering into contracts for the purpose of carrying the Metropolis Management Act, 1855 (*p*), into execution, it is provided by

(*k*) *Horsley* v. *Bell*, Amb. 770; 1 Bro. C.C. 101, n.; *Lambert* v. *Knott*, 6 Dowl. & R. 122.

(*l*) *Bogg* v. *Pearse*, 10 C.B. 534; 20 L.J. C.P. 99; *Alexander* v. *Worman*, 6 H. & N. 100; 30 L.J. Ex. 198.

(*m*) *Andrews* v. *Dally*, 4 Bing. 566; 1 M. & P. 490; *Smart* v. *West Ham Union*, 10 Exch. 867; 24 L.J. Ex. 201; *Addison* v. *Preston* (*Mayor*), 12 C.B. 108; 21 L.J. C.P. 146.

(*n*) *Hall* v. *Taylor*, E. B. & E. 107; 27 L.J. Q.B. 311.

(*o*) 62 & 63 Vict. c. 14, s. 4 (1).

(*p*) 18 & 19 Vict. c. 120, s. 149.

sect. 149 of that Act that "every such contract for works or materials, whereof the value or amount exceeds ten pounds, shall be in writing or printing or partly in writing and partly in print, sealed with the seal of the board or vestry."

Contracts with parish councils.—Every parish council is, by sect. 3 (9) of the Local Government Act, 1894 (*q*), constituted a body corporate, and ordinarily every contract made with it would have to be under seal; but the intention of sub-sect. 9 would seem to be that a contract may be signified by an instrument simply under the hands—or, if an instrument under seal is required, under the hands and seals—of the chairman presiding at the meeting and two other members of the council. Powers to acquire land for the purposes of the Local Government Act, 1894, or for allotments, are given by sect. 9 of that Act, which by the same section provides for the mode of holding inquiries by the Local Government Board and by a county council. Power is also given by sect. 12 to a parish council to borrow money for certain purposes set out in that section.

Contracts with district councils.—Urban district councils (*r*) and rural district councils (*s*) have now taken the place of the local authorities—urban sanitary authorities and rural sanitary authorities—created by the Public Health Act, 1875 (*t*). Every rural district council is a body corporate with perpetual succession and a common seal (*u*). Sect. 173 of the Public Health Act, 1875 (*x*), gives power to any local authority to enter into any contracts necessary for carrying the Act into execution, and, by sect. 174, as to contracts by urban authorities, if over 50*l.*, they are to be in writing sealed with the common seal (*y*), and to specify the work, the price, the time, and the penalty (*z*). An estimate is to be obtained and a report made. Before a contract of 100*l.* is made, ten days' notice and tenders are to be given, and security to be taken. Such contracts duly made will be binding on such authority and their successors, and all other parties, subject to a proviso as to compounding. Power to purchase land is given by sects. 175—178, and the mode of reference to arbitration by sects. 179—181. Powers of borrowing money are given to any local authority by sects. 233—239 (*a*).

Contracts with parish officers.—Agreements entered into by

(*q*) 56 & 57 Vict. c. 73, s. 3 (9).
(*r*) *Ibid.* s. 21.
(*s*) *Ibid.* s. 25 (1), (5).
(*t*) 38 & 39 Vict. c. 55, s. 5.
(*u*) 56 & 57 Vict. c. 73, s. 24 (7).
(*x*) 38 & 39 Vict. c. 55, s. 173.
(*y*) *Hunt* v. *Wimbledon Local Board*, 4 C.P.D. 48; 48 L.J. C.P. 207; *Att.-Gen.* v. *Gaskill*, 22 Ch.D. 537; 51 L.J. Ch. 870; *ante*, pp. 348, 350.
(*z*) These provisions are obligatory: *British Insulated Wire Co.* v. *Prescot Urban Council*, (1895) 2 Q.B. 463; 64 L.J. Q.B. 811; on appeal, (1895) 2 Q.B. 538; 65 L.J. Q.B. 190.
(*a*) See also the Local Loans Acts, 1875, 1885 (38 & 39 Vict. c. 83; 48 & 49 Vict. c. 90).

churchwardens and parishioners will, under certain circumstances, be binding upon the parish (*b*). But, as churchwardens, overseers of the poor, and parish officers, have no power of contracting so as to give any right of action against the parish, it seems that they would be themselves personally responsible upon all contracts entered into by them in the exercise of the duties of their office (*c*), unless the party with whom they have contracted agrees to look exclusively to the funds of the parish for payment (*d*).

Overseers of the poor are bound to take care of casual poor within their parishes; and the law obliges them to reimburse a private individual for expenses necessarily incurred by him in procuring relief and medical attendance for a casual pauper on any sudden emergency (*e*). If an accident happens in the parish of A. to a pauper belonging to the parish of B., which disables the pauper, and he is then removed to his own place of abode in his own parish of B., and attended by the surgeon of that parish, the surgeon may maintain an action against the officers of the parish of A., where the accident happened, to recover a reasonable compensation for his medicine and attendance (*f*). But the law raises no implied promise from one parish to another in respect of relief and necessaries afforded to casual poor (*g*), unless the parish sued has, in some shape or another, sanctioned or authorised the relief (*h*). An agreement by the churchwardens, overseers, and surveyors of a parish for a lease of land to be converted into gardens for the occupation of the poor is a personal contract of their own upon which they are individually liable; and they may, consequently, be sued for the rent agreed to be paid to the owner, or for use and occupation, although they have ceased to be parish officers (*i*).

Friendly societies.—Contracts with friendly societies are regulated by the Friendly Societies Act, 1896 (*k*).

Loans to friendly societies.—Where money has been lent to the directors and recognised officers or agents of a friendly society, and the money has come to the use of the society, and the members have had the benefit of the loan, the society cannot exempt itself from responsibility by showing that the directors have exceeded their borrowing powers, or that certain prescribed formalities

(*b*) *Martin* v. *Nutkin*, 2 P. Wms. 266.
(*c*) *Kirby* v. *Banister*, 5 B. & Ad. 1069; 3 L.J. M.C. 69; *Crew* v. *Petit*, 3 N. & M. 456.
(*d*) *Marsh* v. *Davies*, 1 Exch. 668; 17 L.J. Ex. 94.
(*e*) *Simmons* v. *Wilmott*, 3 Esp. 91.
(*f*) *Tomlinson* v. *Bentall*, 5 B. & C. 745; 5 L.J. (O.S.) M.C. 7; *Lamb* v. *Bunce*, 4 M. & S. 275.
(*g*) *Atkins* v. *Banwell*, 2 East, 505.
(*h*) *Paynter* v. *Williams*, 1 Cr. & M. 815; 2 L.J. M.C. 105.
(*i*) *Uthwatt* v. *Elkins*, 13 M. & W. 772, 777; 14 L.J. Ex. 131; 5 & 6 Vict. c. 57.
(*k*) 59 & 60 Vict. c. 25. As to contracts which are unauthorised but not illegal, see *Coltman, In re*, 19 Ch.D. 64; 51 L.J. Ch. 3.

annexed to those borrowing powers have not been complied with (*l*).

Industrial and provident societies.—Contracts with industrial and provident societies are regulated by the Industrial and Provident Societies Act, 1893 (*m*). By sect. 23, sub-sect. 1, of that Act, all moneys payable by a member to the society shall be a debt due from such member to the society, and shall be recoverable as such, either in the County Court of the district in which the registered office of the society is situate, or that of the district in which such member resides, at the option of the society.

By sect. 35, contracts on behalf of the society may be made, varied or discharged as follows:—(a) Any contract, which if made between private persons would be by law required to be in writing, and if made according to the English law, to be under seal, may be made on behalf of the society in writing under the common seal of the society, and may in the same manner be varied or discharged: (b) Any contract, which if made between private persons would be by law required to be in writing and signed by the persons to be charged therewith, may be made on behalf of the society in writing by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged: (c) Any contract under seal, which if made between private persons might be varied or discharged by a writing not under seal signed by any person interested therein, may be similarly varied or discharged on behalf of the society by any person acting under the express or implied authority of the society: (d) Any contract, which if made between private persons would be by law valid, though made by parol only and not reduced into writing, may be made by parol on behalf of the society by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged: (e) A signature purporting to be made by a person holding any office in the society attached to a writing whereby any contract purports to be made, varied, or discharged by or on behalf of the society, shall *primâ facie* be taken to be the signature of a person holding at the time when the signature was made the office so stated. And all contracts which may be or have been made, varied, or discharged, according to the provisions contained in this section, shall, so far as concerns the form thereof, be effectual in law and binding on the society, and all other parties thereto, their heirs, executors or administrators, as the case may be.

(*l*) *Pare* v. *Clegg*, 30 L.J. Ch. 747; 29 Beav. 589. (*m*) 56 & 57 Vict. c. 39.

The dissolution and winding-up of such societies is provided for by sects. 58—61.

It was held that under the former Acts an industrial and provident society was not liable to be sued in its corporate capacity for goods supplied before the registration, although the action was not brought until after registration (*n*). Such an action should have been brought against the committee of management (*o*). But a society formed under 15 & 16 Vict. c. 31 (repealed), and afterwards registered under the Acts subsequently in force, might sue in its corporate name upon a bond given to the trustees of the society before the passing of the latter Acts (*p*). Members of an unregistered society enrolled and certified under the old Act (15 & 16 Vict. c. 31), giving a promissory note in the following form for a debt of the society: "Twelve months after date, we, the undersigned, being members of the executive committee, on behalf of the L. & S. W. Railway Co-operative Society, do jointly promise to pay," &c., were held personally liable (*q*).

Contracts with benefit building societies are regulated by the 6 & 7 Will. 4, c. 32 (societies before 1874), and the 54 & 55 Vict. c. 39, s. 89 (stamps); and by the Building Societies Acts, 1874 to 1894 (*r*). A rule empowering the trustees to borrow a limited amount of money for the purposes of the society was held not illegal under the old Acts (*s*). But now these societies have power under the above Acts to borrow money (*t*). Parties who sign promissory notes, or expressly contract in their own names for the repayment of money advanced to a benefit building society, cannot exonerate themselves from personal liability upon their contract merely by describing themselves on the face of it as "trustees" or "secretary" for the society (*u*). The total amount of the loan must not at any time exceed two-thirds of the amount secured by mortgages from its members (*x*). Formerly, even where there was a power given by the rules to borrow money, it must be limited; an unlimited power of borrowing is invalid (*y*).

Contracts with freehold land societies.—There is a great distinction between a freehold land society and a benefit building

(*n*) *Linton* v. *Blakeney Industrial School*, 3 H. & C. 853; 34 L.J. Ex. 211.

(*o*) *Dear* v. *Mellard*, 32 L.J. C.P. 252; 15 C.B. N.S. 19; *Toutill* v. *Douglas*, 33 L.J. Q.B. 66.

(*p*) *Queensbury Industrial Soc.* v. *Pickles*, L.R. 1 Ex. 1; 35 L.J. Ex. 1.

(*q*) *Gray* v. *Raper*, L.R. 1 C.P. 694.

(*r*) 37 & 38 Vict. c. 42; 38 & 39 Vict. c. 9; 40 & 41 Vict. c. 63; 47 & 48 Vict. c. 41; 57 & 58 Vict. c. 47.

(*s*) *Laing* v. *Reed*, L.R. 5 Ch. 4; 39 L.J. Ch. 1.

(*t*) See 37 & 38 Vict. c. 42, s. 15; *Murray* v. *Scott*, 9 App.Cas. 519; 53 L.J. Ch. 745; *Mutual Aid Society, In re*, 30 Ch.D. 434; 55 L.J. Ch. 111; *Brooks* v. *Blackburn Benefit Building Society*, 9 App.Cas. 857; 54 L.J. Ch. 376.

(*u*) *Price* v. *Taylor*, 5 H. & N. 542; 29 L.J. Ex. 331; *Mare* v. *Charles*, 5 E. & B. 978; 25 L.J. Q.B. 119.

(*x*) 37 & 38 Vict. c. 42, s. 15.

(*y*) *Hill's case*, L.R. 9 Eq. 605; 39 L.J. Ch. 628. As to liability of directors for money borrowed beyond the limit, see *Looker* v. *Wrigley*, 9 Q.B.D. 397.

society. A freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst them; but a benefit building society advances to its borrowing members money derived from the subscriptions, which the borrowing members themselves lay out in the purchase of lands or buildings, and then mortgage them to the society. A freehold land society, whose rules authorise the directors to make speculative investments of the funds of the society in the purchase of estates, to be partitioned and divided amongst the members, cannot be registered as a benefit building society, as its objects are totally different from those of a benefit building society; and both the directors or trustees who enter into contracts for the purchase of estates, and the members or shareholders who authorise them to be made, may become personally responsible for the fulfilment of such contracts (*z*).

Salaries of officers of friendly societies.—Surveyors, secretaries, solicitors, and officers of benefit building societies and industrial and provident societies generally, have notice by the rules of the society that the remuneration for their services to the society is to be paid out of the funds of the society, so that, if the society becomes insolvent, they have no right to resort for payment to individual members. Officers of this class generally have a much greater interest in the societies to which they are attached than the trustees or directors. In the great majority of cases, they are the promoters of the society, at whose request the directors consent to accept office and take upon themselves the liabilities and duties of their situation; and such officers generally discharge their duties, and perform the services rendered by them to the society, with the understanding, on all hands, that they are to be remunerated out of the funds of the society; and, if the funds fail, these officers must remain unpaid (*a*).

Contracts with loan societies are regulated by 3 & 4 Vict. c. 110.

Contracts with registered trade unions are regulated by 34 & 35 Vict. c. 31, amended by 39 & 40 Vict. c. 22 (*b*).

Contracts with infants.—All individuals below the age of twenty-one years are clothed only with a qualified power of contracting. By the Infants' Relief Act, 1874 (*c*), all contracts by infants,

(*z*) *Grimes* v. *Harrison*, 26 Beav. 435; 28 L.J. Ch. 823.

(*a*) *Alexander* v. *Worman*, 6 H. & N. 100; 30 L.J. Ex. 198.

(*b*) As to insurances on the lives of children, &c., see sects. 62—67 of 59 & 60 Vict. c. 25. As to suing a trade union, see *Taff Vale Ry.* v. *Amalgamated Railway Servants Society*, (1901) A.C. 426; 70 L.J. K.B. 905.

(*c*) 37 & 38 Vict. c. 62, s. 1; at common law these contracts were not absolutely void, but might have been ratified by the infant on attaining his majority.

whether by specialty or simple contract, for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, are absolutely void. But this enactment does not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as then by law were avoidable (*d*). Nor can an infant, who has entered into a contract, and has paid under it for something which he has consumed, recover back the money on the ground that the contract was void under the section (*e*).

It was held that, notwithstanding the above enactment, and sect. 2, *infra*, and *post*, p. 380, an infant debtor trader might, after he has attained full age, be made a bankrupt upon an act of bankruptcy committed during infancy (*f*); but this has been overruled (*g*), unless, perhaps, where the infant has expressly represented himself to be of full age (*h*).

The contracts of an infant are binding upon him during his minority if they are necessary, and for his benefit and advantage, but, speaking generally, may be avoided by him on his coming of age. The contracts of an infant which are not necessary or for his benefit or advantage cannot be enforced against him during his minority; but at common law they might, if not by deed, have been ratified by the infant on his arriving at full age, and could then have been enforced against him. By 9 Geo. 4, c. 14, s. 15, such ratification must have been in writing signed by the party to be charged therewith; and by the Infants' Relief Act, 1874 (*i*), no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age, of any promise or simple contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

In deciding whether a contract is or is not for the benefit and advantage of an infant, the court does not always consider the circumstances of each contract; for it has been laid down that certain contracts can under no circumstances be enforced against an infant during his minority. Thus, no penal obligations entered into by infants are enforceable, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to

(*d*) *Duncan* v. *Dixon*, 44 Ch.D. 211; 59 L.J. Ch. 437.

(*e*) *Valentini* v. *Canali*, 24 Q.B.D. 166; 59 L.J. Q.B. 75.

(*f*) *Lynch*, *Ex parte*, 2 Ch.D. 227; 45 L.J. Bankr. 48.

(*g*) *Jones*, *Ex parte*, 18 Ch.D. 109; 50 L.J. Ch. 673.

(*h*) *Per* Lush, L.J., *Jones*, *Ex parte*, *supra*; but see *post*, p. 375, note (*s*).

(*i*) 37 & 38 Vict. c. 62, s. 2.

a penalty (*k*). All deeds, also, and covenants, feoffments, grants, releases, confirmations, cognovits, or other writings under seal made by infants, are, as a general rule (subject to some few exceptions presently noticed), not binding (*l*); and an infant cannot be sued on his covenant to serve contained in an indenture of apprenticeship executed by him (*m*); nor on a contract not to accept professional engagements during apprenticeship (*n*); nor on a bill of exchange accepted by him, although the bill may have been accepted on account of necessaries furnished to such infant (*o*); nor on a contract of suretyship (*p*); nor for a breach of warranty made by him on the sale of a horse (*q*); nor is he bound by an agreement to refer disputes to arbitration, nor by the recitals in any deed executed by him during infancy (*r*). If the infant has induced another party to contract with him by falsely representing that he was of age, he is, nevertheless, not precluded from setting up his infancy as an answer to any action founded on such contract (*s*). Where an infant, in consideration of being employed as a milk-carrier, agreed not to compete in business within a radius of five miles for two years after leaving his employment, it was held that the contract was beneficial to him, and that the stipulation could, therefore, be enforced against him after attaining his majority (*t*).

Contracts also entered into by infants in the exercise of a trade cannot be enforced against them. An action, consequently, cannot be maintained against an infant who carries on trade, for work done for him, or for the rent of houses and buildings hired by him, in the course of that trade, although he gains his living thereby (*u*). An agreement with an infant workman which binds him to serve during a certain term, but leaves the master free to stop his work and his wages whenever he chooses, is not beneficial to the infant (*x*). The entire contract must be looked at, and if it

(*k*) Co. Litt. 172, a; *Fisher* v. *Mowbray*, 8 East, 330; *Baylis* v. *Dinely*, 3 M. & S. 447; *Stikeman* v. *Dawson*, 16 L.J. Ch. 205; 1 De G. & S. 90; see, however, *Wood* v. *Fenwick*, 10 M. & W. 195; 11 L.J. M.C. 127.

(*l*) Co. Litt. 171, b; *Oliver* v. *Woodroffe*, 4 M. & W. 650; 8 L.J. Ex. 105.

(*m*) *Gylbert* v. *Fletcher*, Cro. Car. 179; but see *Walter* v. *Everard*, (1891) 2 Q.B. 369; 60 L.J. Q.B. 738.

(*n*) *De Francesco* v. *Barnum*, 43 Ch.D. 165; 59 L.J. Ch. 151; 45 Ch.D. 430; 60 L.J. Ch. 63.

(*o*) *Williams* v. *Harrison*, Carth. 160; *Williamson* v. *Watt*, 1 Campb. 551; *Harrison* v. *Cotgreave*, 16 L.J. C.P. 198; 4 C.B. 562; *Soltykoff*, *In re*, (1891) 1 Q.B. 413; 60 L.J. Q.B. 339.

(*p*) *Maples* v. *Wightman*, 4 Conn. 376; *Allen* v. *Minor*, 2 Call. 70.

(*q*) *Howlett* v. *Haswell*, 4 Campb. 118; *Green* v. *Greenbank*, 2 Marsh. 485; *Grove* v. *Nevill*, 1 Keb. 778.

(*r*) Watson's Arbitr. 40, 41, 42; *Milner* v. *Lord Harewood*, 18 Ves. 274.

(*s*) *Bartlett* v. *Wells*, 1 B. & S. 836; 31 L.J. Q.B. 57; *De Roo* v. *Foster*, 12 C.B. N.S. 272. See, however, note (*h*), p. 374.

(*t*) *Evans* v. *Ware*, (1892) 3 Ch. 502; 62 L.J. Ch. 256.

(*u*) *Dilk* v. *Keighley*, 2 Esp. 480; *Whittingham* v. *Hill*, Cro. Jac. 494; *Whywall* v. *Champion*, 2 Str. 1083; *Lowe* v. *Griffith*, 1 Sc. 458; 1 Hodg. 30.

(*x*) *Reg.* v. *Lord*, 12 Q.B. 757; 17 L.J. M.C. 181; see *Leslie* v. *Fitzpatrick*, 3 Q.B.D. 229; 47 L.J. M.C. 22; and *Meakin* v. *Morris*, 12 Q.B.D. 352; 53

contains stipulations so unfair as to be detrimental to the infant, it will be set aside; if, however, it is on the whole for the benefit of the infant, it will be enforced (*y*). A plaintiff cannot convert a breach of duty arising out of a contract into a tort so as to charge an infant in an action *ex delicto*. Therefore, if a horse lent to an infant is immoderately ridden by the latter and is injured, the infant is protected from liability by his infancy (*z*). And an infant innkeeper is not liable for the loss of the guest's goods (*a*). But, if the act of the infant is not an abuse of a contract, but a wrong actionable *per se*, he will not be protected from the consequences (*b*).

Land in possession of an infant is now deemed settled estate, and the court will sell or lease it as such, and will manage the estate by trustees; see the Conveyancing Act, 1881 (*c*).

Rights ex contractu *of infants*.—"Infancy is a personal privilege, of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age" (*d*). Therefore, in cases of promises of marriage, contracts of purchase and sale, and contracts for the performance of work, the adult contracting party is bound and may be sued by the infant, although the latter has incurred no corresponding legal obligation (*e*). But an infant cannot obtain a decree for a specific performance of a contract against an adult contracting party (*f*). An infant cannot be compelled to complete a contract for the purchase of an estate; but, if he has paid a deposit under such a contract, he cannot recover it back merely because he declines to complete the purchase (*g*). When an infant has brought an action by his next friend, and has recovered damages which have been received by the solicitor, the money is the money of the infant; and he may sue the solicitor for it (*h*).

Contracts binding upon infants.—Infants are not rendered absolutely incapable of contracting so as to bind themselves; for "the law, at the same time that it protects their imbecility and indiscretion from injury, enables them to do certain binding acts

(*y*) *Flower* v. *L. & N. W. Ry.*, (1894) 2 Q.B. 65; 63 L.J. Q.B. 547; *Clements* v. *L. & N. W. Ry.* (No. 2), (1894) 2 Q.B. 482; 63 L.J. Q.B. 837.

(*z*) *Jennings* v. *Rundall*, 8 T.R. 335; *Green* v. *Greenbank*, 2 Marsh. 485.

(*a*) Rolle, Abr. 1, 2, Action Sur. Cas. D. 3.

(*b*) *Burnard* v. *Haggis*, 14 C.B. N.S. 45; 32 L.J. C.P. 189.

(*c*) 44 & 45 Vict. c. 41, ss. 41, 42, 43.

(*d*) Bac. Abr. Infants (T.) 4; *Farnham* v. *Atkins*, 1 Sid. 446; *Holt* v. *Ward*, 2 Str. 937; 2 Barn. 173.

(*e*) *Warwick* v. *Bruce*, 2 M. & S. 205; 6 Taunt. 118; *Forrester's case*, 1 Sid. 41; 1 Keb. 1; *Davis* v. *Manington*, 2 Sid. 109.

(*f*) *Flight* v. *Bolland*, 4 Russ. 298.

(*g*) *Wilson* v. *Kearse*, Peake's Ad. Cas. 196.

(*h*) *Collins* v. *Brook*, 4 H. & N. 276; 28 L.J. Ex. 143; *Brocklebank, Ex parte*, 6 Ch.D. 358; 46 L.J. Bankr. 113.

for their own benefit. They may grant leases when it is manifestly to their interest and advantage that leases should be granted; and they will not be permitted to avoid them when they come of age; for the privilege is given as a *shield*, not as a SWORD, and shall never be turned into an offensive weapon of fraud and injustice" (*i*). By 11 Geo. 4 and 1 Will. 4, c. 65, ss. 16 and 17, infants are empowered to grant renewal of leases, and the Court of Chancery may authorise leases to be made of lands belonging to infants for the benefit of the estate. (And see now 44 & 45 Vict. c. 41, ss. 41—43, *ante*, p. 376.) If an infant contracts for necessary repairs to be done to his dwelling-house, he will not be allowed to avail himself of his infancy as an answer to a fair claim for the payment of the price of the work so done (*k*). By the custom of gavelkind, an infant at the age of fifteen is reckoned at full age to sell his lands, but under great limitations and restrictions, to prevent him being defrauded. And by custom in some places, an infant seised of lands in socage may, at the age of fifteen years, make a lease for years which shall bind him after he comes of age; for the custom makes fifteen his full age for that purpose (*l*).

Contracts by infants for necessaries.—"If an infant lives with his parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessaries of life, the child cannot bind himself to a stranger even for what might otherwise be allowed as necessaries" (*m*). If he orders clothes of a tailor, and they are sent to the father's residence, and the latter disapproves of the proceeding, and sends the clothes back, the tailor will have no claim against anybody for the payment of the price of them. He cannot sue the parent because he has not sanctioned or authorised the contract (*n*); neither can he sue the infant; for, as the latter was provided for in the father's house, he was under no necessity of contracting for the purchase of goods on his own credit. If, however, the parent was aware of the order and of the delivery of the goods, and saw the infant using and wearing the articles, and made no objection thereto, and did not exercise his parental authority and control to prevent further supplies of such articles, this will be strong evidence to show that the father authorised the order to be given, so as to render him responsible as the principal in the transaction, and the

(*i*) *Zouch* v. *Parsons*, 3 Burr. 1801; *Maddon* v. *White*, 2 T.R. 161; *Allen* v. *Allen*, 2 Dr. & W. 307, 340; *Staton* v. *Brady*, 14 Ir. C.L. 61.

(*k*) *Smith* v. *Low*, 1 Atk. 489; *Ashfield* v. *Ashfield*, Wm. Jones, 157.

(*l*) Bac. Abr. INF. A.; Co. Litt. 45 b.

(*m*) *Bainbridge* v. *Pickering*, 2 W. Bl. 1325; *Cook* v. *Deaton*, 3 C. & P. 114; *Story* v. *Perry*, 4 *ib.* 526.

(*n*) *Blackburn* v. *Mackey*, 1 C. & P. 1; *Fluck* v. *Tollemache*, *ib.* 5; *Crantz* v. *Gill*, 2 Esp. 472; *Rolfe* v. *Abbott*, 6 C. & P. 286; *Clements* v. *Williams*, 8 *ib.* 58.

real purchaser of the articles through the medium of his child acting as his agent in that behalf (*o*). If an infant is placed at a boarding-school by a parent or guardian, the master has not in general any remedy against the infant, but must resort to those with whom he agreed for the infant's board and instruction (*p*).

What are necessaries.—Infants not residing under the parental roof, and not provided by their parents with the necessaries of life, may bind themselves by contract to pay for their necessary meat, drink, apparel, physic, good teaching, and instruction (*q*). It has been said that an infant may enter into a contract under seal "for his necessary meat and drink, or his necessary apparel, or his fit schooling, and shall not avoid the same" (*r*); but such contracts would at the present day be regarded with suspicion. And a deed to secure the repayment of money advanced for necessaries has been held voidable; although the infant was ordered to pay the money due (*s*). The infant cannot bind himself to the payment of any particular sum for necessaries, or to give any particular price for them; for the law does not leave the determination of the amount to the infant, but intrusts it to the arbitration of a jury (*t*). From the earliest times down to the present the word "necessaries" has not been confined in its strict sense to such articles as are necessary for the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is (*u*). The expression "necessaries" in sect. 2 of the Sale of Goods Act, 1893 (*x*), means goods suitable to the condition of life of an infant, and to his actual requirements at the time of the sale and delivery; and where necessaries are sold and delivered to an infant, he must pay a reasonable price therefor (*y*). Thus, an infant may be made liable for the rent of a fit and proper lodging (*z*), also for lace, silks, and wedding garments, suitable for a person of his rank in life (*a*), for education for himself (*b*), and for food, clothing, groceries, nursing, attendance, and necessaries furnished to his wife and family and infant children residing with him (*c*), but not for premises hired to carry on trade (*d*).

(*o*) *Mortimore* v. *Wright*, 6 M. & W. 485; 9 L.J. Ex. 158.

(*p*) *Duncomb* v. *Tickridge*, Aleyn, 94; Bac. Abr. INFANCY (I.) 1.

(*q*) Bac. Abr. INFANCY (I.); *Cooper* v. *Simmons*, 7 H. & N. 707; 31 L.J. M.C. 138.

(*r*) Perkins, s. 14; *Russel* v. *Lee*, 1 Lev. 86.

(*s*) *Martin* v. *Gale*, 4 Ch.D. 428; 46 L.J. Ch. 84.

(*t*) Cas. Law & Eq. 185.

(*u*) *Peters* v. *Fleming*, 6 M. & W. 46; 9 L.J. Ex. 81; *Hewlings* v. *Graham*, 70 L.J. Ch. 568.

(*x*) 56 & 57 Vict. c. 71, s. 2.

(*y*) *Ibid.*

(*z*) *Kirton* v. *Elliott*, 2 Bulstr. 69; *Evelyn* v. *Chichester*, 3 Burr. 1719.

(*a*) *Rainsford* v. *Fenwick*, Carth. 215; *Dalton* v. *Gib*, 5 Bing. N.C. 198; 8 L.J. C.P. 151; *Brayshaw* v. *Eaton*, 5 Bing. N.C. 231; 8 L.J. C.P. 153.

(*b*) *Walter* v. *Everard*, (1891) 2 Q.B. 369; 60 L.J. Q.B. 738.

(*c*) Bacon's Maxim, R. 18, p. 67, ed. 1639; *Chapple* v. *Cooper*, 13 M. & W. 259; 13 L.J. Ex. 286.

(*d*) *Lowe* v. *Griffith*, 1 Sc. 458; 4 L.J. C.P. 94; *ante*, p. 375.

Things held not to be necessaries.—The question as to what things are, and what things are not, necessaries suitable for an infant who is living away from the parental roof, and supplies his own wants from funds of which he has himself the management, is a mixed question of law and fact, to be determined by the particular circumstances of each case. There are, however, many things which cannot be necessary for the use of an infant under any circumstances, and respecting which no valid contract can be entered into (*e*). Thus, articles of mere luxury cannot be necessaries suitable to the condition of any infant. But articles of utility, although luxurious and expensive, may be; and whether they are so or not is a question for the jury in each particular case, subject to the preliminary question whether there is evidence on which they may reasonably and properly conclude that the articles in question are necessaries (*f*). The infant may adduce evidence to show that at the time the order was given he was sufficiently supplied with articles of a similar description, and the fact that the tradesman was ignorant of this is immaterial (*g*). If the infant be an invalid, and horse or carriage exercise is recommended by a medical man, and is resorted to by the infant for the restoration of his health, it will be considered necessary, and the infant will be bound to pay for it (*h*).

Things which may, or may not, be necessaries according to circumstances.—The infant's clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill, and the extent of his probable means when of age; and the nature and number of his servants and attendants will depend upon his position in society (*i*). Expensive uniforms are necessary for infant officers in the guards (*k*), and the ordinary volunteer regimentals to infant members of a volunteer corps (*l*). Silks, furs, and velvets may be necessary for a young lady of rank and station in society, and a gold watch-chain and gold breast-pin for the use of the son of a gentleman of fortune (*m*). A proper marriage settlement also is necessary for a female infant of rank and station about to be married; and she may therefore retain a solicitor to draw it up (*n*). If an infant widower gives directions

(*e*) *Brooker* v. *Scott*, 11 M. & W. 67; *Wharton* v. *Mackenzie*, 5 Q.B. 606; 13 L.J. Q.B. 130; *Burghart* v. *Angerstein*, 6 C. & P. 698; *Charters* v. *Bayntun*, 7 *ib.* 52.

(*f*) *Ryder* v. *Wombwell*, L.R. 4 Ex. 32; 38 L.J. Ex. 8. See *Barnes* v. *Toye*, 13 Q.B.D. 410; 53 L.J. Q.B. 567.

(*g*) *Barnes* v. *Toye*, *supra*.

(*h*) Coleridge, J., *Wharton* v. *Mackenzie*, 5 Q.B. 612, 613.

(*i*) Alderson, B., *Chapple* v. *Cooper*, 13 M. & W. 258; 13 L.J. Ex. 286; *Hands* v. *Slaney*, 8 T. R. 578; *Walter* v. *Everard*, *ante*, p. 378.

(*k*) *Burghart* v. *Hall*, 4 M. & W. 730.

(*l*) *Coates* v. *Wilson*, 5 Esp. 152.

(*m*) *Dalton* v. *Gib*, 5 Bing. N.C. 198; 8 L.J. C.P. 151; *Brayshaw* v. *Eaton*, 5 Bing. N.C. 231; 8 L.J. C.P. 153; *Ford* v. *Fothergill*, Peake, 301.

(*n*) *Helps* v. *Clayton*, 17 C.B. N.S. 553; 34 L.J. C.P. 1.

for the funeral of a deceased wife, he is personally responsible for the expenses thereof; and the same liability arises in the case of an infant widow who has given an order to an undertaker for the burial of a deceased husband, although the latter may have died in insolvent circumstances (*o*).

Infant purchasers of estates and railway shares.—An infant purchaser of real estate, who has taken possession, becomes liable to all the obligations attached to the estate, to pay rent in the case of a lease rendering rent, and to pay a fine due on admission in the case of a copyhold to which the infant has been admitted, unless he has elected to waive the purchase altogether, either during infancy or after full age (*p*). An infant who acquires railway shares is in the same situation as an infant acquiring real estate or any other permanent interest (*q*). A transfer to an infant of shares in a company which becomes insolvent before the infant attains his majority will be treated as a nullity, and the transferor will remain liable (*r*).

Avoidance of contracts made during infancy.—By sect. 2 of the Infants' Relief Act, 1874 (*s*), no action (*t*) shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. A judgment obtained by default, after majority, upon a bill of exchange given during minority, is a ratification within the Act, and cannot be enforced in bankruptcy (*u*). Where the defendant promised to marry, and afterwards, on coming of age, recognized the promise without expressly making a fresh promise, it was held that the Act applied, and the plaintiff was non-suited (*x*). But where an infant covenanted on his marriage to settle after-acquired property, and repudiated the marriage settlement five years after coming of age, it was held that the settlement was, as regarded him, voidable, and not void, and could only be repudiated by him within a reasonable time of his attaining his majority (*y*). As regards leases, however, if the infant accepts rent from the lessee, and does acts affirmatory

(*o*) *Chapple* v. *Cooper*, 13 M. & W. 259; 13 L.J. Ex. 286.

(*p*) Co. Litt. 2 b.

(*q*) *Hamilton* v. *Vaughan Electrical Engineering Co.*, (1894) 3 Ch. 589; 63 L.J. Ch. 795.

(*r*) *Capper's case*, L.R. 3 Ch. 458; *Mann's case*, *ib.* 459, n.

(*s*) 37 & 38 Vict. c. 62, s. 2.

(*t*) See a doubt suggested in Dart's Vendors and Purchasers, as to whether the Act applies to *suits* for specific performance.

(*u*) *Kibble*, *Ex parte*, L.R. 10 Ch. 373; 44 L.J. Bankr. 63; *Smith* v. *King*, (1892) 2 Q.B. 543.

(*x*) *Coxhead* v. *Mullis*, 3 C.P.D. 439; 47 L.J. C.P. 761; as to what amounts to a fresh promise, however, see *Northcote* v. *Doughty*, 4 C.P.D. 385, and *Ditcham* v. *Worrall*, 5 C.P.D. 410; 49 L.J. C.P. 688.

(*y*) *Edwards* v. *Carter*, (1893) A.C. 360; 63 L.J. Ch. 100.

of the contract, the lease will *primâ facie* be deemed to have been a necessary and beneficial lease, and will be valid and binding. If, on the other hand, the infant repudiates the contract on his attaining his majority, this will be evidence the other way. Where the obligation is incident to a beneficial interest in property, the obligation cannot be avoided and the interest retained. If an infant lessee remains in possession of property demised to him, and pays rent after he attains his majority, he cannot afterwards repudiate the lease. He becomes chargeable, moreover, with all the arrears incurred during his minority, for, though at full age he might have departed from the bargain, and thereby have avoided payment of the arrears which the lessor suffered to accrue during the minority, yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives a remedy for the arrears of rent incurred from the time of the contract made (*z*). So an infant who has taken possession of land under a contract of sale, and after coming of age has continued in possession, and exercised acts of ownership, cannot avoid payment of the consideration (*a*).

A person collaterally responsible for an infant cannot avail himself of the infancy of the principal debtor (*b*). It would seem that a person is not liable on a negotiable instrument drawn or indorsed by him as an infant, since by sect. 22 of the Bills of Exchange Act, 1882, capacity to incur liability as a party to a bill is co-extensive with capacity to contract. By the Betting and Loans (Infants) Act, 1892 (*c*), "If any infant who has contracted a loan which is void in law agrees after he comes of age to pay any money which in whole or in part represents, or is agreed to be paid in respect of, any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever. For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan."

Extortionate contracts with expectant heirs (*d*), by creditors who

(*z*) *Baylis* v. *Dineley*, 3 M. & S. 477; Bac. Abr. Inf. (A.); (K.) 8; *Smith* v. *Low*, 1 Atk. 489; *Ketsey's case*, Cro. Jac. 20; *Kirton* v. *Eliott*, 2 Bulstr. 69.

(*a*) *Henry* v. *Root*, 33 N.Y. 526.

(*b*) *Hartness* v. *Thompson*, 5 John. 160.

(*c*) 55 Vict. c. 4. As to presumption of knowledge of infancy under sect. 2, see 63 & 64 Vict. c. 51, s. 5.

(*d*) The doctrine extends to young people who are supposed to be well off, and where the money is lent in hope of extorting payment from the father: *Neville* v. *Snelling*, 15 Ch.D. 679; 49 L.J. Ch. 777. As to reopening transactions with money-lenders, see 63 & 64 Vict. c. 51, s. 1; and *Wilton* v. *Osborne*, (1901) 2 K.B. 110; 70 L.J. K.B. 507.

take advantage of the pecuniary necessities of such heirs, will be set aside, and the jurisdiction of the courts is not taken away by 31 & 32 Vict. c. 4, s. 1, by which no purchase (which, by sect. 2, is to include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired), made *bonâ fide* and without fraud or unfair dealing (*e*), of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue (*f*).

Contracts with young persons: undue influence.—The courts will prevent young persons, subject to undue influence, from entering into imprudent contracts without proper advice, and in respect of which they cannot appreciate the bearings (*g*), and a volunteer or any person with notice taking an assignment of such contract will be liable to have the same set aside (*h*).

Obligation of parents to provide for their children.—By the common law, a father who gives no authority to another, and enters into no contract, is no more liable for goods supplied to his child than a brother, or an uncle, or a mere stranger would be. "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person" (*i*); but by sect. 7 of the Poor Relief Act, 1601 (*k*), the father and grandfather, and mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person; and by sect. 56 of the Poor Law Act, 1834 (*l*), all parish relief given to the wife, or to a child under the age of sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband or parent, as the case may be, and may be treated (sect. 58) as a loan to the latter, and may be recovered in the mode thereby appointed (sect. 59). A child left to starve, there-

(*e*) This means an unconscientious use of the power arising out of the circumstances and conditions of the parties. *Aylesford (Earl)* v. *Morris*, L.R. 8 Ch. 484, 491; 42 L.J. Ch. 146; *Brenchley* v. *Higgins*, 70 L.J. Ch. 788; *Beynon* v. *Cook*, L.R. 10 Ch. 389; *Fry* v. *Lane*, 40 Ch.D. 312; 58 L.J. Ch. 113. See *James* v. *Kerr*, 40 Ch.D. 449; 58 L.J. Ch. 355.

(*f*) *Miller* v. *Cook*, L.R. 10 Eq. 641; 40 L.J. Ch. 11; *Tyler* v. *Yates*, L.R. 6 Ch. 665; 40 L.J. Ch. 768; see, however, *O'Rorke* v. *Bolingbroke*, 2 App.Cas. 814, as to the effect of the statute, *per* Ld. Blackburn; see also *Beynon* v. *Cook*, *supra*; *Slater's Trusts*, *In re*, 11 Ch.D. 227; 48 L.J. Ch. 473.

(*g*) *Kempson* v. *Ashbee*, L.R. 10 Ch. 15; 44 L.J. Ch. 195.

(*h*) *Bainbrigge* v. *Browne*, 18 Ch.D. 188; 50 L.J. Ch. 522.

(*i*) Ld. Abinger, *Mortimore* v. *Wright*, 6 M. & W. 487; 9 L.J. Ex. 158; see *Ruttinger* v. *Temple*, 33 L.J. Q.B. 1; 4 B. & S. 491; where the child is living with its mother, under an order of the Court of Chancery, see *Bazeley* v. *Forder*, L.R. 3 Q.B. 559; 37 L.J. Q.B. 237.

(*k*) 43 Eliz. c. 2, s. 7.

(*l*) 4 & 5 Will. 4, c. 76, s. 56.

fore, must apply to the parish, and the parish will compel payment of subsistence money from the parent (*m*).

Contracts with executors.—An executor may sell or pledge the assets of the testator (*n*), and may also sell part of the assets at a fixed price to a creditor of the testator to clear the debt (*o*). He has, in fact, absolute control over the property of the testator (*p*), notwithstanding it may be affected with some peculiar equity in his hands; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator to which his property is legally liable before all other claims. But, if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside (*q*). Thus, if a creditor of the executor buys or receives in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his debt, he is, generally speaking, a party to the breach of trust by the executor, because this sale or pledging is *primâ facie* inconsistent with the duty of an executor (*r*).

If an executor or administrator takes a bond or contract under seal in his representative character, this is an obligation strictly personal to himself, upon which he can recover only in his own right. But, if the personal representatives, in the course of their administration, have themselves entered into simple contracts upon which a right of action has accrued, and the money when recovered would be assets, they may sue in their representative capacity (*s*). Thus, where executors carry on the business of their testator, the money recovered by them upon contracts effected in carrying on the business, will be assets in their hands, and they may therefore sue for it in their representative capacity (*t*), and it makes no difference that the materials supplied under the contract never belonged to the testator (*u*). They may also maintain an action in their representative character upon all negotiable securities which have been indorsed or made payable to them as executors or administrators, or generally, or individually, if the amount when recovered will be assets in their hands. If, by mistake, they pay away the money, or if they sell the goods, of their

(*m*) *Shelton* v. *Springett*, 11 C.B. 452; see 45 & 46 Vict. c. 75, ss. 20, 21.

(*n*) *Scott* v. *Tyler*, 2 Dick. 712, 725.

(*o*) *Hepworth* v. *Heslop*, 6 Hare, 561; 18 L.J. Ch. 352.

(*p*) *Vane* (*Earl*) v. *Rigden*, L.R. 5 Ch. 663; 39 L.J. Ch. 797; *Basset* v. *Nosworthy*, 2 W. & T. L.C. 150 (ed. 7); see, however, *Oceanic Steam Nav. Co.* v. *Sutherberry*, 16 Ch.D. 236; 50 L.J. Ch. 308.

(*q*) *Elliot* v. *Merryman*, 1 W. & T. L.C. 896 (ed. 7).

(*r*) *Keane* v. *Robarts*, 4 Madd. 357.

(*s*) *Heath* v. *Chilton*, 12 M. & W. 632; 13 L.J. Ex. 228.

(*t*) *Moseley* v. *Rendell*, L.R. 6 Q.B. 388; 40 L.J. Q.B. 111; *Abbott* v. *Parfitt*, L.R. 6 Q.B. 346; 40 L.J. Q.B. 115; explaining *Bolingbroke* v. *Kerr*, L.R. 1 Ex. 222; 35 L.J. Ex. 137.

(*u*) *Abbott* v. *Parfitt*, *supra*.

testator, or carry on his business for the benefit of his personal estate and for the purpose of winding up his affairs, and enter into contracts in so doing, they may sue either in their representative capacity, or in their individual character, not naming themselves executors (*x*). They should, however, upon such contracts, sue in their representative capacity, in order to protect the assets from a set-off in respect of their individual debts (*y*). The title of an administrator to the effects and personal estate of the deceased, though it does not exist until the grant of administration, relates back to the time of the death, so as to entitle the administrator to sue upon an implied contract of sale in respect of goods delivered to and received by a party before the grant of the letters of administration. And, if an agent sells goods in ignorance of the death of the principal, the administrator may adopt the contract, and sue upon it in his representative character as soon as he has obtained letters of administration (*z*).

Interest of executors or administrators.—As the executors unitedly represent the person of the testator, they are all jointly interested in contracts entered into with the deceased, although some of them be infants under the age of seventeen years (*a*), unless they have renounced probate, in which case the right of representation devolves upon the others, just as if the parties making the renunciation had never been appointed executors (*b*). But two of three co-executors may recover lands of their testator in ejectment on a joint demise by the two (*c*). In contracts which have been entered into with the personal representatives themselves in the course of their administration, all are jointly interested if the contract has been made on behalf of all; but where three out of four executors undertook the management of the testator's concerns, and possessed themselves of his property, and directed an auctioneer to sell certain portions of the estate, and sued for the price without joining the fourth, it was held that the action was well brought by the three who had authorised the sale, and were the actual parties to the contract (*d*).

Liabilities of executors and administrators on their own contracts.—A promise by an executor to pay a debt due from his testator will not make him personally liable *de bonis propriis*, unless there be

(*x*) *Aspinall* v. *Wake*, 10 Bing. 51; 2 L.J. C.P. 227; *Grissell* v. *Robinson*, 3 Sc. 335; 5 L.J. C.P. 313; *Vanquelin* v. *Bouard*, 33 L.J. C.P. 78; 15 C.B. N.S. 341.

(*y*) *Clark* v. *Hougham*, 2 B. & C. 155; 1 L J. (O.S.) K.B. 249. See Ord. XVIII. r. 5, which does not apply to counter-claims: *Macdonald* v. *Carington*, 4 C.P.D. 28; 48 L.J, C.P. 178.

(*z*) *Foster* v. *Bates*, 12 M. & W. 226; 13 L.J. Ex. 88; *Welchman* v. *Sturgis*, 13 Q.B. 552; 18 L.J. Q.B. 211; *Bodger* v. *Arch*, 10 Exch. 333; 24 L.J. Ex. 19.

(*a*) *Foxwist* v. *Tremaine*, 2 Saund. 212.

(*b*) 20 & 21 Vict. c. 77, s. 79.

(*c*) *Doe* v. *Wheeler*, 15 M. & W. 623; 16 L.J. Ex. 312.

(*d*) *Brassington* v. *Ault*, 9 Moore, 340; 3 L.J. (O.S.) C.P. 243.

some new and valid consideration for the promise. He is chargeable only thereon in his representative character to the extent of the assets in his hands, although the promise has been put into writing and signed by him, pursuant to the Statute of Frauds (*e*). But if the executor binds himself by deed, without any fresh consideration, or if he gives a written undertaking or promise to pay the debt, founded on a new and valid consideration, he will then be personally liable *de bonis propriis* upon the contract (*f*).

If an executor signs a promissory note as executor, whereby he promises to pay a sum of money with interest to the promisee, he cannot escape from his liability for the payment of the money to the latter by showing that the amount promised to be paid was a debt due from his testator, or that it was a legacy bequeathed to the promisee, and that he, the executor, has fully administered, &c.; for the giving of such a security by the personal representative to the creditor or legatee imports an agreement for forbearance, and binds him individually, and supersedes the necessity of proving assets (*g*). If executors have effected a policy of insurance to insure the estate against loss, they will be responsible if they allow the policy to drop without consulting the parties beneficially interested, or resorting to the court (*h*). If they give orders for the funeral of their deceased testator, or adopt or sanction the acts of those who have given such orders, they will themselves be personally responsible *de bonis propriis* to the parties who have fulfilled the orders (*i*). If the executor continues the trade of the testator, he will of course be personally responsible *de bonis propriis* upon all contracts entered into by him in carrying on such trade, although he receives no part of the profits, and acts strictly as trustee (*k*); and, by the law of England, executors and trustees taking shares in joint-stock companies make themselves personally liable as partners, even though they describe themselves as trustees; and they are deemed to have intended to bind themselves absolutely; for, if it were held that persons entering into contracts with a trustee were really contracting, not with the individual but with the trust estate, it would be necessary to examine beforehand the state and amount of the trust estate, and the powers of the trustee; and it could not afterwards be dealt

(*e*) *Nelson* v. *Serle*, 4 M. & W. 795; 8 L.J. Ex. 305; 2 Wms. Saund. 137, n. (a); *Hamilton* v. *Terry*, 21 L.J. C.P. 132.

(*f*) *Wheeler* v. *Collier*, Cro. Eliz. 406; *Hamilton* v. *Incledon*, 4 Bro. P.C. 4; *Johnson* v. *Whitechott*, 1 Roll. Abr. 24; *Hawes* v. *Smith*, 2 Lev. 122; *Fish* v. *Richardson*, Yelv. 55; *Bradly* v. *Heath*, 3 Sim. 543; *Davis* v. *Reyner*, 2 Lev. 3; 1 Ventr. 120; 2 Wms. Saund. 137, n. (d).

(*g*) *Childs* v. *Monins*, 5 Moore, 282; 2 B. & B. 460; *Barnard* v. *Pumfret*, 5 Myl. & Cr. 63; 10 L.J. Ch. 124; *Ridout* v. *Bristow*, 1 Cr. & J. 231; 9 L.J. (O.S.) Ex. 48.

(*h*) *Garner* v. *Moore*, 24 L.J. Ch. 687; 3 Dr. 777.

(*i*) *Brice* v. *Wilson*, 3 N. & M. 512; 3 L.J. K.B. 93.

(*k*) *Whitman* v. *Townroe*, 1 M. & S. 412; *Garland, Ex parte*, 10 Ves. 119.

with or disposed of until the consequences of the contract were ascertained (*l*). If an executor, after the death of the testator, borrows money, although for the purposes of the estate, he is only liable personally, and the lender cannot prove against the estate (*m*). But, when there is a promise by an executor, founded upon a previous contract made by the testator, the executor may be sued in his representative character so as to charge the assets (*n*). So he may be sued in his representative capacity for money paid to his use, but only when the matter arises out of a contract with, or something done by, the testator (*o*).

Liability of executors and administrators for the acts of each other.—Upon contracts that have been entered into by the personal representatives themselves in the course of their administration they are jointly liable, if they are jointly parties to the contract, or if one of them has contracted as a recognised or authorised agent on behalf of all; but one executor has no implied authority to bind his co-executors for anything beyond the reasonable and necessary expenses for the funeral of the deceased. An infant executor is not liable upon contracts made by the personal representatives themselves in the course of their administration.

Rights of husband upon contracts made with wife during coverture.—By the common law the husband was entitled to the benefit of all contracts executed by the wife, and of all executory contracts made by her without his knowledge but for his benefit (*p*). In the case of all simple contracts made with the wife, except bills of exchange and promissory notes, the husband alone took the benefit, unless there was an express promise made to the wife, and unless the consideration upon which the promise was founded moved from her (*q*); for, if the wife rendered services without any express promise of remuneration having been made to her, the husband alone was entitled to the benefit of the contract, because he was entitled to the fruits of her labour (*r*); and, where the personal skill of the wife did not alone form the consideration for the promise, but materials were provided which were the property of the husband, he alone could enforce the contract (*s*).

In the case of bills and notes made payable to the wife during

(*l*) *Lumsden* v. *Buchanan*, 4 Macq. 953; *Muir* v. *City of Glasgow Bank*, 4 App.Cas. 337; *Cuninghame* v. *City of Glasgow Bank*, 4 App.Cas. 607; *Cree* v. *Somervail*, 4 App.Cas. 648; *Gillespie* v. *City of Glasgow Bank*, 4 App.Cas. 632.

(*m*) *Farhall* v. *Farhall*, L.R. 7 Ch. 123; 41 L.J. Ch. 146.

(*n*) *Dowse* v. *Coxe*, 3 Bing. 20; 3 L.J. (O.S.) C.P. 127; *Farhall* v. *Farhall*, *supra*; *Powell* v. *Graham*, 7 Taunt. 581.

(*o*) *Farhall* v. *Farhall*, *supra*.

(*p*) *Millard* v. *Harvey*, 34 Beav. 237.

(*q*) *Buckley* v. *Collier*, 1 Salk. 114.

(*r*) *Brashford* v. *Buckingham*, Cro. Jac. 77, 205; *Fountain* v. *Smith*, 2 Sid. 128; Roll. Abr. 32, pl. 12.

(*s*) *Holmes* v. *Wood*, 1 Barn. 75, 249; *Abbot* v. *Blofield*, Cro. Jac. 644; *King* v. *Bassingham*, 8 Mod. 199; *Bidgood* v. *Way*, 2 W. Bl. 1236; *Johnson* v. *Lucas*, 1 E. & B. 659; 22 L.J. Q.B. 174; *Bond* v. *Nurse*, 16 L.J. Q.B. 196; 10 Q.B. 244.

the coverture, the husband might take the sole benefit (*t*), or he might at his option give his wife an interest therein by joining her with him as a co-plaintiff (*u*). And the law was the same in the case of bonds and other personal contracts under seal entered into during the coverture with the wife separately, or with the husband and wife jointly (*x*). The wife, indeed, might sue alone and recover upon a contract under seal made with her during coverture, if the coverture was not pleaded (*y*). The position of a husband with regard to his wife's contracts has, however, been entirely altered by the Married Women's Property Act, 1882 (*z*). By that Act a married woman is made capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property as if she were a *feme sole* (*a*). She can enter into and render herself liable in respect of and to the extent of her separate property, on any contract, and can sue or be sued in all respects as if she were a *feme sole* (*b*). Her husband need not be joined with her as plaintiff or defendant, or be made a party to any legal proceeding brought by or taken against her, and any damages or costs recovered by her in any such action are her separate property, and any damages or costs recovered against her in any such action are payable only out of her separate property (*c*). By the Married Women's Property Act, 1893 (*d*), sub-sects. 3 and 4 of sect. 1 of the Act of 1882 are repealed, and the following provisions substituted: "Every contract hereafter entered into by a married woman otherwise than as agent (1) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (2) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (3) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is

(*t*) *Burrough* v. *Moss*, 10 B. & C. 558; 6 L.J. (O.S.) K.B. 287.

(*u*) *Phillis Kirk* v. *Pluckwell*, 2 M. & S. 393.

(*x*) *Howell* v. *Maine*, cited 2 M. & S. 396; *Ankerstein* v. *Clarke*, 4 T.R. 616; *Arnold* v. *Revoult*, 4 Moore, 66; 1 B. & B. 443; *Hellyer* v. *Grace*, Styles, 9.

(*y*) *Bendix* v. *Wakeman*, 12 M. & W. 97; 13 L.J. Ex. 15; *Guyard* v. *Sutton*, 3 C.B. 153; 15 L.J. C.P. 225; *Dalton* v. *Mid. Ry.*, 13 C.B. 474; 22 L.J. C.P. 177.

(*z*) 45 & 46 Vict. c. 75.

(*a*) Sect. 1 (1).

(*b*) See *Whittaker* v. *Kershaw*, 45 Ch.D. 320; 60 L.J. Ch. 9. As to joint contract by her, see *Hoare* v. *Niblett*, (1891) 1 Q.B. 781; 60 L.J. Q.B. 565.

(*c*) Sect. 1 (2).

(*d*) 56 & 57 Vict. c. 63, s. 4. This section abrogates the decisions in *Stogdon* v. *Lee*, (1891) 1 Q.B. 661; 60 L.J. Q.B. 669; *Palliser* v. *Gurney*, 19 Q.B.D. 519; 56 L.J. Q.B. 546; *Beckett* v. *Tasker*, 19 Q.B.D. 7; *Shakespear, In re*, 30 Ch.D. 169.

restrained from anticipating." If she carries on a trade separately from her husband she may, in respect of her separate property, be made bankrupt as if she were a *feme sole* (*e*). She may effect a policy of insurance on her own life or that of her husband for her separate use (*f*), and she has in her own name against all persons, including her husband, the same civil remedies for the protection of her separate property as if she were a *feme sole* (*g*). She may act as executrix or trustee, and sue and be sued in that capacity without her husband (*h*), and her legal personal representative has the same rights and liabilities in respect to her separate estate as she would have if she were living (*i*).

Rights and liabilities of married women. Contracts during coverture.—A married woman is, as we have seen, capable, as if she were a *feme sole*, of entering into and rendering herself liable in respect of and to the extent of her separate property. The qualification is of importance. She cannot render herself personally liable, and she can only bind her separate property which she is not restrained from anticipating (*k*). Since she is not personally liable, she cannot be the subject of a committal order under sect. 5 of the Debtors Act, 1869, as that is limited to debts which a judgment debtor is under a personal obligation to pay (*l*). So, too, a judgment obtained against her on a contract debt is not, if she is not carrying on a trade separately from her husband, an act of bankruptcy (*m*). (If she is carrying on a trade separately from her husband, she is subject to the bankruptcy laws as if she were a *feme sole* (*n*).) Where judgment was obtained against a single woman on a bill of exchange, and she committed an act of bankruptcy, but married between the presentation of the petition and the making of the receiving order, it was held that, as she was not carrying on a trade separately from her husband, the receiving order must be discharged (*o*). The judgment may, however, be made the foundation of garnishee proceedings (*p*).

The liability of the married woman being only in respect of her separate property (*q*), it becomes important to consider what is

(*e*) 45 & 46 Vict. c. 75, s. 1 (5).
(*f*) Sect. 11.
(*g*) Sect. 12.
(*h*) Sect. 18.
(*i*) Sect. 23. *Surman* v. *Wharton*, (1891) 1 Q.B. 491; 60 L.J. Q.B. 233.
(*k*) *Barnett* v. *Howard*, (1900) 2 Q.B. 784; 69 L.J. Q.B. 955.
(*l*) *Draycott* v. *Harrison*, 17 Q.B.D. 147; *Meager* v. *Pellew*, 14 Q.B.D. 973; *Scott* v. *Morley*, 20 Q.B.D. 120; 57 L.J. Q.B. 43; 32 & 33 Vict. c. 62, s. 5.
(*m*) *Gardiner, In re*, 20 Q.B.D. 249; 57 L.J. Q.B. 149.
(*n*) 45 & 46 Vict. c. 75, s. 1 (5); *Lester, Ex parte*, (1893) 2 Q.B. 113; 62 L.J. Q.B. 372; *Helsby, In re*, 63 L.J. Q.B. 261; *Dagnall, In re*, (1896) 2 Q.B. 407; 65 L.J. Q.B. 666; *Worsley, In re*, (1901) 1 Q.B. 309; 70 L.J. Q.B. 93.
(*o*) *Debtor, In re*, (1898) 2 Q.B. 576; 67 L.J. Q.B. 820.
(*p*) *Holtby* v. *Hodgson*, 24 Q.B.D. 103; 59 L.J. Q.B. 46; *Pelton* v. *Harrison* (No. 2), (1892) 1 Q.B. 118; 61 L.J. Q.B. 144; *Softlaw* v. *Welch*, (1899) 2 Q.B. 419; 68 L.J. Q.B. 940.
(*q*) The form of judgment to be adopted against a married woman is given in *Scott* v. *Morley*, 20 Q.B.D. 120; 57 L.J. Q.B. 43.

included in the term "separate property." Before any legislative recognition of the separate estate of married women, courts of equity, by means of trusts, created and enforced certain rights in favour of married women (*r*). The effect of the Married Women's Property Act has been to render all property possessed by a married woman (married after the Act) at the date of her marriage, or acquired by her during coverture, separate estate. A woman married since Jan. 1st, 1883, takes as her separate property all real and personal property belonging to her at the time of marriage, or acquired by or devolving upon her after marriage. A woman married before that date takes as her separate property all real and personal property, her title (*s*) to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue (*t*) after that date, including any wages, earnings, or money, gained or acquired by her (*u*). The separate property of a married woman may, however, be subject to restraint upon anticipation, and if it is so subject, whether it consist of capital or income (*x*), it cannot be made available for the debts of a married woman contracted during coverture (*y*), unless the restraint exists under a settlement or agreement for a settlement of her own property made by herself (*z*), since sect. 19 of the Married Women's Property Act, 1882 (*a*), provides that nothing in the Act shall interfere with or render inoperative any restriction against anticipation attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument. It seems doubtful whether moneys in the hands of a married woman derived from an income which she cannot anticipate can be taken in execution under a judgment against her (*b*); they certainly cannot be attached while in the hands of her trustees (*c*). The restraint on anticipation of a married woman's separate estate ceases to attach to such income as soon as it becomes due and payable to her under the trusts of the instrument under which she is entitled (*d*); but a receiver cannot be appointed of, and judgment cannot be enforced against, arrears of such income which have accrued due after the date of the judgment (*e*).

(*r*) *Ashworth* v. *Outram*, 5 Ch.D. 923; 46 L.J. Ch. 687.

(*s*) See *Parsons*, *In re*, 45 Ch.D. 51; 59 L.J. Ch. 666.

(*t*) See *Reid* v. *Reid*, 31 Ch.D. 402; 55 L.J. Ch. 294; *Whitaker*, *In re*, 34 Ch.D. 227; 56 L.J. Ch. 251; *Hancock* v. *Hancock*, 38 Ch.D. 78; 57 L.J. Ch. 396.

(*u*) 45 & 46 Vict. c. 75, s. 5. As to damages recovered in an action of tort, see *Beasley* v. *Roney*, (1891) 1 Q.B. 509; 60 L.J. Q.B. 408.

(*x*) See *Grey's Settlements*, *In re*, 34 Ch.D. 712; 56 L.J. Ch. 511.

(*y*) *Pike* v. *Fitzgibbon*, 17 Ch.D. 454; 50 L.J. Ch. 394.

(*z*) *Bursill* v. *Tanner*, 13 Q.B.D. 691.

(*a*) 45 & 46 Vict. c. 75, s. 2.

(*b*) See *Draycott* v. *Harrison*, 17 Q.B.D. 147; and *Ellis* v. *Johnson*, 31 Ch.D. 532; 55 L.J. Ch. 325.

(*c*) *Chapman* v. *Biggs*, 11 Q.B.D. 27.

(*d*) *Hood-Barrs* v. *Heriot*, (1896) A.C. 174; 65 L.J. Q.B. 352.

(*e*) *Whiteley* v. *Edwards*, (1896) 2 Q.B. 48; 65 L.J. Q.B. 457; *Lumley*, *In re*, (1896) 2 Ch. 690; 65 L.J. Ch. 837.

It has been held that income of property vested in trustees for the separate use of a married woman subject to a restraint against anticipation, although paid into her hands after the determination of the coverture, is not since the Married Women's Property Act, 1893 (*f*), available to satisfy an obligation arising out of a contract entered into by her during coverture (*g*). By sect. 2 of the Married Women's Property Act, 1893 (*h*), the court may order the costs of a suit instituted by a woman, or her next friend, to be paid out of property subject to a restraint upon anticipation, and may enforce such payment by the appointment of a receiver (*i*).

Property over which a married woman has a general power of appointment becomes, upon the execution of the power, liable for her debts as her separate property (*k*). But she cannot be compelled to exercise the power, and until it is exercised the property is not available for her debts (*l*). In the case of bequests to a husband and wife and a third person, the old rule that the husband and wife take one moiety, and the third person the other, still exists, but the wife takes a quarter of the bequest as her separate property (*m*).

By the Married Women's Property Act, 1870, all moneys earned by a married woman's own exertions and skill are her separate property, and whatever is bought by her with such money becomes also her separate property (*n*).

As to the authority of a married woman to pledge her husband's credit, see *post*, p. 392. A married woman can contract with her husband so as to bind her separate estate (*o*). But he cannot maintain any action against her for money lent to her by him before the marriage (*p*). She may prove as a creditor in her husband's bankruptcy for any sums lent by her to him, if all claims of his other creditors have been satisfied (*q*), and if she has lent money to a partnership of which he is a member she may prove in the bankruptcy in competition with the other creditors (*r*).

Inability of married women to bind themselves or their husbands by deed.—The husband cannot be sued upon any contract under seal entered into and executed by the wife in his name or on his behalf,

(*f*) 56 & 57 Vict. c. 63, s. 1.
(*g*) *Barnett* v. *Howard*, (1900) 2 Q.B. 784; 69 L.J. Q.B. 955.
(*h*) 56 & 57 Vict. c. 63, s. 2.
(*i*) *Nunn* v. *Tyson*, 70 L.J. K.B. 854.
(*k*) 45 & 46 Vict. c. 75, s. 4.
(*l*) *Gilchrist, Ex parte, Armstrong, In re*, 17 Q.B.D. 521; 55 L.J. Q.B. 578.
(*m*) *Jupp, In re*, 39 Ch.D. 148; 57 L.J. Ch. 774.
(*n*) *Weldon* v. *De Bathe*, 14 Q.B.D. 339; 54 L.J. Q.B. 113.
(*o*) *Hewison* v. *Negus*, 16 Beav. 594; 22 L.J. Ch. 655; *Woodward* v. *Woodward*, 3 De G. J. & S. 672; *Butler* v. *Butler*, 16 Q.B.D. 374; 55 L.J. Q.B. 55; *Hastings (Lady), In re*, 35 Ch.D. 94; 56 L.J. Ch. 631.
(*p*) *Butler* v. *Butler*, 14 Q.B.D. 831.
(*q*) 45 & 46 Vict. c. 75, s. 3; *Genese, In re*, 16 Q.B.D. 700; 55 L.J. Q.B. 118; *Clark, In re*, (1898) 2 Q.B. 330; 67 L.J. Q.B. 759; *Cronmire, In re*, (1901) 1 K.B. 480; 70 L.J. K.B. 310.
(*r*) *Tuff, In re*, 19 Q.B.D. 88; 56 L.J. Q.B. 440.

unless he has given her a power of attorney under seal to contract for him by deed, or unless the deed is sealed and delivered by her in his name, in his presence, and by his commandment. Neither was the wife herself liable upon the deed by reason of her coverture (*s*). But where work had been performed, or services rendered, or goods supplied for the use of the husband upon the faith of a covenant by the wife for payment or remuneration, the husband was held liable for the fair value of the work and services, and of the goods supplied, just as if the covenant had never been in existence (*t*). Where the marriage has taken place since August 9th, 1870, and before January 1st, 1883, the wife cannot pass the fee simple of real estate descended upon her by an unacknowledged deed (*u*). The Married Women's Property Act, 1882, has, as we have seen, given women, married after the latter date, a full power of disposition over their property (*x*).

Authority of wife to sign writings for husband.—The liability of the husband upon simple contracts made or signed by the wife during the coverture depends upon the nature of such contracts, and of the things stipulated and agreed to be done. No power of attorney is requisite to enable the wife to bind the husband by simple contract; but the latter will be held liable, provided he appears to have expressly or impliedly sanctioned what she has done (*y*). The wife is not the agent of the husband in respect of the management of his estate and business (*z*), unless he has intrusted her with the general management of it, in which case he makes her his general agent for the carrying it on, and clothes her with an implied authority to enter into all such contracts and agreements as are usual and necessary for the purpose; and he is consequently responsible for the fulfilment of all contracts that may be entered into by her in the execution of her task, just as if they had been made by any ordinary general agent employed by him in the matter (*a*). Formerly, bills of exchange or promissory notes drawn, accepted, or indorsed by a married woman in her own name with her husband's authority were held to bind him (*b*); but

(*s*) *Lambert* v. *Atkins*, 2 Campb. 272.

(*t*) *White* v. *Cuyler*, 6 T.R. 176. By the 56 & 57 Vict. c. 53, s. 16, a married woman who is a bare trustee may convey or surrender freehold or copyhold as if she were a *feme sole*. See *Docwra, In re*, 29 Ch.D. 693; 54 L.J. Ch. 1121; but see *Harkness' Contract, In re*, (1896) 2 Ch. 358; 65 L.J. Ch. 726; *Brooke's Contract, In re*, (1898) 1 Ch. 647; 67 L.J. Ch. 272. A verbal agreement by a wife to convey lands to her husband will not bar the heir-at-law: *Williams* v. *Walker*, 9 Q.B.D. 576.

(*u*) *Johnson* v. *Johnson*, 35 Ch.D. 345; 56 L.J. Ch. 326.

(*x*) See *Drummond's Contract, In re*, (1891) 1 Ch. 524; 60 L.J. Ch. 258.

(*y*) *M'George* v. *Egan*, 7 Sc. 112.

(*z*) *Meredith* v. *Footner*, 11 M. & W. 202; 12 L.J. Ex. 183.

(*a*) *Petty* v. *Anderson*, 10 Moore, 577; 3 L.J. (O.S.) C.P. 223.

(*b*) *Prestwick* v. *Marshall*, 5 Moo. & P. 513; 7 Bing. 565; *Cotes* v. *Davis*, 1 Campb. 485; *Lindus* v. *Bradwell*, 5 C.B. 583; 17 L.J. C.P. 123.

now that a married woman may contract as if she were a *feme sole*, she would probably herself be held liable, since no person is liable on a bill, as drawee, indorsee or acceptor, who has not signed it as such in his own name (*c*). It has been held that a wife who has the conduct of her husband's business, and who is in the habit of drawing, accepting, and indorsing bills and notes in his name, may draw and indorse by the hand of her daughter (the daughter being in her presence and acting under her immediate direction) without violating the rule *delegatus non potest delegare* (*d*).

Loans of money to wife.—A married woman has in general no implied authority to borrow money and charge the husband with the repayment of it (*e*). But such small amounts as a wife may require upon an emergency for her household expenses, medicines, or necessaries, a third party would be justified in lending her (*f*); and a person who has advanced money to the wife for necessaries may be entitled to stand in the place of the person who actually supplied the necessaries (*g*).

Sale of goods to married women.—Every married woman residing with her husband, and having the general management of his house and household affairs, is presumed to be his general agent in all matters connected with the domestic economy of the house and family. She is, therefore, clothed with an implied authority from the husband to give orders for wearing apparel, furniture, provisions, and all such things as may fairly be presumed necessary for the decent maintenance of herself, her husband, and family, and the general comfort and enjoyment of the household, according to the apparent circumstances and situation in life of her husband and the position in society which he allows her to assume (*h*). But a wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband chooses to live (*i*). This presumption of the wife's authority may be rebutted by proof that the husband had furnished her with ready money to pay for what was necessary, and had forbidden her to pledge his credit (*k*), or that the wife had, during the husband's absence and without his knowledge, placed herself under the protection of a man with

(*c*) See 45 & 46 Vict. c. 61, ss. 23, 91, *post*, pp. 1108, 1165.

(*d*) *Lord* v. *Hall*, 8 C.B. 631; 19 L.J. C.P. 47.

(*e*) *Knox* v. *Bushell*, 3 C.B. N.S. 334.

(*f*) *Harris* v. *Lee*, 1 P.Wms. 482.

(*g*) *Jenner* v. *Morris*, 29 L.J. Ch. 923; 1 Dr. & Sm. 218; *Davidson* v. *Wood*, 1 De G. J. & S. 465; 32 L.J. Ch. 400.

(*h*) *Etherington* v. *Parrot*, 1 Salk. 118; *Waithman* v. *Wakefield*, 1 Campb. 120; *Clifford* v. *Laton*, 3 C. & P. 16; *Jolly* v. *Rees*, 15 C.B. N.S. 628; 33 L.J. C.P. 177.

(*i*) *Phillipson* v. *Hayter*, L.R. 6 C.P. 38; 40 L.J. C.P. 14; *Debenham* v. *Mellon*, 6 App.Cas. 24; 50 L.J. Q.B. 155.

(*k*) *Jolly* v. *Rees*, and *Debenham* v. *Mellon*, *supra*.

whom she was living in adulterous intercourse (*l*). The implied authority, however, to bind the husband, resulting from cohabitation, "may be discharged by the prohibition and countermand of the husband" (*m*). The wife has no implied authority to run into extravagance, and to give orders which are beyond the husband's means. If, therefore, wines and spirits, or extravagantly expensive dresses, expensive music, jewels, and articles of luxury and ornament are ordered by the wife, there must be reasonable evidence to show that the wife has made the contract with the knowledge and assent of the husband (*n*). If a tradesman finds a wife giving extravagant orders, unsuited to the husband's estate and apparent condition of life, he ought, if he intends to look to the husband for payment, to ascertain whether the latter is aware of the wife's extravagance, and whether he does or does not sanction it (*o*). Where a married lady went to a watering-place without her husband, and ordered expensive articles of dress unsuited to her husband's circumstances, and the latter disapproved of her extravagance as soon as he was aware of it, it was held that he was not responsible for the price of the things supplied to her (*p*). If a married woman obtains silks on credit and pawns them, the husband is not bound to pay for them, as they never came to his use (*q*). As a married woman is now able to contract as if she were a *feme sole*, a question will arise whether credit was given to her as her husband's agent or not. If exclusive credit was given to her, her separate estate will be liable (*r*); and if she assumes to pledge her husband's credit, but has no authority in fact to do so, she will, it seems, probably be liable in an action on the implied warranty of authority (*s*).

Proof of assent of husband to wife's contracts.—When a husband living under the same roof with his wife sees her attired in costly dresses and indulging in expensive ornaments, and fails to manifest his disapprobation by any active interference or opposition, making no inquiry as to where the articles come from, and giving no intimation to the tradesmen who supply them of his intention not to pay for them, he will be presumed to assent to the wife's acts

(*l*) *Atkyns* v. *Pearce*, 2 C.B.N.S. 763; 26 L.J. C.P. 252.

(*m*) *Manby* v. *Scott*, 1 Lev. 5; 1 Bac. Abr. 717; 2 Smith's L.C. 433 (10th ed.); *Jolly* v. *Rees*, and *Debenham* v. *Mellon*, *supra*.

(*n*) *Metcalfe* v. *Shaw*, 3 Campb. 22; *Spreadbury* v. *Chapman*, 8 C. & P. 371; *Reneaux* v. *Teakle*, 8 Exch. 680; 22 L.J. Ex. 241; *Reid* v. *Teakle*, 13 C.B. 627; 22 L.J. C.P. 161.

(*o*) *Montague* v. *Benedict*, 3 B. & C. 631; 3 L.J. (O.S.) K.B. 94; *Lane* v. *Ironmonger*, 13 M. & W. 369; 14 L.J. Ex. 35; *Seaton* v. *Benedict*, 5 Bing. 28; 6 L.J. (O.S.) C.P. 208.

(*p*) *Atkins* v. *Curwood*, 7 C. & P. 756.

(*q*) *Etherington* v. *Parrot*, 1 Salk. 118.

(*r*) 45 & 46 Vict. c. 75, s. 1 (3). See *Bentley* v. *Griffin*, 5 Taunt. 356; *Freestone* v. *Butcher*, 9 C. & P. 643; *Taylor* v. *Brittan*, 1 C. & P. 16 (n.); *Metcalfe* v. *Shaw*, *supra*.

(*s*) See *Drew* v. *Nunn*, 4 Q.B.D., *per* Brett, L.J., at p. 666; 48 L.J. Q.B. 591.

and proceedings in accordance with the maxim *qui non prohibere potest assentire videtur* (*t*). "If the husband," observes Lord Ellenborough, "has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them or cause them to be returned, he adopts his wife's act, and renders himself answerable. Nor is it any excuse in law that the wife is unmanageable and disobedient, as he must be supposed to exercise his marital rights and to regulate her conduct." Where, therefore, the goods have not been eloigned, but are in the house with the knowledge and sanction of the husband, it is his duty to compel their redelivery to the tradesman, or to tender them back to him (*u*). The mere circumstance, however, of the husband seeing the wife wearing some of the things ordered by her, and not objecting to them, will be no proof of his assent to the whole of the extravagant order. The fact that the wife has ordered goods of a similar description from the tradesman with the assent of the husband would be evidence that she had the husband's authority to deal with him (*x*). If the tradesman, at the time he deals with and trusts the wife, does not know her to be a married woman, he cannot be said to have given credit to the husband; and, if articles sold to the wife under such circumstances are not necessary for the use of the wife, and have not been used by the wife with the knowledge of the husband, and have not been consumed in the husband's household, or come in any shape or way to his use, and he has not subsequently sanctioned or adopted the wife's contract, he cannot be made responsible for the payment of the price of them (*y*).

Non-liability of husband upon wife's contracts after separation.—Those who furnish the wife with the means of subsistence after a separation by reason of the wife's adultery have no claim against the husband in respect thereof, whether they had notice of the adultery or not at the time they furnished their goods; for the implied authority of a wife who is not living with her husband to bind her husband by her contracts for necessaries is put an end to by her adultery (*z*). The previous adultery and misconduct of the husband form no excuse in point of law for the adultery of the wife (*a*). But, if a condonation takes place (*b*), and the

(*t*) Parke, B., *Morgan* v. *Thomas*, 8 Exch. p. 307; 22 L.J. Ex. 152; 2 Instit. 305, a.; *Morton* v. *Withers*, Skin. 348.

(*u*) *Waithman* v. *Wakefield*, 1 Campb. 121.

(*x*) *Per* Thesiger, L.J., in *Debenham* v. *Mellon*, 5 Q.B.D. 403; see also 6 App.Cas. 24; 50 L.J. Q.B. 155.

(*y*) *Clifford* v. *Laton*, 1 Moo. & M. 102; 3 C. & P. 16.

(*z*) *Cooper* v. *Lloyd*, 6 C.B. N.S. 519, 524.

(*a*) *Govier* v. *Hancock*, 6 T.R. 603; and see *Needham* v. *Bremner*, L.R. 1 C.P. 583; 35 L.J. C.P. 313.

(*b*) *Keats* v. *Keats*, 28 L.J. P. & M. 78; 1 Sw. & Tr. 334.

husband receives the wife back again, all her original rights are restored; and the husband cannot then refuse to support and maintain her, unless he can prove the commission of a fresh and subsequent act of adultery (*c*). And, if the husband connives at the adultery of the wife, whether he permits her to remain under his roof or turns her out of doors, he cannot refuse to maintain her (*d*). If, however, during the husband's absence abroad, the wife places herself and her husband's children under the protection of a man with whom she carries on an adulterous intercourse, without the knowledge of the husband, the husband is not responsible for things furnished to the children by the wife's order, if he has supplied her with money adequate for the maintenance of the children (*e*).

Desertion of husband by wife.—If the wife leaves the husband without just cause, she cannot procure subsistence elsewhere at his expense. If she has returned to a sense of duty after a short absence, the husband would be bound to receive her back; and, if he refused to do so, his liability for necessaries supplied to her would be revived from the time of such refusal. But, if she has deserted her husband for a lengthened period, he is not bound to receive her back or maintain her (*f*). If tradesmen, therefore, part with their goods to a wife living separate from her husband, and then seek to charge the husband with the payment of them, the burden of proving that the separation took place under such circumstances as will entitle them to recover the price from the latter falls upon their shoulders (*g*). "The mischief," observes Abbot, C. J., "of allowing the ordering of goods by a married woman living apart from her husband to be *primâ facie* evidence, so as to charge him for them, would be incalculable" (*h*).

Desertion of wife by husband (*i*).—If the husband separates from his wife, and leaves her destitute, without being able to prove that she has forfeited her marriage rights by adultery, the law gives her a right to support herself upon the credit, and at the expense, of her husband; and any tradesman who at her request supplies her with necessaries suitable to her station in life, in contemplation of law supplies them to the husband himself, and may recover the

(*c*) *Harris* v. *Morris*, 4 Esp. 41.

(*d*) *Norton* v. *Fazan*, 1 Bos. & P. 227; *Robison* v. *Gosnold*, 6 Mod. 172; *Wilson* v. *Glossop*, 20 Q.B.D. 354; 56 L.J. Q.B. 434.

(*e*) *Athyns* v. *Pearce*, 2 C.B. N.S. 763; 26 L.J. C.P. 252.

(*f*) *Manby* v. *Scott*, 1 Lev. 5.

(*g*) *Clifford* v. *Laton*, 1 Moo. & M. 102; 3 C. & P. 16; *Edwards* v. *Towels*, 6 Sc. N.R. 641; 12 L.J. C.P. 239.

(*h*) *Mainwaring* v. *Leslie*, 1 Moo. & M. 18.

(*i*) Courts of summary jurisdiction have power in cases of assault, desertion, or persistent cruelty by the husband, to grant the wife a separation order and to make an order on the husband for her maintenance: 58 & 59 Vict. c. 39. See *Reg.* v. *Leresche*, (1891) 2 Q.B. 418; 60 L.J. M.C. 153, as to the meaning of "desertion."

amount as a debt due to him from the latter (*k*). The wife may also pledge the husband's credit for necessaries for the maintenance of their children of tender years, living with her against his will, by the order of the court (*l*). A person who advances to a deserted wife money to enable her to supply herself with necessaries has an equitable claim against the husband for so much of the money as is actually applied by the wife in paying for necessaries (*m*); but, if the wife has separate income of her own, adequate to her support, the husband is not then bound to maintain her (*n*); and, if the husband offers to support her, he does not "refuse to maintain her" under sect. 3 of the Vagrancy Act, 1824 (*o*); but her authority to support herself at his expense is not at an end (*p*). The law does not of course sanction a wife in running into extravagance (*q*). Where a wife, being violently turned out of doors and threatened by her husband, employed an attorney to exhibit articles of the peace against him, it was held that the husband was responsible for the payment of the attorney's charges (*r*); for, whenever the husband by his conduct compels the wife to appeal to the law for protection, she may charge him for the necessary expense of the proceedings as much as for the necessary food or raiment (*s*), and her solicitor may sue for his necessary costs (*t*). But an indictment against the husband is not necessary for the protection of the wife; and, therefore, where a husband, having ill-treated his wife, was indicted on her prosecution, and fined, and a brother of the wife advanced money to pay the expenses of the prosecution, it was held that he was not entitled to recover the amount from the husband (*u*). The husband is not liable for expenses incurred by the wife without his sanction in procuring a deed of separation (*x*), nor for the costs of a suit instituted on her behalf for a judicial separation where proper care has not been taken to ascertain that the suit was rightly instituted (*y*). But a husband has been held liable for preliminary expenses incidental to a suit for restitution of conjugal rights, and for the expenses of obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement, and of obtaining professional advice as to the proper mode of

(*k*) *Harris* v. *Morris*, 4 Esp. 41; *Bolton* v. *Prentice*, 2 Str. 1214.

(*l*) *Bazeley* v. *Forder*, L.R. 3 Q.B. 559; 37 L.J. Q.B. 237.

(*m*) *Jenner* v. *Morris*, 3 De G.F. & J. 45; 30 L.J. Ch. 361; *Deare* v. *Soutten*, L.R. 9 Eq. 151.

(*n*) *Liddlow* v. *Wilmot*, 2 Stark. 86; *Johnston* v. *Sumner*, 3 H. & N. 266; 27 L.J. Ex. 341.

(*o*) 5 Geo. 4, c. 83, s. 3; *Flannagan* v. *Bishopwearmouth Overseers*, 8 E. & B. 455; 27 L.J. M.C. 46.

(*p*) *Emery* v. *Emery*, 1 Y. & J. 501.

(*q*) *Emmett* v. *Norton*, 8 C. & P. 510.

(*r*) *Turner* v. *Rookes*, 10 Ad. & E. 47; *Shepherd* v. *Mackoul*, 3 Campb. 327.

(*s*) *Brown* v. *Ackroyd*, 5 E. & B. 826.

(*t*) *Ottaway* v. *Hamilton*, 3 C.P.D. 393; 47 L.J. C.P. 725.

(*u*) *Grindell* v. *Godmond*, 5 Ad. & E. 755; 6 L.J. K.B. 31.

(*x*) *Ladd* v. *Lynn*, 2 M. & W. 265; 6 L.J. Ex. 373.

(*y*) *Hooper*, *In re*, 33 L.J. Ch. 305; 2 De G. J. & S. 91.

dealing with tradespeople who were pressing her for payment for necessaries supplied by them to her since the desertion, and of preventing a threatened distress for rent (*z*), and for the costs necessarily incurred by the wife in filing a petition for a judicial separation, although the petition was not proceeded with, and although the course prescribed by the practice of the Divorce Court for obtaining the wife's costs was not pursued (*a*).

What amounts to expulsion of wife by husband.—If by cruelty the husband renders it morally impossible for the wife to continue to reside with him, and she accordingly leaves him, this is as much an expulsion as if he had turned her out by main force (*b*). If the husband brings home a loose woman, and treats her as a member of his family, this is a sufficient cause for the wife's leaving him; and so is the existence and continuance of an adulterous intercourse on the part of the husband with another woman (*c*). Whenever the wife has once left her husband under justifiable circumstances, she is not bound to return upon the invitation of the latter; and the husband's liability for necessaries furnished to her cannot be determined by a request on his part that she will again return to his protection (*d*).

Liability of husband for necessaries supplied to wife during separation by mutual consent.—The husband is responsible for necessaries furnished to the wife during the continuance of a separation by mutual consent, unless she has competent provision from him or from funds at her own disposal; if she has such a provision, it lies on the husband to show it (*e*), and on the creditor to prove that it is insufficient (*f*). If the wife leaves her home in consequence of a quarrel with the husband in which they are mutually to blame, and obtains lodging and the necessaries of life at the hands of a third party, the husband will be responsible for the board and lodging and necessaries provided for her (*g*). Where a wife voluntarily left her husband's house, and went to reside with her brother about a mile distant, with whom she continued to live apart from her husband until her death many years after, when her brother, without any communication with the husband, buried her in a suitable manner, it was held that the brother was entitled to recover from the husband the expenses of the funeral (*h*). But in all cases of voluntary separation, unaccompanied by cruelty, the

(*z*) *Wilson* v. *Ford*, L.R. 3 Ex. 63; 37 L.J. Ex. 60.
(*a*) *Rice* v. *Shepherd*, 12 C.B. N.S. 332.
(*b*) *Baker* v. *Sampson*, 14 C.B. N.S. 383.
(*c*) *Houliston* v. *Smyth*, 3 Bing. 127; 3 L.J. (O.S.) C.P. 201.
(*d*) *Emery* v. *Emery*, 1 Y. & J. pp. 505, 506.
(*e*) *Dixon* v. *Hurrell*, 8 C. & P. 719.
(*f*) *Johnston* v. *Sumner*, 3 H. & N. 266; 27 L.J. Ex. 341.
(*g*) *Reed* v. *Moore*, 5 C. & P. 200.
(*h*) *Bradshaw* v. *Beard*, 12 C.B. N.S. 344; 31 L.J. C.P. 273.

husband may put an end to his liability for necessaries by requiring the wife to return to him, and prohibiting parties from continuing to give her credit (*i*); and his liability is in all cases dependent upon the pecuniary means at the wife's disposal (*k*). A mere covenant or agreement to make an allowance for the wife's maintenance will not of itself exonerate the husband from his liability. He must show that the covenant has been fulfilled, and that the allowance has been regularly paid, and that it is sufficient, or has been accepted by the wife as sufficient, for her suitable support (*l*). Where a husband consents to his wife living apart from him, on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his credit, although the allowance is inadequate, for the consent to the separation is given upon the terms that she agrees to the adequacy of the allowance (*m*).

Effect of decree for judicial separation.—By the Matrimonial Causes Act, 1857 (*n*), in every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contracting and suing and being sued, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any costs she may incur as plaintiff or defendant; but, where, upon any judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same has not been duly paid by the husband, he is then liable for necessaries supplied for the wife's use (*o*). By sect. 8 of the Matrimonial Causes Act, 1858 (*p*), no discharge, variation, or reversal of any decree for a judicial separation is to prejudice or affect any rights or remedies which any person would otherwise have had in respect of any debts, contracts or acts of the wife incurred, entered into, or done, between the making of the decree and the discharge, variation, or reversal thereof (*q*).

Orders for the protection of the property and earnings of a deserted wife place the wife during the continuance of the order and the desertion in the like position in all respects with regard to property and contracts, and suing and being sued, as if she had obtained a decree for a judicial separation (*r*). Such orders are, however,

(*i*) *Hindley* v. *Westmeath*, 6 B. & C. 200; 5 L.J. (O.S.) K.B. 115.

(*k*) *Mizen* v. *Pick*, 3 M. & W. 481; 7 L.J. Ex. 153; *Tod* v. *Stokes*, 12 Mod. 245; as to the liability of a lunatic husband, see *post*, p. 403.

(*l*) *Nurse* v. *Craig*, 2 B. & P.N.R. 148; *Burrett* v. *Booty*, 8 Taunt. 343.

(*m*) *Biffin* v. *Bignell*, 7 H. & N. 877; 31 L.J. Ex. 189; *Eastland* v. *Burchell*, 3 Q.B.D. 432; 47 L.J. Q.B. 500.

(*n*) 20 & 21 Vict. c. 85, s. 26.

(*o*) *Hunt* v. *De Blaquiere*, 5 Bing. 550; 7 L.J. (O.S.) C.P. 198; and the same would hold under a magistrate's separation order, under 41 Vict. c. 19.

(*p*) 21 & 22 Vict. c. 108, s. 8.

(*q*) See also 20 & 21 Vict. c. 85, ss. 25, 26; *Poole* v. *Soady*, L.R. 3 Ch. 220; 37 L.J. Ch. 246; *Nicholson* v. *Drury Buildings Co.*, 7 Ch.D. 48; 47 L.J. Ch. 192.

(*r*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, ss. 6—10.

confined to money or property acquired by lawful industry, and do not extend to property acquired by keeping a brothel (*s*).

Imprisonment of the husband for a term of years operates as a suspension of the civil and marital rights of the husband during the continuance of the term of banishment (*t*). But a voluntary absence beyond the sea, on the part of the husband, or a compulsory absence in the service of the state, does not in anywise alter or affect the legal position of the wife. If the husband has been banished for the term of his natural life, he is civilly dead (*u*). If the husband is an alien enemy, he has no legal existence in this country; and, so long as he remains in that position, his wife, resident here, is looked upon as a *feme sole;* and she is, consequently, liable to be sued upon all contracts entered into by her, just the same as if she were a widow (*x*). But if he is an alien *ami*, his wife is in the same plight as any other married woman.

Death of husband. Rights and liabilities of surviving wife.—The death of the husband did not render the wife responsible upon any contracts made by her during coverture; nor was she responsible upon any promise, made after the death of the husband, to pay for things furnished her in his lifetime, as such a promise was without consideration (*y*). A contract entered into by the wife after the death of her husband, but before it was known, was held not to be binding on her (*z*).

If the wife survives the husband, she is entitled to the benefit of all contracts under seal entered into during the coverture with herself alone, or with her husband and herself jointly (*a*), but she may waive her right to the instrument; and it then becomes the obligation of the husband alone. To a debt due on a joint judgment recovered by herself and husband during the coverture, the wife is also entitled by survivorship (*b*). The surviving wife is entitled also to all promissory notes and bills of exchange made payable to her during the coverture, and to all express simple contracts where the promise has been made to herself during the marriage, and the consideration to support it has moved from her (*c*). Where a *feme covert* administratrix received a sum

(*s*) *Mason* v. *Mitchell*, 3 H. & C. 528; 34 L.J. Ex. 68.

(*t*) *Franks, Ex parte*, 1 M. & Sc. 11; *Carroll* v. *Blencow*, 4 Esp. 28.

(*u*) Co. Litt. 133, a; *Portland (Countess)* v. *Prodgers*, 2 Vern. 104; *Franks, Ex parte, supra.*

(*x*) *Derry* v. *Mazarine (Duchess)*, 1 Raym. 147; but see *De Wahl* v. *Branne*, 1 H. & N. 178; 25 L.J. Ex. 343.

(*y*) *Meyer* v. *Haworth*, 8 Ad. & E. 467; 7 L.J. Q.B. 211.

(*z*) *Smout* v. *Ilbery*, 10 M. & W. 1; 12 L.J. Ex. 357; *Blades* v. *Free*, 9 B. & C. 167; 7 L.J. (O.S.) K.B. 211; but see now 56 & 57 Vict. c. 63, *ante*, p. 387.

(*a*) 1 Roll. Abr. 349 (B.); *Coppin* v. ——, 2 P.W. 496.

(*b*) Com. Dig. Bar. et Feme, F. 1; *Oglander* v. *Baston*, 1 Vern. 396.

(*c*) *Nash* v. *Nash*, 2 Mad. 133; *Gaters* v. *Madeley*, 6 M. & W. 423; 9 L.J. Ex. 173; *Fleet* v. *Perrins*, L.R. 4 Q.B. 500; 38 L.J. Q.B. 257.

of money in that character, and lent the same to her husband, taking in return for it the joint and several promissory notes of her husband and two other persons payable to her with interest, and the husband died, it was held that the note was a *chose in action* surviving to the wife (*d*). As regards a simple contract, however, made with the husband and wife jointly during coverture, the husband may elect to let his wife have the benefit of it by survivorship, or he may take it himself. If, in his lifetime, he brings an action upon the contract in his own name, that amounts to an election to appropriate it to himself, and the wife cannot, consequently, in this case, take it by survivorship (*e*). If he joins his wife as a party suing on the contract and dies, she may prosecute the suit to judgment for her own sole use; and, even if judgment has been signed in the action so commenced prior to the husband's death, but no execution has been levied, the benefit of the judgment will survive to the wife, and she may forthwith issue execution thereon for her own use (*f*).

Death of wife. Husband's rights by survivorship.—If, after the death of the wife, the husband becomes tenant by the courtesy of her real estate, the interest in real contracts or covenants annexed to such estate pass to him; but he can maintain no action on covenants annexed to her estate of which he is not tenant by the courtesy (*g*). Where the wife dies without disposing of her separate personalty under the powers given to her by the Married Women's Property Acts, her husband's right to such undisposed-of personalty accrues as though her separate use had never existed (*h*).

Liabilities resulting from reputed marriages.—If parties have lived together as man and wife, and are commonly reputed to be married, this suffices to enable third parties to charge them with the duties and responsibilities that result from such a relationship (*i*); and, if it be proved that they have actually gone through the marriage ceremony, but that they afterwards separated, there is sufficient evidence of their standing towards each other in the relationship of man and wife, unless a divorce can be proved.

"If a man," observed Lord Kenyon, "has permitted a woman to whom he was not married to use his name, and pass for his wife, and in that character to contract debts, he is liable for her debts, whether the tradesman who furnished the goods knew the circum-

(*d*) *Richards* v. *Richards*, 2 B. & Ad. 447; 9 L.J. (O.S.) K.B. 319.

(*e*) *Scarpellini* v. *Atcheson*, 7 Q.B. 864; 14 L.J. Q.B. 333.

(*f*) *Sherrington* v. *Yates*, 12 M. & W. 855, 865; *Bond* v. *Simmons*, 3 Atk. 21; *Nanney* v. *Martin*, 1 Ch.C. 27.

(*g*) *Blake* v. *Foster*, 8 T.R. 487.

(*h*) *Lambert's Estate, In re*, 39 Ch.D. 626; 57 L.J. Ch. 927; *Surman* v. *Wharton*, (1891) 1 Q.B. 491; 60 L.J. Q.B. 233.

(*i*) *Mace* v. *Cammell*, Lofft, 782; *Edwards* v. *Farebrother*, 2 Moo. & P. 293; 3 C. & P. 524.

stance to be so or not. But this must not be taken to apply to the case of a common strumpet, who may assume the name of a person without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family" (*k*). And it matters not whether the man so acting is a married man or a single man. If he lives with a woman, and gives her every appearance of being his wife, the proof of a previous marriage with some other woman cannot exonerate him from liability (*l*). Having once held out the woman as his wife, the reputed husband is bound, when the connection ceases, to make the termination of it notorious, in order to escape from the difficulties of his position (*m*).

As to the liability of the husband on contracts entered into by his wife before marriage, see *ante*, Transfer by Marriage, p. 239.

Contracts with bankrupts.—For the protection of persons having *bonâ fide* dealings with a bankrupt after the act of bankruptcy, but without notice of it, it is enacted by the Bankruptcy Act of 1883 that, subject to the provisions of the Act with respect to the effect of bankruptcy on an execution or attachment, and to the avoidance of certain settlements and preferences, nothing in the Act shall invalidate in case of a bankruptcy any payment by the bankrupt to any of his creditors, or any payment or delivery to the bankrupt, or any conveyance or assignment by the bankrupt for valuable consideration, or any contract, dealing, or transaction, by or with the bankrupt for valuable consideration, provided that the two following conditions are complied with: (1) That the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order, and (2) That the person to, by, or with whom such payment, &c., was made, has not at that date notice of any available act of bankruptcy committed by the bankrupt before that time (*n*).

Liabilities of trustee in bankruptcy.—If the trustee of a bankrupt permit the bankrupt to carry on his trade for the benefit of the estate, he will be responsible for the payment of the price of goods ordered and used by him in the exercise of such trade (*o*).

Contribution between trustees in bankruptcy.—If, in the course of the administration of the estate, the trustees enter into joint

(*k*) *Watson* v. *Threlkeld*, 2 Esp. 637.

(*l*) *Robinson* v. *Nahon*, 1 Campb. 245.

(*m*) *Ryan* v. *Sams*, 17 L.J. Q.B. 271; 12 Q.B. 460.

(*n*) 46 & 47 Vict. c. 52, s. 49; as to what are protected transactions, see *Waugh, In re*, 4 Ch.D. 524; 46 L.J. Bankr. 24; *Jay, Ex parte*, 14 Ch.D. 19; *Richdale, Ex parte*, 19 Ch.D. 409; *Whitehead, Ex parte*, 14 Q.B.D. 419; *Powell* v. *Marshall, Parkes & Co.*, (1899) 1 Q.B. 710; 68 L.J. Q.B. 477. As to notice, see *Warren, Ex parte*, 15 Q.B.D. 48; 54 L.J. Q.B. 320; *Revell, Ex parte*, 13 Q.B. D. 727; 54 L.J. Q.B. 89.

(*o*) *Kinder* v. *Howarth*, 2 Stark. 354. See 46 & 47 Vict. c. 52, s. 64.

contracts, and incur a joint liability thereon, and one alone is compelled to pay the whole amount due on such contracts, he has a right to an action for contribution against his co-trustee, whether the latter has or has not in his hands any funds from the bankrupt's estate (*p*).

Contracts with drunkards.—A party who makes a contract in such a state of drunkenness as not to know what he is doing, cannot be compelled to perform that contract by the other party who knew him to be in that state. A man who takes an obligation from another so circumstanced is guilty of actual fraud (*q*). But a contract made by a man in a state of drunkenness is voidable only and not void; and, therefore, the drunken man may, if he pleases, ratify it after he becomes sober, and it will then be binding upon him (*r*). It has been said that a bill of exchange or a promissory note, indorsed or accepted or made by a person in a *complete* state of intoxication, cannot be enforced, as against the drunkard, by a *bonâ fide* holder who received and gave value for it on the credit of the acceptance or indorsement, or signature, in ignorance of the drunkenness and of the fraudulent circumstances under which the instrument was obtained (*s*); but this seems very doubtful, and it is clearly otherwise if the party was only partially intoxicated at the time he accepted or indorsed the instrument (*t*).

Contracts with lunatics.—If a party to a contract was, at the time he entered into the engagement, a lunatic or of unsound mind, and any imposition appears to have been practised upon him, or any advantage taken of his infirmity by the other contracting parties, the contract will be void as having been procured by fraud; but, if the contract is a fair and honest contract, and bears no symptoms of the infirmity of mind of the party sought to be charged thereon, the courts will enforce it like any other contract (*u*). A lunatic, however, will not be bound by any deed entered into by him (*x*), unless it be shown that it was entered into during a lucid interval; and if it be a necessary and beneficial contract for him to enter into, such as a lease of his lands at an advantageous rent, the nature of the contract may be *primâ facie* evidence of its having been made during a lucid interval (*y*). An action upon a contract

(*p*) *Hart* v. *Biggs*, Holt, 245; *Bevan* v. *Whitmore*, 15 C.B. N.S. 433; 19 *ib.* 763. See 46 & 47 Vict. c. 52, s. 84.

(*q*) *Gore* v. *Gibson*, 13 M. & W. 623; 14 L.J. Ex. 152; *Cole* v. *Robins*, Bull. N.P. 172, a.; *Pett* v. *Smith*, 3 Campb. 33; *Fenton* v. *Holloway*, 1 Stark. 126; *Hamilton* v. *Grainger*, 5 H. & N. 40.

(*r*) *Matthews* v. *Baxter*, L.R. 8 Ex. 132; 42 L.J. Ex. 73.

(*s*) *Sentance* v. *Poole*, 3 C. & P. 1.

(*t*) *Shaw* v. *Thackray*, 17 Jur. 1045.

(*u*) *Manby* v. *Bewicke*, 3 K. & J. 342; *Jenkins* v. *Morris*, 14 Ch.D. 674; 49 L.J. Ch. 392.

(*x*) *Yates* v. *Boen*, 2 Str. 1104; *Thompson* v. *Leech*, 3 Salk. 301; Vin. Abr. (LUNATIC); *Beverley's case*, 4 Co. 123, b.

(*y*) *Sergeson* v. *Sealey*, 2 Atk. 413; *Faulder* v. *Silk*, 3 Campb. 126; *Creagh* v. *Blood*, 2 Jones & Lat. 509.

cannot be defeated by showing that the defendant had been found by inquisition to be a lunatic at the time he received the benefit of the contract (*z*); for the law will not permit the lunatic's infirmity to be made an instrument of fraud upon third parties who have dealt with him in good faith (*a*). If a lunatic, apparently of sound mind and not known to be otherwise, enters into a fair and *bonâ fide* contract, such contract cannot afterwards be set aside (*b*). A party to a contract cannot avoid it on the ground of his insanity at the time he entered into it, unless his insanity was at the time known to the other contracting party. The burden of proving both the insanity and the knowledge of it by the other contracting party lies upon the party seeking to avoid the contract (*c*). The lunacy of a husband is no answer to an action brought against him upon the ordinary implied contract in respect of necessaries furnished to his wife (*d*); for the authority given by law to a destitute wife to pledge the credit of her husband for her support is not revoked by the husband becoming insane. Where the husband whilst of sound mind had given the wife authority to deal with the plaintiff, and she, after he had become insane, ordered goods, and the plaintiff was not aware of the insanity of the husband, it was held that the husband upon his recovery might be sued for the goods (*e*). But the authority of a wife to pledge her husband's credit is not greater in the case of a lunatic husband than in the ordinary case of husband and wife; and, therefore, if she has an income adequate to maintain her in her station of life, she cannot pledge the lunatic husband's credit (*f*). Although a contract by a lunatic is voidable, yet if, after he has been so found, his committee has been directed to carry out the contract, that direction amounts to a ratification of the contract, and it cannot afterwards be set aside (*g*). Equity will raise an implied contract, and enforce a demand against the lunatic or his estate for monies expended for the necessary protection of person or estate (*h*).

Contracts with alien friends.—Every subject of a friendly state resident in this country has the same power of entering into and enforcing personal contracts as the natural-born subjects of the

(*z*) *Brown* v. *Jodrell*, 3 C. & P. 30; M. & M. 105; *Niell* v. *Morley*, 9 Ves. 478; *Dane* v. *Kirkwall*, 8 C. & P. 679; *Bagster* v. *Portsmouth* (*Earl*), 7 D. & R. 614; 5 B. & C. 170.

(*a*) *Nelson* v. *Duncombe*, 9 Beav. 211; 15 L.J. Ch. 296.

(*b*) *Molton* v. *Camroux*, 4 Exch. 17; 18 L.J. Ex. 358; *Beavan* v. *M'Donnell*, 9 Exch. 309; 23 L.J. Ex. 94; *Brice* v. *Berrington*, 3 Mac. & G. 486.

(*c*) *Imperial Loan Co.* v. *Stone*, (1892) 1 Q.B. 599; 61 L.J. Q.B. 449.

(*d*) *Read* v. *Legard*, 6 Exch. 636; 20 L.J. Ex. 309; *Davidson* v. *Wood*, 1 De G. J. & S. 465; 32 L.J. Ch. 400.

(*e*) *Drew* v. *Nunn*, 4 Q.B.D. 661; 48 L.J. Q.B. 591.

(*f*) *Richardson* v. *Du Bois*, L.R. 5 Q.B. 51; 39 L.J. Q.B. 69.

(*g*) *Baldwyn* v. *Smith*, (1900) 1 Ch. 589; 69 L.J. Ch. 336.

(*h*) *Williams* v. *Wentworth*, 5 Beav. 325; *Stedman* v. *Hart*, Kay, 607; 23 L.J. Ch. 908; *Rhodes*, *In re*, 44 Ch.D. 94; 59 L.J. Ch. 298.

realm (*i*). Formerly an alien could not purchase or hold any estate of freehold or inheritance in lands or tenements, because such an interest in the soil was supposed to require a permanent allegiance; and he could not, therefore, lawfully enter into or enforce any contracts connected with the acquisition and enjoyment of freehold estates (*k*). By 33 Vict. c. 14, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject. But nothing in that Act is to qualify an alien to be the owner of a British ship (*l*). If, after a contract has been made with an alien friend, a war breaks out between his country and this, his right of action on the contract is suspended until the return of peace (*m*). The crown may indeed, if it thinks fit, lay hands on all his debts and *choses in action*, and prevent him from afterwards putting them in suit; but, if it does not think fit so to do, his rights are restored on the return of peace (*n*).

Contracts with alien enemies.—All alien enemies, and all British subjects and subjects of neutral nations domiciled in any enemy's territory, or engaged in the service of a hostile power (*o*), are disabled from contracting with British subjects unless they have obtained a licence to trade. But they may lawfully provide for the wants and necessities of Englishmen detained abroad, and may enforce contracts made for such purposes on the return of peace (*p*). So long as hostilities last they are utterly disabled from suing in our courts of justice, although they may be sued if they reside within their jurisdiction. In one case it was held that a natural-born subject might sue in trust for an alien enemy (*q*); but this decision seems to be at variance with numerous authorities (*r*). If a subject of a state at war with this country resides here with the licence and permission of the crown, he has the same rights and privileges as an alien friend (*s*). But the mere fact of the residence of a party in this country without disturbance or interruption, is not evidence of a licence from the crown, unless it be shown that the government was cognizant of his being here, and sanctioned his stay (*t*).

(*i*) Com. Dig. ALIEN, c. 5; *Openheimer* v. *Levy*, 2 Str. 1082.

(*k*) *Calvin's case*, 7 Co. 23, a.; Co. Litt. 2, b.; Roll. Abr. 194.

(*l*) 33 Vict. c. 14, s. 14.

(*m*) *Flindt* v. *Waters*, 15 East, 260; Co.Litt. 129, b.; *Boussmaker, Ex parte*, 13 Ves. 71.

(*n*) 1 Rolle Abr. ALIEN, B. pl. 3; Bro. DENIZEN, pl. 16, 20.

(*o*) *Roberts* v. *Hardy*, 3 M. & S. 534; *M'Connell* v. *Hector*, 3 B. & P. 113; *O'Mealy* v. *Wilson*, 1 Campb. 482; *The Ocean*, 5 Rob. 90.

(*p*) *Antoine* v. *Morshead*, 6 Taunt. 237; *Duhammel* v. *Pickering*, 2 Stark. 92.

(*q*) *Daubuz* v. *Morshead*, 6 Taunt. 332.

(*r*) *Brandon* v. *Nesbitt*, 6 T.R. 23; *Bristow* v. *Towers*, *ib.* 35; *Brandon* v. *Curling*, 4 East, 413; *Warin* v. *Scott*, 4 Taunt. 605; *Albrecht* v. *Sussman*, 2 Ves. & B. 323; *Willison* v. *Patteson*, 7 Taunt. 447; *Kensington* v. *Inglis*, 8 East, 288.

(*s*) *Wells* v. *Williams* 1 Ld. Raym. 282; 1 Salk. 46; *Casseres* v. *Bell*, 8 T.R. 166; Vin. Abr. ALIEN (I.) pl. 8.

(*t*) *Boulton* v. *Dobree*, 2 Campb. 162; *Alciator* v. *Smith*, 3 Campb. 244.

Prisoners of war, remaining in the realm under the protection of the crown, may enter into and enforce personal contracts, unless the crown interferes to prevent them; and they appear to have the same civil rights and privileges as alien friends (*u*).

Disabilities of convicts.—When a person has been convicted of treason or felony, and has been sentenced to death or penal servitude, he is precluded by 33 & 34 Vict. c. 23, from alienating or charging any property, or making any contract (*x*). The convict may, however, make contracts when he is lawfully at large under any licence, and may sue in respect thereof (*y*). And his disability ceases altogether when he has suffered his punishment or received a pardon (*z*). The administrator of a convict's property, appointed in the manner prescribed by the Act (*a*), may let, mortgage, sell, convey, or transfer any part of such property at his discretion (*b*); and all such contracts, *bonâ fide* made by the administrator under the powers of the Act, will be binding on the convict, and on all persons claiming an interest in the property by virtue of that Act (*c*).

Disabilities of outlaws.—When a person has been outlawed he is civilly dead, and is incapable of enforcing any contract he may have entered into (*d*), although he is liable to be sued thereon (*e*). An attainted man, although civilly dead for some purposes, is nevertheless capable of contracting in a foreign country a marriage which will be deemed valid in England, if it was valid by the law of that country (*f*). The incompetency to contract and sue may be removed by means of a reversal of the outlawry.

Parties privileged from actions and suits.—A foreign sovereign cannot be sued in the courts of this country, unless he appears and consents to the action (*g*); and even then he does not lose his rights as a foreign sovereign (*h*); and the same privilege is possessed by the ambassadors and ministers of foreign reigning sovereigns, their secretaries, and domestic servants (*i*). A writ of summons in an action cannot be issued against, and, therefore, the Statute of Limitations does not commence to run in favour of, the ambassador of a foreign State whilst he is accredited to this country, or during

(*u*) *Sparenburgh* v. *Bannatyne*, 1 B. & P. 163, 170; *Maria* v. *Hall*, 2 B. & P. 236; 1 Taunt. 33, n.

(*x*) Sect. 8. He can pay a debt claimed by a debtor's summons, and if he fails he will commit an act of bankruptcy. *Graves, Ex parte*, 19 Ch.D. 1; 51 L.J. Ch. 1.

(*y*) Sect. 30.

(*z*) Sect. 7.

(*a*) Sect. 9.

(*b*) Sect. 12.

(*c*) Sect. 17.

(*d*) Hawk. P.C. lib. 2, c. 49, s. 9.

(*e*) *Macdonald* v. *Ramsey*, Foster, 61.

(*f*) *Kynnaird* v. *Leslie*, L.R. 1 C.P. 389; 35 L.J. C.P. 226.

(*g*) *Brunswick* (*Duke*) v. *Hanover* (*King*), 6 Beav. 1; 13 L.J. Ch. 107; *Wilson* v. *Church*, 13 Ch.D. 1; affirmed, 5 App.Cas. 177; *Twycross* v. *Dreyfus*, 5 Ch.D. 605; 46 L.J. Ch. 510; *Mighell* v. *Johore* (*Sultan*), (1894) 1 Q.B. 149; 63 L.J. Q.B. 593.

(*h*) *Vavasseur* v. *Krupp*, 9 Ch. D. 351.

(*i*) 7 Anne, c. 12, s. 3.

such time after his recall as is reasonably occupied by him in winding up the affairs of his embassy and leaving the country (*k*).

Mandamus to parties to contracts.—By the Judicature Act, 1873 (*l*), a mandamus may now be granted by an interlocutory order of the court (*m*) in all cases in which it shall appear to be just or convenient that such order should be made, either unconditionally or upon terms. It was said by Brett, L.J., that the mandamus here spoken of "is not the prerogative writ, but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie" (*n*): that is to say, that it is in the nature of a mandatory injunction, and not of a writ issuing where there has been a positive refusal to perform a public duty or negligence amounting to a positive refusal.

Mandamus to public companies to make calls.—Where a public board or corporate body is clothed with certain defined statutory powers, and is authorized to enter into contracts, and has the power of creating, by calls on shareholders, a future corporate property, from time to time, out of the private assets of its individual members, and contracts are made with the corporation on the faith that an honest exercise will be made of these powers, and it is clearly established that the corporation is evading the payment of its just debts, and the due satisfaction of a judgment recovered against them, on the ground that they have no corporate assets in hand wherewith to pay, the court will, by mandamus, compel them to exercise the powers vested in them for raising funds, and answer the demands of their creditors (*o*). But where an action has been brought against a corporation for a debt claimed to be due, and judgment has been recovered, and the plaintiff has the ordinary legal remedy of an execution, the court will not issue a mandamus merely because the execution may produce no fruits (*p*).

Mandamus to local boards, commissioners, trustees, and public officers to levy rates and satisfy and discharge judgment-debt or pecuniary obligation.—Whenever judgment has been recovered in an action against the clerk of a local board, or of commissioners, or trustees, in respect of something done by such board or commissioners

(*k*) *Musurus Bey* v. *Gadban*, (1894) 2 Q.B. 352; 63 L.J. Q.B. 621.

(*l*) 36 & 37 Vict. c. 66, s. 25 (8).

(*m*) A chancery judge may now issue such a writ in a cause before him. See *Paris Skating Rink Co., In re*, 6 Ch.D. 731; 46 L. J. Ch. 831. It would seem, however, that the Queen's Bench Division is the proper Court to issue such a writ. See *Glossop* v. *Heston Local Board*, 12 Ch.D. 102, *per* James, L.J., pp. 115, 116, *per* Brett, L.J., p. 122, 49 L.J. Ch. 89.

(*n*) *Glossop* v. *Heston Local Board*, 12 Ch.D. 102, at p. 122; 49 L.J. Q.B. 89.

(*o*) *Rex* v. *St. Kath. Dock Co.*, 4 B. & Ad. 360. See *Webb* v. *Herne Bay Commissioners*, L.R. 5 Q.B. 642; 39 L.J. Q.B. 221.

(*p*) *Reg.* v. *Victoria Park Co.*, 1 Q.B. 288, 292.

or trustees in execution of statutory powers, exempting them from personal liability, the judgment-creditor, when he fails to obtain satisfaction of his judgment-debt from the corporate estate and effects of the board, is, in general, entitled to a mandamus to compel the board or other public body to levy a rate, and discharge the judgment-debt. Wherever public officers have borrowed money upon the security of rates they are authorized to impose, and have not themselves contracted any personal liability to pay, a mandamus will go to compel them to make a rate and repay the money (*q*). If an Act of Parliament authorizes public officers to enter into contracts for public works, to employ subordinate salaried officers, and to charge the costs and expenses upon rates, and contracts are made by them, and officers appointed, and expenses incurred, and there is no personal liability to pay, and the ordinary remedy by way of action is not available, the court will, by mandamus, compel them to make a rate and pay such expenses (*r*).

Under sect. 89 of the Local Board of Health Act, 11 & 12 Vict. c. 63 (*s*), a local board of health might be compelled by mandamus to make a rate for the purpose of satisfying a judgment within six months after the judgment had been obtained against them (*t*). And the remedy is not, generally speaking, available after the six months have expired (*u*). But a rate may be ordered in aid of a judgment within six months after the judgment was obtained, although the action on which the judgment was obtained was commenced more than six months after the claim accrued, if the delay is shown not to have been undue (*x*).

Actions in which claim for mandamus maintainable.—Wherever, by charter or Act of Parliament, a duty is imposed upon a corporate body or chartered company, in the fulfilment of which the plaintiff is interested, and in respect of the non-fulfilment of which the plaintiff is entitled to maintain an action for damages, he may claim a mandamus (*y*). Thus where the plaintiff, in an action for a mandamus against a trading company, set forth the incorporation of the company by letters patent, directing amongst other things

(*q*) *Reg.* v. *Brancaster Churchwardens*, 7 Ad. & E. 458.

(*r*) *Reg.* v. *Hurstbourne Tarrant Churchwardens*, 27 L.J. M.C. 214; E. B. & E. 246; *Reg.* v. *Norfolk Sewers Commissioners*, 20 L.J.Q.B. 121; 15 L.J. Q.B. 549; *Bogg* v. *Pearse*, 10 C.B. 542; 20 L.J. C.P. 99.

(*s*) This Act is repealed, but there is a similar provision in the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 210.

(*t*) *Reg.* v. *Rotherham*, 8 E. & B. 906; 27 L.J. Q.B. 156.

(*u*) *Burland* v. *Kingston-upon-Hull Local Board*, 32 L.J. Q.B. 17; 3 B. & S. 271; in other cases, the plaintiff is not concluded by delay. *Ward* v. *Lowndes*, 1 E. & E. 940; 29 L.J. Q.B. 40; *Reg.* v. *Hurstbourne Tarrant Churchwardens*, 27 L.J. M.C. 214; E. B. & E. 246; see *Bush* v. *Martin*, 2 H. & C. 311; 33 L.J. Ex. 17.

(*x*) *Worthington* v. *Hulton*, L.R. 1 Q.B. 63; 35 L.J. Q.B. 51; see *Ringland* v. *Lowndes*, 33 L.J. C.P. 25; 15 C.B. N.S. 173.

(*y*) See *Morgan* v. *Metropolitan Ry.*, L.R. 4 C.P. 97; 38 L.J. C.P. 87.

that the capital of the company should be divided into shares, and provision made for the registration of the names of all the proprietors of such shares; and showed that a register of shareholders had been established, in conformity with the provisions of the charter; and that the plaintiff was entitled, as the executor of a deceased shareholder, to have his name inserted in such register, averring that he was personally interested, &c., and had sustained damage, and had made a demand on the company to have his name entered, and that they had refused, &c., it was held on demurrer that the plaintiff was entitled to the writ; for wherever there is a duty in the fulfilment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is a case for a mandamus (*z*). It is a case also where a prerogative writ would be granted independently of the statute (*a*).

Commissioners, or the members of a local board, appointed annually for executing the powers of a local Act of Parliament, are generally a fluctuating body in the nature of a corporation, represented by their clerk, who is the party to be sued for services rendered them for purposes within the scope of the Act (*b*). But for the statute, the commissioners who retain, or order the services to be rendered by, the plaintiff, would be personally liable; but as they are acting for public purposes under statutory authority, with power over a public fund created by the statute, they are generally expressly exempted from personal liability, and the burthen of satisfying and discharging the debts they incur in the execution of the purposes of the Act is thrown upon the fund they are authorized to administer. An action to enforce payment of these debts must be brought against them in the name of their clerk, and when judgment is obtained against the clerk, the public fund, or the rates, are to be resorted to for its satisfaction, and not the private property of the commissioners (*c*). If, therefore, after judgment has been recovered against the clerk, a demand is made upon the commissioners for satisfaction and discharge of the judgment debt, and they neglect to provide themselves with funds, or to make the payment, an action for damages

(*z*) Ld. Campbell, *Norris* v. *Irish Land Co.*, 8 E. & B. 512; 27 L.J. Q.B. 115; but a company is not bound to register a transfer not in accordance with the statutable form, *Reg.* v. *Gen. Cem. Co.*, 6 E. & B. 415; 25 L.J. Q.B. 342; *Copeland* v. *N. E. Ry.*, 6 E. & B. 277; *Swan* v. *Brit. Austr. Co.*, 2 H. & C. 175; 32 L.J. Ex. 273; *Ward* v. *S. E. Ry.*, 29 L.J. Q.B. 177; *Ward* v. *Lowndes*, 1 E. & E. 940; 29 L.J. Q.B. 40.

(*a*) *Norris* v. *Irish Land Co.*, *supra*; *Rex* v. *Merchant Taylors' Co.*, 2 B. & Ad. 115; 9 L.J. (O.S.) K.B. 146.

(*b*) *Allen* v. *Hayward*, 7 Q.B. 960; 15 L.J. Q.B. 99; *Bush* v. *Martin*, 33 L.J. Exch. 17; 2 H. & C. 311.

(*c*) *Hall* v. *Taylor*, E. B. & E. 107; 27 L.J. Q.B. 311; *Kendall* v. *King*, 17 C.B. 483; 25 L.J. C.P. 132. See Addison on Torts, p. 729 (ed. 7).

may be brought upon the judgment, and the claim for a mandamus conjoined therewith, to compel the levying of a rate and the satisfaction and discharge of the judgment debt. But, in these cases, the old prerogative writ of mandamus would seem to afford as convenient a remedy for enforcing satisfaction of the judgment debt (*d*) as the bringing of a second action for a mandamus. If a second action is brought it must, in many cases, be commenced within six months of the recovery of the judgment (*e*); and it must appear that the judgment has been recovered against the clerk or secretary of the board in respect of some act or proceeding by the members of the board in the *bonâ fide* execution of the statutory powers entrusted to them, so as to exempt them, and their clerk or secretary, from personal liability (*f*); for if they have exceeded the powers conferred upon them, and are not protected from personal liability by the statute, they cannot charge the debts they incur, or the consequences of their unauthorized proceedings, upon the rates, and a mandamus cannot issue to compel them to do what they have no power or authority to do (*g*).

Actions in which claim for mandamus not maintainable.—If, in an action for a mandamus, nothing more appears upon the record than that the action is brought for the recovery of a debt incurred by the members of some local board, commissioners, or corporate body, and there is nothing to exclude the personal liability of the defendants, and to show that a public duty is sought to be enforced, or that the ordinary remedy by action would not be available, a claim for a mandamus cannot be sustained (*h*). Thus, where the plaintiffs in an action for a mandamus set forth that the defendant, as clerk to certain commissioners for putting into execution a local improvement Act, became indebted to the plaintiffs for certain salary, due to them for services rendered to the commissioners under the provisions of the Act upon the retainer and request of the commissioners, and also for work and labour, journeys and attendances, as solicitors for the commissioners upon their retainer, &c., and for fees, &c., money paid, &c., and on an account stated, and that these debts were a charge upon any monies and funds which might be in the hands of the commissioners, if the commissioners had funds, and, if not, then upon a rate leviable under the statute; that the plaintiffs were personally

(*d*) *Ante*, p. 406.

(*e*) *Burland* v. *Kingston-upon-Hull Local Board*, 32 L.J. Q.B. 17; 3 B. & S. 271, *ante*, p. 407.

(*f*) *Southampton Bridge Co.* v. *Southampton Local Board*, 8 E. & B. 801; 28 L.J. Q.B. 41.

(*g*) *Duncan* v. *Findlater*, 6 Cl. & F. 908; *Bush* v. *Beavan*, 32 L.J. Ex. 54; 1 H. & C. 100.

(*h*) *Benson* v. *Paull*, 6 E. & B. 273; 25 L.J. Q.B. 274; *Norris* v. *Irish Land Co.*, 8 E. & B. 512; 27 L.J. Q.B. 115; *Bush* v. *Beavan*, *supra*; but see *Ward* v. *Lowndes*, 1 E. & E. 940; 28 L.J. Q.B. 265.

interested, &c.; that they demanded and were refused payment, and sustained damage, &c., and the plaintiffs then claimed a mandamus, it was held, on demurrer, that no right to a mandamus had been shown, for there were various ways in which the commissioners might retain the services of an attorney in matters relating to their official duties, and become personally liable in respect thereof; and there was nothing to show that the debt claimed could not be recovered by the ordinary remedy by way of action of debt (*i*). Where the performance of the duty is impossible by reason of insufficient funds the court will not issue a writ (*k*).

Declaration in an action for a mandamus.—When the mandamus is claimed for the satisfaction and discharge of a pecuniary demand, it must be shown that it does not constitute a mere private debt, in respect of which the ordinary action of debt would be an available remedy, but that the only mode of obtaining payment is by recourse to a rate, the duty of making and levying which is, by statute or royal charter, imposed upon the defendants. The declaration need not state the precise amount due, as in the case of the prerogative writ of mandamus to enforce a judgment obtained against an officer of a corporation; but the plaintiff is at liberty to allege the existence of the debt generally, leaving it to the jury to find the precise amount for which the mandamus claimed is to issue, and when that amount is found by them, the mandamus forms part of the judgment in the action (*l*).

(*i*) *Bush* v. *Beavan*, 32 L.J. Ex. 54; 1 H. & C. 100.
(*k*) *Bristol Ry., In re*, 3 Q.B.D. 10; 47 L.J. Q.B. 48.
(*l*) *Ward* v. *Lowndes*, 1 E. & E. 940; 29 L.J. Q.B. 40.

CHAPTER VIII.

KINDS OF CONTRACTS.

SECTION I.

EXPRESS CONTRACTS.

With certain exceptions men are free to make such contracts as they may deem to be for their own interest, and the law will ascertain and carry into effect the intention of the parties. This intention is generally expressed either by word of mouth or in writing, and in such cases the contract is called an express contract (*a*). An express contract is proved by an actual agreement; an implied contract by circumstances and the course of dealing between the parties. But whenever a contract is once proved the consequences resulting from the breach of it must be the same whether it be proved by direct or by circumstantial evidence (*b*). Express contracts are, of course, as various as the needs and wishes of mankind, but there are certain well-known and usual contracts which are so frequently made that the forms in which they are generally constructed, and the particular principles which govern the interpretation of them, have become familiar to all men, and have, in our own courts, been the subject of innumerable decisions. Such, for instance, are the contracts for the sale of land or goods, of letting, between landlord and tenant, and the letting of chattels; contracts of security between mortgagor and mortgagee, pawner and pawnee; contracts for services, and work and labour, between employer and employed, between master and servant, between principal and agent, and between bailor and bailee or carrier; contracts of indemnity between principal and surety, insurer against perils of the sea or fire and the insured; contracts made

(*a*) Sect. 2, Black. Com. 443.

(*b*) *Marzetti* v. *Williams*, 1 B. & Ad. 415, 423; 9 L.J. (O.S.) K.B. 42; *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L.J. Ex. 131; *Handford* v. *Palmer*, 5 Moore, 74.

by means of usual mercantile instruments; and finally, contracts of association, such as partnership, companies, and marriage. These will be found separately discussed in the different chapters of the Second Book of this work. Contracts may also be of a mixed character, partly expressed in words or writing and partly implied from circumstances. Many contracts, in order to be binding in law, are required to be authenticated by writing and by other formalities, and cannot be implied from circumstances, or be presumed by law; but the law will of itself, in certain cases, imply a contract without regard to the intention of the party.

SECTION II.

IMPLIED CONTRACTS.

Sub-section I.

GENERAL PRINCIPLES.

Implied contracts.—The law implies from men's conduct contracts as binding as those made by express words, and such contracts are implied sometimes in furtherance of the intention, or presumed intention, of the parties, and sometimes in furtherance of justice, without regard to the intention of the parties. Thus a promise to pay for services rendered or for goods received or money obtained, will be implied against a wrong-doer who never intended to pay, or intended deceptively to avoid payment (*c*). Although a contract may appear on the face of it to bind only one party, yet there are occasions on which the law will imply corresponding obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, the law will there imply a corresponding obligation to do the things necessary for the completion of the contract. Thus, if A. convenants or engages by contract to buy an

(*c*) *Foster* v. *Stewart*, 3 M. & S. 191; *Lightly* v. *Clouston*, 1 Taunt. 113; *Rumsey* v. *N. E. Ry.*, 32 L.J. C.P. 244; 14 C.B. N.S. 641; *Clark* v. *Gilbert*, 2 Sc. 520, 534; 5 L.J. C.P. 61.

estate of B. at a given price, although that contract may be silent as to any obligation on the part of B. to sell, yet as A. cannot buy without B. selling, the law will imply a corresponding obligation on the part of B. to sell (*d*). So, if a man agrees to work and render services which necessitate a great outlay of money, time, and trouble, and he is only to be paid by the measure of the work he has performed, the contract necessarily implies on the part of the person who engages him an obligation to supply the work. So, where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible that the party bestowing his services could claim any remuneration (*e*).

Implied contracts have sometimes been divided into inferred contracts, implied contracts properly so called, and constructive contracts. A contract is said to be inferred where the intention of the parties is not expressed in words, but may be gathered from their acts and from surrounding circumstances. In these cases the law enforces what it deems to have been the intention of the parties. It not unfrequently happens, however, that in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and, consequently, where no intention has been expressed by them, or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities according to the dictates of justice—that is, of general expediency—and according to what it is presumed their intention would have been, had they had those circumstances in their consideration when they made the contract. In a third class of cases the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities which exist in certain cases of express contract. Thus, if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back; for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and, in fact, are not contracts at all.

Implied covenants.—Although the words of a contract under seal do not in themselves import any express covenant, yet the law,

(*d*) *Pordage* v. *Cole*, 1 Wms. Saund. 319, l.

(*e*) *Churchward* v. *Reg.*, L.R. 1 Q.B. 195.

in order to promote good faith, will create, as a necessary result of the contract, certain obligations, which bind the parties as effectually as if they had been expressed in the most explicit terms in the deed itself. Thus, where it was agreed by deed between A. and B. that B. should pay a sum of money for A.'s lands by a particular day, it was held that there was, by implication, a covenant to execute a conveyance of the land by the day named (*f*). And, where, on the sale and transfer of the goodwill of a business, it was stipulated that the transferee should pay to the transferor one-fourth part of the earnings of the business for four successive years, it was held that the law would imply a covenant from the transferee to continue the business for four years, and endeavour to make it productive, if there was reasonable prospect of success (*g*). At common law, if one man granted to another any estate or interest or incorporeal right, the law implied a covenant from the grantor that he would do nothing to avoid such grant; if he granted a watercourse, a right of way, or estovers, there resulted from such grant, by inference of law, a covenant for the quiet enjoyment of the thing granted; and, if the grantor stopped up the watercourse or the road, or cut down the wood out of which the estovers were to be taken, the grantee was entitled to an action of covenant against him for the misfeasance (*h*). By 7 & 8 Vict. c. 76, s. 6, however, which extends to all estates, rights, and interests created between the 1st of January and the 1st of October, 1845, it is enacted that the word "grant" in a deed shall not have the effect of creating any covenant by implication, except in cases where by any Act of Parliament, it is or shall be declared that the word "grant" shall have such effect; and by 8 & 9 Vict. c. 106, s. 4, it is enacted that the word "give" or the word "grant" in a deed executed after the 1st of October, 1845, shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word "give" or the word "grant" may, by force of any Act of Parliament, imply a covenant.

By the Conveyancing Act, 1881 (*i*), the use of the word "grant" is declared to be unnecessary in order to convey tenements or hereditaments corporeal or incorporeal; and by sect. 7 various covenants, such as "right to convey," "quiet enjoyment," "freedom from incumbrance," "further assurance," "validity of lease," are to be implied in conveyances, mortgages, &c., by persons who convey and are expressed to convey as beneficial owners or as trustee, mortgagee, &c.

(*f*) *Pordage* v. *Cole*, 1 Saund. 319.
(*g*) *McIntyre* v. *Belcher*, 14 C.B. N.S. 654; 32 L.J. C.P. 254.
(*h*) 1 Saund. 321; Bac. Abr. Covenant, B.
(*i*) 44 & 45 Vict. c. 41, s. 49.

It was formerly held, in the case of leases under seal, that the law would imply from the word "demise," or any equivalent words in the contract creating the lease, a covenant on the part of the lessor that he had a right to make the lease (*k*); but it has been determined that there is no implied covenant on the part of the lessor that he has "good title to demise," but only a covenant that he will put the lessee into possession of the thing demised (*l*), and that the lessee "shall quietly enjoy" during the term (*m*), or in the case of a tenancy from year to year, during the continuance of the lessor's interest (*n*). It seems that a covenant for title or quiet enjoyment is implied from the mere relationship of landlord and tenant or from the words "agree to let" in a lease, and not only from the word "demise" (*o*). From the words "yielding" or "paying," or any equivalent words amounting to a reservation of rent, there is an implied covenant, on the part of the lessee, to pay the rent so reserved, although the words do not in themselves import any express covenant. In all assignments of leases and existing interests, there is an implied covenant on the part of the assignor that he has himself done nothing, and will do nothing, to prejudice or defeat the estate, title, or interest that he professes to assign. Where the proprietor of a medicine and a recipe for making the same assigned the medicine and recipe, and all his "right, title, interest, claim, or demand to the same medicine, &c.," to a purchaser, it was held that the law would imply from the transfer and assignment a covenant from the vendor that he would not himself prepare and vend the medicine so assigned, or engage with others so doing (*p*). And, where a man by deed "bargained, sold, assigned, and transferred" a sum of money due to him from a third person, it was held that the law would imply, from the words of transfer and assignment, a covenant from the assignor to do no act to prevent the assignee from obtaining possession of the sum so assigned (*q*). It has been said, however, that it does not follow "that, because parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants" (*r*).

(*k*) *Holder* v. *Taylor*, Hob. 12; Shep. Touch. 165, 167; *Noke's case*, 4 Co. Rep. 80, b.; 9 Ves. 330; *Line* v. *Stephenson*, 7 Sc. 69; 7 L.J. C.P. 263.

(*l*) *Coe* v. *Clay*, 5 Bing. 440; 7 L.J. (O.S.) C.P. 162; *Messent* v. *Reynolds*, 3 C.B. 194; 15 L.J. C.P. 226.

(*m*) *Bandy* v. *Cartwright*, 8 Exch. 913; 22 L.J. Ex. 285; *Williams* v. *Burrell*, 1 C.B. 428; 14 L.J. C.P. 98.

(*n*) *Penfold* v. *Abbott*, 32 L.J. Q.B. 67.

(*o*) *Budd-Scott* v. *Daniell*, (1902) 2 K.B. 351; 71 L.J. K.B. 706; *Baynes* v. *Lloyd*, (1895) 2 Q.B. 610; 64 L.J. Q.B. 787.

(*p*) *Seddon* v. *Senate*, 13 East, 63.

(*q*) *Deering* v. *Farrington*, 3 Keb. 304; Freem. 368.

(*r*) *Aspdin* v. *Austin*, 5 Q.B. 683, 684; but see *Emmens* v. *Elderton*, 4 H.L.Cas. 624, 647, 656; 13 C.B. 495; and *Whittle* v. *Frankland*, 2 B. & S. 49; 31 L.J. M.C. 81.

Implied promises.—An agreement for a lease to commence from a particular day does not amount to an agreement to give the intended lessee possession on that day (*s*); but if there be a lease or present demise, there is an implied promise from the lessor to put the lessee into possession of the thing demised, and to secure him the free use, possession, and enjoyment of it for the term for which he has agreed to let it, as against all persons claiming through the lessor or by title paramount (*t*). If apartments in the interior of a house are demised by parol, the law implies a promise from the lessor to allow the tenant the use of the door-bell and knocker, the benefit of the skylight on the staircase, the use of the water-closet, and the enjoyment of all such rights as are naturally incident to the subject-matter of the contract, and necessary for the comfortable enjoyment of it (*u*). In the case of an executory agreement for the sale of a lease, the law implies a promise from the vendor to make good his title to the lease which he proposes to sell and assign (*x*); and, when the purchaser has accepted the assignment, the law implies a promise from him to the assignor to pay the rent reserved in such lease, and perform the covenants therein contained (*y*). In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—(1) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass; (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods; (3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made (*z*).

The law also implies, from all persons who undertake any duty, office, or trust, a promise to act with diligence, and reasonable care in the execution thereof, and according to orders given and assented to (*a*). A banker who has in his hands sufficient funds of a customer impliedly undertakes to pay a cheque drawn by the latter, if the cheque be presented within banking hours (*b*); and a man who undertakes the office of an executor, and has assets sufficient for the purpose, impliedly promises to pay for a funeral

(*s*) *Drury* v. *Macnamara*, 25 L.J. Q.B. 5; 5 E. & B. 612.

(*t*) *Post*, p. 619.

(*u*) *Underwood* v. *Burrows*, 7 C. & P. 29.

(*x*) *Souter* v. *Drake*, 5 B. & Ad. 992; 3 L.J. K.B. 31; *Hall* v. *Betty*, 5 Sc.N.R. 508; 11 L.J. C.P. 256.

(*y*) *Burnett* v. *Lynch*, 5 B. & C. 589, 602; 4 L.J. (O.S.) K.B. 274.

(*z*) 56 & 57 Vict. c. 71, s. 12.

(*a*) *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L.J. Ex. 131.

(*b*) *Marzetti* v. *Williams*, 1 B. & Ad. 415; 9 L.J. (O.S.) K.B. 42.

suitable to the station in life of his testator, furnished by a third person in the absence of the executor, and without his concurrence; and the law implies a request from the executor to the stranger who has undertaken the necessary duty, to do what he has done, although in point of fact he gave no orders and made no promise (*c*). If a man voluntarily takes charge of the goods of another, the law implies a promise from him to take reasonable care of them (*d*). The law also implies a promise from a common innkeeper to secure his guest's goods in his inn, and to take all reasonable care of horses and cattle placed in his stables (*e*); from a common carrier, or cab proprietor, to be answerable for the goods he carries (*f*); from a ferryman, safely to transport things intrusted to him across a river, and deliver them on the opposite bank; from a common farrier, that he will shoe a horse without laming him; from a trainer of horses, that he will exercise reasonable skill in the riding of horses intrusted to him; from any artificer and handicraftsman, that he will exercise his art skilfully, as he ought; and from brokers, agents, solicitors, surgeons, and other professional men, that they will severally, in their respective callings, exercise competent skill and care in the service they undertake to perform, in which if they fail, an action lies to recover damages for the breach of their implied promise (*g*).

When one man engages with another to supply him with a particular thing, to be applied to a certain use, in consideration of a pecuniary payment, he enters into an implied contract that the thing shall be reasonably fit for the purpose for which it is to be used, and shall not contain any defect unfitting it for such purpose which might have been discovered by the exercise of reasonable skill and diligence, or by ordinary enquiry and examination (*h*).

If a husband wrongfully discards his wife, any person may furnish her with raiment, food, lodging, and the necessaries of life; and the law will imply a promise from the husband to pay for the things so supplied, in the same way as if they had been supplied to himself at his express request (*i*). As a man is bound to support his wife whilst living as being part and parcel of himself, so he is bound by law to bury her when dead; and, if the husband

(*c*) *Rogers* v. *Price*, 3 Y. & J. 28; *Tugwell* v. *Heyman*, 3 Camp. 298.

(*d*) *Southcote's case*, 4 Rep. 83, b. 84.

(*e*) *Post*, p. 701.

(*f*) *Post*, p. 949.

(*g*) *Norris* v. *Staps*, Hob. 211; 1 Roll. Abr. 91, pl. 15; *Best* v. *Yates*, 1 Ventr. 268.

(*h*) See as to a building to view a public exhibition, *Francis* v. *Cockrell*, L.R. 5 Q.B. 501; 39 L.J. Q.B. 291; a railway carriage, *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169; as to a bridge, *Grote* v. *Chester and Holyhead Ry.*, 2 Ex. 251; as to a staircase in a public exhibition, *Brazier* v. *Polytechnic Institution*, 1 F. & F. 507. With regard to implied conditions as to quality or fitness of goods sold, see 56 & 57 Vict. c. 71, s. 14, and *post*.

(*i*) *Ante*, p. 395.

has abandoned the wife and lives in a distant land, and is unable, or, being able, is unwilling, and neglects to bury her, any stranger may undertake the duty, and defray the expenses of a funeral suitable to her rank or fortune; and the law implies a request on the part of the husband to the stranger so to do, as well as a promise to repay the money so laid out, upon which implied promise an action is maintainable against the husband, though the burial was, in point of fact, undertaken, and the money paid, without his knowledge or consent (*k*). In a contract of service involving confidential relations there is an implied promise of fidelity on the part of the servant which is broken when the latter surreptitiously makes lists of his master's customers to use when he has set up a rival business (*l*).

When a servant binds himself to work for some certain period, and the master agrees to pay wages in proportion to the work done, there is an implied obligation on the part of the master to provide work. And, if a person contracts to pay a salary for services to be rendered for a certain time, there is an implied contract on his part to permit those services to be performed (*m*). Generally speaking, every workman who devotes his labour, his talents, and his time to the service of an employer, is entitled to a recompense; and the law implies a promise from the employer, in case nothing has been said or stipulated concerning payment, to pay a reasonable compensation for the services rendered; and the right of action upon such implied promise or undertaking arises as soon as the work has been completed, and the employer is enabled to avail himself of the benefit of it (*n*). But the law raises no implied promise in respect of services rendered against the will of the recipient (*o*), or in respect of mere gratuitous services, such as voluntary assistance in saving property from fire, or securing property found afloat, or beasts found astray, or voluntary and unsolicited supplies of food and lodging, or voluntary services in the management of the affairs of another; for that which is offered and accepted as a gratuity cannot afterwards be converted into a debt (*p*). The law raises no implied promise of remuneration in favour of a person who professes to render services of a purely honorary character (*q*). Where a duty

(*k*) *Jenkins* v. *Tucker*, 1 H. Bl. 94; *Chapple* v. *Cooper*, 13 M. & W. 259; 13 L.J. Ex. 286; *Bradshaw* v. *Beard*, 12 C.B. N.S. 344; 31 L.J. C.P. 273.

(*l*) *Robb* v. *Green*, (1895) 2 Q.B. 315; 64 L.J. Q.B. 593.

(*m*) *Reg.* v. *Welch*, 2 E. & B. 357; 22 L.J. M.C. 145; *Emmens* v. *Elderton*, 4 H.L.Cas. 624; 13 C.B. 495.

(*n*) *Hughes* v. *Lenny*, 5 M. & W. 183; 9 L.J. Ex. 177.

(*o*) *Stokes* v. *Lewis*, 1 T.R. 20; *British Empire Shipping Co.* v. *Somes*, E. B. & E. 353; 30 L.J. Q.B. 229.

(*p*) *Nicholson* v. *Chapman*, 2 H. Bl. 354; *Taylor* v. *Brewer*, 1 M. & S. 290; *Roberts* v. *Smith*, 4 H. & N. 315; 28 L. J. Ex. 164.

(*q*) *Post*, p. 806.

is imposed by statute upon a public officer, and no provision is made for the payment of any remuneration, an action is not maintainable upon the statute for the recovery of any remuneration (*r*).

Whether any contract is made, or on what terms it is made, must depend on the circumstances of each case and upon custom and usage (*s*). If a fund is to be collected, and a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand, there is no contract. If he does work on the order of another under such circumstances that it must be presumed that he looks to be paid as a matter of right by him, then a contract would be implied with that person (*t*). If a man wrongfully decoys away a servant or apprentice against his master's will, and makes use of his services, the law will imply a promise from the wrongdoer to render the master a fair equivalent in respect thereof (*u*). So, if a man takes luggage by an excursion train, knowing that the company do not carry luggage gratuitously for persons travelling by such train, a contract to pay for its carriage may be implied (*x*).

Part execution of special contract.—Where a workman had been induced to enter into a special contract to remove a quantity of rubbish by a fraudulent representation made by the employer, it was held that he might repudiate the contract as soon as he discovered the fraud, and sue his employer for compensation for his lost time and labour (*y*); and, when a special contract for work and services has been abandoned and put an end to, and the employer has derived some benefit from work done under it, he may be made liable, upon an implied promise, to make a reasonable remuneration in respect thereof (*z*).

Implied contracts for sale.—Whenever a purchaser retains goods after a special contract for the sale of them has gone off, or has not been exactly performed by the vendor, the vendor may recover the value of the goods upon a new contract and promise which the law then implies from the retention of the goods (*a*). If goods have been obtained by fraud and deceit, the party defrauded of his

(*r*) *Jones* v. *Carmarthen* (*Mayor*), 8 M. & W. 605; 10 L.J. Ex. 401.

(*s*) *Rigley* v. *Daykin*, 2 Y. & J. 83, 87.

(*t*) *Higgins* v. *Hopkins*, 3 Exch. 163, 166; 18 L.J. Ex. 113.

(*u*) *Lightly* v. *Clouston*, 1 Taunt. 112; *Foster* v. *Stewart*, 3 M. & S. 195.

(*x*) *Rumsey* v. *N. E. Ry.*, 14 C.B. N.S. 641; 32 L.J. C.P. 244.

(*y*) *Selway* v. *Fogg*, 5 M. & W. 86; 8 L.J. Ex. 199.

(*z*) *Burn* v. *Miller*, 4 Taunt. 745; *Hopkins* v. *Richardson*, 14 L.J. Q.B. 80; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15; *Bartholomew* v. *Markwick*, 15 C.B. N.S. 711; 33 L.J. C.P. 145.

(*a*) *Oxendale* v. *Wetherell*, 9 B. & C. 386; 7 L.J. (O.S.) K.B. 264; *Mavor* v. *Pyne*, 11 Moore, 2; *Colonial Ins. Co.* v. *Adelaide Marine Ins. Co.*, 12 App.Cas. 128; 56 L.J. P.C. 19; and see also 56 & 57 Vict. c. 71, s. 30, *post*.

goods may, if he thinks fit, waive the tort, and sue upon an implied contract, treating the wrongdoer as a purchaser of the goods. Where a father falsely pretended to retire from business in favour of an infant son, whom he introduced as his successor, stating that he should keep a watchful eye over him, and upon this representation the plaintiffs supplied the son with goods to the amount of 800*l.*, and, the son refusing to pay for these goods, and being exonerated from liability by reason of his minority, the plaintiffs brought their action against the father, it was held that, if the father's statement to the plaintiffs was false, and he continued, notwithstanding his pretended retirement, to have a secret interest in the concern, he was liable upon an implied promise to pay to the plaintiffs the price of the goods as the real buyer and principal in the transaction (*b*). Where the defendant knowingly induced the plaintiff to sell goods to an insolvent, which goods were immediately afterwards made over to the defendant himself, the Court held that the law would imply a contract from the defendant to pay for the goods as the real purchaser, the insolvent appearing to have been the mere creature and agent of the defendant, and a mere man of straw in the transaction, made use of by the defendant to enable him to perpetrate a fraud upon the plaintiff (*c*).

Implied contracts of indemnity.—When an act has been done by A., under the express directions of B., which occasions an injury to the rights of third persons; yet, if such an act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with B.'s directions, he is bound to indemnify A. against the consequences (*d*). Thus, where the plaintiff, an auctioneer, had sold cattle at the direction of the defendant which, as it afterwards turned out, belonged to another person, who made the auctioneer responsible, it was held that the plaintiff was entitled to be indemnified by the defendant (*e*). So where the plaintiff, a sheriff who had received from the defendant a *fi. fa.* for execution, executed it on cattle which the defendant pointed out to him as being the debtor's, it was held that an indemnity might be implied (*f*). Where again the plaintiff at the request of the defendant had delivered to him certain goods which belonged to a third party it was held that a promise to indemnify might be implied (*g*).

Foreign judgments.—The law raises an implied contract to pay

(*b*) *Biddle* v. *Levy*, 1 Stark. 20.

(*c*) *Hill* v. *Perrott*, 3 Taunt. 274; *Abbotts* v. *Barry*, 2 B. & B. 369; 5 Moore, 98.

(*d*) *Toplis* v. *Grane*, 5 Bing.N.C. 636; 9 L.J. C.P. 180.

(*e*) *Adamson* v. *Jarvis*, 4 Bing. 66; 5 L.J. (O.S.) C.P. 68.

(*f*) *Humphreys* v. *Pratt*, 5 Bli. N.S. 154.

(*g*) *Betts* v. *Gibbins*, 2 Ad. & E. 57; 4 L.J. K.B. 1; *Dugdale* v. *Lovering*, L.R. 10 C.P. 196; 44 L.J. C.P. 197.

a sum of money adjudged to be due from one man to another by the sentence of a foreign or colonial court (*h*), provided the judgment is final, and a fixed and ascertained sum of money is thereby adjudged to be paid (*i*). But the pendency of an appeal is no bar to the action, although it may afford ground for an application to stay proceedings (*k*). Nor is it any answer to such an action that the judgment is erroneous on the merits or founded on a mistaken notion of English law (*l*); but it may be defeated by showing that the court had no jurisdiction (*m*), as, for instance, that the judgment was pronounced against a person behind his back, who was not subject to its jurisdiction (*n*), or that the judgment was obtained by fraud (*o*), or perhaps that it was given against good faith and natural justice (*p*).

Statutes.—Where a statute gives a right to a sum of money and provides no means of recovering it the law raises an implied contract to pay it, and an action may be maintained for the amount (*q*).

Sub-section II.

Of implied promises in respect of money paid for another.

Implied promise in respect of money paid for another.—Whenever one man has expended and laid out money for the use of another by his authority or at his request, the law implies, from the person on whose account and for whose use the money has been expended, a promise of repayment, in the absence of circumstances showing that the money was advanced as a gift (*a*). If a person

(*h*) *Williams* v. *Jones*, 13 M. & W. 633; 14 L.J. Ex. 145; *Philpott* v. *Adams*, 7 H. & N. 888; 31 L.J. Ex. 421.

(*i*) *Sadler* v. *Robins*, 1 Campb. 253; *Nouvion* v. *Freeman*, 15 App.Cas. 1; 59 L.J. Ch. 337.

(*k*) *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L.J. Q.B. 81.

(*l*) *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; 30 L.J. Ex. 238; *Castrique* v. *Imrie*, L.R. 4 H.L. 414; 39 L.J. C.P. 350; *Godard* v. *Gray*, L.R. 6 Q.B. 139; 40 L.J. Q.B. 62.

(*m*) *Vanquelin* v. *Bouard*, 33 L.J. C.P. 78; 15 C.B. N.S. 341.

(*n*) *Buchanan* v. *Rucker*, 9 East, 192; *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155; 40 L.J. Q.B. 73; see, however, *Copin* v. *Adamson*, 1 Ex.D. 17; 45 L.J. Ex. 15; *Rousillon* v. *Rousillon*, 14 Ch.D. 351. See *Feyerick* v. *Hubbard*, 71 L.J. K.B. 509.

(*o*) *Bowles* v. *Orr*, 1 Y. & C. Ex. 464; *Bank of Australasia* v. *Nias*, 16 Q.B. 717; 20 L.J. Q.B. 284; even if the foreign court has decided that there was no fraud, *Abouloff* v. *Oppenheimer & Co.*, 10 Q.B.D. 295; 52 L.J. Q.B. 1; *Vadala* v. *Lawes*, 25 Q.B.D. 310.

(*p*) *Simpson* v. *Fogo*, 1 H. & M. 195; 32 L.J. Ch. 249; 2 Smith, L.C. 767 (ed. 10).

(*q*) *Richardson* v. *Willis*, L.R. 8 Ex. 69; 42 L.J. Ex. 68.

(*a*) *Brittain* v. *Lloyd*, 14 M. & W. 762; 15 L.J. Ex. 43; *Barber* v. *Butcher*, 15 L.J. Q.B. 289; 8 Q.B. 863; *Alexander* v. *Vane*, 1 M. & W. 511; 5 L.J. Ex. 187.

who owes a debt to A., by any contrivance, causes B. to pay it, an action will lie to recover back the amount, and the machinery by which the mischief was brought about is utterly immaterial. Therefore, where one of two partners made a note in the partnership name, and paid it away in discharge of his own private debt, and the co-partner was compelled to pay the amount of the note, it was held that he was entitled to recover the money from his colleague, the maker of the note, as money paid at his request (*b*). When several persons together consent to share a common responsibility, there is in the absence of an express agreement to the contrary, an understood authority from all to each of them to discharge the common burthen and liability; and if any one of them pays the whole amount, or more than his own proportion, the money paid by him above his own proportion is money paid for the use of the others, at their request (*c*). The same rule prevails with regard to all joint contractors, not being partners, who have undertaken a joint liability, and one of whom has paid the whole or more than his own proportion of the common burthen, and has thus relieved his co-contractors from their liability, either wholly or in part (*d*). If a party of friends, for example, meet to dine at a tavern, and give a joint order for dinner, and after dinner all but the plaintiff depart without paying, and the plaintiff pays for all, he may maintain an action against the others upon an implied promise to pay their several proportions of the joint liability (*e*); and the same implied promise arises, where four persons jointly retain a solicitor to defend them against a civil or a criminal charge, or to conduct an action or a prosecution on their behalf, and the plaintiff, one of the four, has paid the solicitor's bill (*f*); or where two parties agree to employ an arbitrator, and one of them pays money to take up the award (*g*). But there is no contribution between persons who have engaged to do an unlawful act, and are therefore joint tort-feasors (*h*); nor where money has been paid by one of several joint contractors negligently, and not in discharge of a joint liability (*i*); and it has been held that no such promise is implied, as between under-lessees of separate portions of premises holden under one original lease at an entire rent,

(*b*) *Cross* v. *Cheshire*, 21 L.J. Ex. 3; 7 Exch. 43; *Driver* v. *Burton*, 21 L.J. Q.B. 157; 17 Q.B. 989.

(*c*) *Harbert's case*, 3 Co. 13, a, 15, b.

(*d*) *Burnell* v. *Minot*, 4 Moore, 340; *Prior* v. *Hembrow*, 8 M. & W. 873; 10 L.J. Ex. 371; *Reynolds* v. *Wheeler*, 10 C.B. N.S. 561; 30 L.J. C.P. 350; *Macdonald* v. *Whitfield*, 8 App.Cas. 733; 52 L.J. P.C. 70.

(*e*) *Hussey* v. *Crickitt*, 3 Campb. 168, 173.

(*f*) *Edger* v. *Knapp*, 6 Sc. N.R. 707, 713; *Holmes* v. *Williamson*, 6 M. & S. 158.

(*g*) *Marsack* v. *Webber*, 6 H. & N. 1, 6.

(*h*) *Farebrother* v. *Ansley*, 1 Campb. 343; *Wilson* v. *Milner*, 2 Campb. 452.

(*i*) *Hunter* v. *Hunt*, 1 C.B. 300; 14 L.J. C P. 113.

where one only has been distrained upon or compelled under a threat of distress to pay the whole of such rent (*k*).

Money paid by mistake.—Where money has been paid by A. to B.'s bankers at the request of B. under forgetfulness or a mistake of facts, A. is entitled to recover back the money (*l*).

Implied request to pay.—The action for money paid is founded on the notion that the money was paid by the plaintiff for the use of the defendant, at his *request*, and that the defendant in consideration thereof, promised the plaintiff to pay him the amount so expended; for the law raises no implied promise in respect of a voluntary payment, which the party was not required to make on behalf of another (*m*). But the law will, under certain circumstances, imply the request as well as the promise, and so support a meritorious claim. If, for example, the defendant, by neglecting to pay money which he was bound by law to pay, has cast the duty and obligation upon the plaintiff, and the latter has paid the money, not voluntarily, but by compulsion of law, the compulsion so brought upon the plaintiff by the defendant is equivalent to an express request; and proof of such compulsion will support the necessary allegation in the claim, that the money was paid by the plaintiff for the use of the defendant at his request (*n*).

It has been held, for example, that a compulsion indirectly emanating from the defendant amounted to a constructive request in the following cases:—where the carriage of the plaintiff was intrusted to the defendant, a coachmaker, to be repaired, and whilst standing on the defendant's premises, was distrained by the landlord for rent due from the defendant, and the plaintiff, in order to redeem his carriage, was obliged to pay the rent (*o*);—where a sub-tenant paid, under a threat of distress, a ground-rent to the original lessor, which ought to have been paid by his own immediate landlord (*p*); also, where a tenant was compelled to pay income-tax and other outgoings, which ought by law to have been paid by the lessor (*q*);—where an executor paid a legacy in full, inadvertently omitting to deduct the legacy duty, which he is required by Act of Parliament to deduct and pay to the crown, and was afterwards compelled to pay such duty, the statute declaring that, in case the executor omits to deduct the duty, such duty shall

(*k*) *McIlreath* v. *Margetson*, 4 Doug. 278; see *Johnson* v. *Wild*, 44 Ch.D. 147; 59 L.J. Ch. 322.

(*l*) *Mills* v. *Alderbury Union*, 3 Exch. 590; 18 L.J. Ex. 252; and see *post*, pp. 426—429.

(*m*) Lord Kenyon, *Exall* v. *Partridge*, 8 T.R. 308, 310, 613; *Stokes* v. *Lewis*, 1 T.R. 21.

(*n*) *Edmunds* v. *Wallingford*, 14 Q.B.D. 811; 54 L.J. Q.B. 305; *The Orchis*, 15 P.D. 38; 59 L.J. P. 31.

(*o*) *Exall* v. *Partridge*, 8 T.R. 308; *Rodgers* v. *Maw*, 15 M. & W. 444, 448; 10 L.J. Ex. 137.

(*p*) *Sapsford* v. *Fletcher*, 4 T.R. 511.

(*q*) *Baker* v. *Greenhill*, 3 Q.B. 148; 11 L.J. Q.B. 161; *Graham* v. *Tate*, 1 M. & S. 611; *Earle* v. *Maugham*, 14 C.B. N.S. 626.

become a debt due to the crown from both the executor and the legatee (*r*);—where the defendant omitted to furnish money for the payment of shares which he had directed the plaintiff to buy for him, and the plaintiff was obliged to re-sell the shares at a loss, and the action was brought for the money lost (*s*);—where the plaintiff had been obliged by the custom of the Stock Exchange to pay calls on shares bought by him for the defendant, which calls the defendant was bound to pay (*t*);—where the plaintiff, a carrier, by mistake, delivered to the defendant goods consigned to a third party, and the defendant appropriated the goods to his own use, and the carrier was obliged to pay the value of them to the consignor (*u*);—where the defendant obtained possession of goods intrusted to the plaintiff to be sold at a fixed price, upon the terms that he should either re-deliver them to the plaintiff, or pay the price within a limited period, and the defendant refused to do either, and the plaintiff, being threatened with an action, paid the price to the owner, and the action was brought to recover the amount so paid (*x*);—where the plaintiff had entered into a deed of composition with his creditors upon the terms that they should receive ten shillings in the pound, and the defendant refused to sign the deed without receiving security for the payment of the residue of the debt, and the plaintiff privately gave the defendant his promissory note for the remainder of the debt, upon the terms that he should keep such note in his own hands, and the defendant, in breach of his agreement to that effect, negotiated the note, and the plaintiff was compelled to pay the amount thereof to the indorsee (*y*);—where the plaintiff agreed to grant the defendant a lease, and the lease was prepared by the plaintiff's solicitor, and the plaintiff was obliged to pay for the lease by reason of the defendant's refusal so to do, it being shown that, according to the usual course of business in such cases, the lessor's solicitor prepared the lease, and the lessee paid the expense of it (*z*). But the law raises no such implied promise from a mortgagor in favour of the mortgagee's attorney, where the negotiation for a mortgage goes off through the default of the mortgagor (*a*). Where the owner of goods had left them for his

(*r*) *Hales* v. *Freeman*, 4 Moore, 21; *Foster* v. *Ley*, 2 Sc. 438; 5 L.J. C.P. 17; *Bate* v. *Payne*, 13 Q.B. 900; 18 L.J. Q.B. 273.

(*s*) *Pollock* v. *Stables*, 12 Q.B. 765; 17 L.J. Q.B. 352; *Smith* v. *Lindo*, 5 C.B. N.S. 587; 27 L.J. C.P. 335.

(*t*) *Bayley* v. *Wilkins*, 7 C.B. 886; 18 L.J. C.P. 273.

(*u*) *Brown* v. *Hodgson*, 4 Taunt. 189.

(*x*) *Longchamp* v. *Kenny*, 1 Doug. 137.

(*y*) *Horton* v. *Riley*, 11 M. & W. 492; 13 L.J. Ex. 81; *Bradshaw* v. *Bradshaw*, 9 M. & W. 29; 11 L.J. Ex. 5; *Smith* v. *Cuff*, 6 M. & S. 160; *Atkinson* v. *Denby*, 31 L.J. Ex. 362; 7 H. & N. 934.

(*z*) *Grissell* v. *Robinson*, 3 Sc. 329; 5 L.J. C.P. 313; see, as to the cost of preparing a marriage settlement, *Helps* v. *Clayton*, 17 C.B. N.S. 553; 34 L.J. C.P. 1.

(*a*) *Wilkinson* v. *Grant*, 25 L.J. C.P. 233; 18 C.B. 319.

own convenience in a place in which they were lawfully seized for the debt of another, it was at one time thought that he would not obtain indemnity (*b*); but it is very doubtful whether this exception to the general rule would now be held to exist (*c*).

The law also raises an implied promise in respect of money paid by the plaintiff for the use of the defendant in the following cases:—where a broker has paid money for his principal in the usual and known course of business, although without a direct request from the principal (*d*); where the plaintiff, at the request of the defendant, has become security for him for the payment of money, and the plaintiff, by reason of the neglect of the defendant to pay at the time appointed, is compelled to pay the debt out of his own pocket (*e*); where the plaintiff accepts a bill of exchange drawn on him by the defendant, and the consideration for the acceptance fails, and the plaintiff is obliged to pay the amount of the bill when due (*f*); also where the plaintiff has accepted a bill for money lent by the defendant, and has become insolvent, and the defendant has agreed to a composition, and it has become his duty to indemnify the plaintiff from liability on the bill, and he has neglected so to do, and the plaintiff has been compelled to pay the amount (*g*); also, where the plaintiff accepts a bill of exchange, or makes or endorses a promissory note for the accommodation of the defendant, and without value or consideration, and the plaintiff is obliged to pay the bill or note when it comes to maturity, by reason of the defendant's neglect to provide the necessary funds for the purpose (*h*); also, where the acceptor neglects to pay a bill when due, and the plaintiff, as indorser, is compelled by the holder to pay him (*i*). It is sufficient, if the party paying the money shows that the legal obligation was cast upon him by the default of the defendant, and that the law compelled him to do what he has done; he need not wait for the actual issue of legal process, or abide the result of an action, in order to establish the fact of the compulsion (*k*). But the law raises no implied promise out of a transaction which has been a breach of duty, and will give no assistance towards the recovery of money paid in furtherance of

(*b*) *England* v. *Marsden*, L.R. 1 C.P. 529; 35 L.J. C.P. 259.

(*c*) *Bishop, Ex parte*, 15 Ch.D. 400, 417; 50 L.J. Ch. 18; *Edmunds* v. *Wallingford*, 14 Q.B.D. 811; 54 L.J. Q.B. 305.

(*d*) *Sentance* v. *Hawley*, 13 C.B. N.S. 458.

(*e*) *Fisher* v. *Fellows*, 5 Esp. 171; Lord Kenyon, *Exall* v. *Partridge*, 8 T.R. 310; *Lewis* v. *Campbell*, 8 C.B. 541; 19 L.J. C.P. 130.

(*f*) *Hooper* v. *Treffry*, 1 Exch. 17; 16 L.J. Ex. 233.

(*g*) *Hawley* v. *Beverley*, 6 Sc.N.R. 837; 6 M. & G. 221.

(*h*) *Bleadon* v. *Charles*, 5 Moo. & P. 14; 9 L.J. (O.S.) C.P. 82; *Reynolds* v. *Doyle*, 2 Sc.N.R. 45; *Driver* v. *Burton*, 21 L.J. Q.B. 157; 17 Q.B. 989. See 45 & 46 Vict. c. 61, s. 28, *post*, p. 1123.

(*i*) *Pownal* v. *Ferrand*, 6 B. & C. 439; 5 L.J. (O.S.) K.B. 176.

(*k*) *Maydew* v. *Forrester*, 5 Taunt. 615; *Austen* v. *Ward*, Ry. & M. 116.

an illegal or immoral purpose (*l*); or which a party has been compelled to pay in consequence of his own neglect (*m*). If a tenant, after he has paid the income-tax, omits to deduct it from the rent, he cannot recover it from the landlord in an action for money paid (*n*). It must be shown that money or its equivalent has been actually paid (*o*), and that the defendant was bound to pay what the plaintiff has been compelled to pay on his behalf (*p*).

Sub-section III.

IMPLIED PROMISES IN RESPECT OF MONEY RECEIVED FOR THE USE OF ANOTHER.

Implied promises in respect of money received for the use of another.—The rules of Equity upon this matter do not appear to be so strict as those of the Common Law (*a*); and even mistakes in law, as upon the doubtful construction of a grant (*b*), will in general though not always (*c*) be rectified (*d*); and the reader must bear this in mind in considering the cases cited in this section. If a man, through some mistake or misapprehension, or forgetfulness of facts, has received money to which he is not justly and legally entitled, and which he ought not, *in foro conscientiæ*, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner (*e*).

But it has been held that, if a party makes a voluntary payment in satisfaction and discharge of some disputed claim, with full knowledge of the facts, but under ignorance of the law and from a misapprehension of his legal liability, and no fraud, or concealment, or misrepresentation, has been resorted to by the other side to induce the payment, the law will not help the party so

(*l*) *Pitcher* v. *Bailey*, 8 East, 172; *Betts* v. *Gibbins*, 2 Ad. & E. 57; 4 L.J. K.B. 1.

(*m*) *Capp* v. *Topham*, 6 East, 392; *Pitcher* v. *Bailey*, 8 East, 171.

(*n*) *Cumming* v. *Bedborough*, 15 M. & W. 438.

(*o*) *Taylor* v. *Higgins*, 3 East, 169; *Maxwell* v. *Jameson*, 2 B. & Ald. 51; *Moore* v. *Pyrke*, 11 East, 52.

(*p*) *Griffenhoofe* v. *Daubuz*, 25 L.J.Q.B. 237; 5 E. & B. 746.

(*a*) *Darnell* v. *Sinclair*, 6 App.Cas. 181; 50 L.J. P.C. 50.

(*b*) *Beauchamp* (*Earl*) v. *Winn*, L.R. 6 H.L. 223.

(*c*) *Rogers* v. *Ingham*, 3 Ch.D. 351.

(*d*) See *post*, p. 439, as to mistakes in accounts.

(*e*) *Kelly* v. *Solari*, 9 M. & W. 58; 11 L.J. Ex. 10; *Lucas* v. *Worswick*, 1 Moo. & R. 293; *Milnes* v. *Duncan*, 6 B. & C. 671, 677; 5 L.J. (O.S.) 239; *Bell* v. *Gardiner*, 4 M. & Gr. 11; 4 Sc.N.R. 621; *Barber* v. *Brown*, 1 C.B. N.S. 121; 26 L.J. C.P. 41; *Durrant* v. *Ecclesiastical Commissioners*, 6 Q.B.D. 234; 50 L.J. Q.B. 30.

paying the money to recover it back (*f*). If an action, for example, has been commenced to enforce a claim put forward by the plaintiff, and the defendant settles the action and pays money in satisfaction and discharge of such claim, and then discovers that the claim was unfounded, and that there was no cause of action, he cannot recover back the money on the ground that it was paid by mistake; for there would be no end to litigation, if that were to be permitted, and disputed transactions so settled were to be opened afresh (*g*). It is otherwise, however, if the party making the claim knows it to be unfounded, and wrongfully makes use of the process of the law for purposes of extortion (*h*). But, where the money has actually been paid under compulsory process of law, in consequence of the non-attendance of a particular witness, or the non-production of a particular document, it cannot be recovered back; for otherwise the rights of parties would never be settled, and verdicts and judgments might be rendered nugatory (*i*). The rule in the absence of fraud applies to a case where the money was paid under a material mistake of fact, and under the compulsion of a police court summons which was afterwards withdrawn (*k*); but it does not apply where there has been an absence of *bona fides* on the part of the defendant; it is, however, applicable to a case where the plaintiff, although he has paid no money to the defendant, has by mistake given him credit for a payment on account which has not in fact been made (*l*). The rule, also, has always been that, if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to have paid, he cannot recover back the money, as where a man has paid a debt which was barred by the Statute of Limitations, or a debt contracted during infancy (*m*).

It has been held that the law would imply a promise from the defendant to pay to the plaintiff money received under the following circumstances: where silver was sold in bars at a price to be calculated according to the number of ounces of pure silver contained in each bar, to be determined by an assay of the metal, and a mistake was made by the assay master, and the plaintiff, in consequence thereof, paid the defendant for a greater quantity of silver than each bar was found subsequently to contain, and the

(*f*) *Bilbie* v. *Lumley*, 2 East, 469; *Brisbane* v. *Dacres*, 5 Taunt. 143; *Higgs* v. *Scott*, 7 C.B. 63; *Platt* v. *Bromage*, 24 L.J. Ex. 63; *Rogers* v. *Ingham*, *supra*.

(*g*) *Marriott* v. *Hampton*, 7 T.R. 269; *Goodman* v. *Sayers*, 2 J. & W. 263; *Hamlet* v. *Richardson*, 2 Moo. & Sc. 811; 9 Bing. 644.

(*h*) *Cadaval* (*Duke de*) v. *Collins*, 4 Ad. & E. 858; 5 L.J. K.B. 171.

(*i*) *Marriott* v. *Hampton*, 7 T.R. 269; *Wilson* v. *Ray*, 10 Ad. & E. 82; 8 L.J. Q.B. 224; *Caird* v. *Moss*, 33 Ch.D. 22; 55 L.J. Ch. 854.

(*k*) *Moore* v. *Fulham Vestry*, (1895) 1 Q.B. 399; 64 L.J. Q.B. 226.

(*l*) *Ward* v. *Wallis*, (1900) 1 Q.B. 675; 69 L.J. Q.B. 423.

(*m*) *Bize* v. *Dickason*, 1 T.R. 286.

action was brought to recover the amount of such overpayment (*n*); where the plaintiff had paid rent to the defendant, and it afterwards appeared that the defendant had no right to receive such rent, and the action was brought to recover it back, the title to the land not coming into question, and not being sought to be tried in such action (*o*); where money was paid by the plaintiff to the defendant for the purchase of a leasehold estate, and it afterwards appeared that the defendant had no title to the lease (*p*). It is not necessary, however, that money should have been actually received by the defendant to render him liable in this form of action; but the circumstances must be equivalent to a receipt of money (*q*). If two men reckon together, and money is passed in account, and one overpays the other by mistake or false reckoning, the overpayment may be recovered in an action for money had and received (*r*). But the law raises no implied promise upon which an action can be maintained in respect of money had and received, from the mere fact of one man's money having come into the possession of another (*s*). "If I apply to a man for payment of a debt, and some third person pays me, he cannot recover back the money merely because he has paid it under some misapprehension" (*t*). It is necessary in order to maintain this action, that a certain amount of money belonging to one person should have improperly come into the hands of another (*u*), and that there should be some privity between them (*x*). The Colonial Bank were instructed by R. to remit his monies to a bank at Halifax; by their agent's mistake they paid them to a New York bank to be transmitted to a Nova Scotia bank who debited the New York bank and credited R., and being afterwards advised of the mistake, claimed to retain the monies in reduction of R.'s account; the Colonial Bank sued the Nova Scotia bank for monies received to their use and recovered the amount (*y*).

When money paid by mistake cannot be recovered back.—If trustees

(*n*) *Cox* v. *Prentice*, 3 M. & S. 349, 350.

(*o*) *Newsome* v. *Graham*, 10 B. & C. 234; 8 L.J. (O.S.) K.B. 100; *Robinson* v. *Anderton*, 1 Peake, 129; *Moneypenny* v. *Bristowe*, 2 Russ. & Mylne, 117; 1 L.J. Ch. 88; the courts will not suffer a title to land to be tried in an action for money had and received: *Marshall* v. *Hopkins*, 15 East, 313, 314; *Clarance* v. *Marshall*, 2 Cr. & M. 495; 3 L.J. Ex. 142.

(*p*) *Cripps* v. *Reade*, 6 T.R. 606.

(*q*) *Gingell* v. *Purkins*, 4 Exch. 720, 726; 19 L.J. Ex. 129; *Spratt* v. *Hobhouse*, 4 Bing. 173, 179; 5 L.J. (O.S.) C.P. 147.

(*r*) Holt, C.J., *Lamine* v. *Dorrell*, 2 Ld. Raym. 1217; *Townsend* v. *Crowdy*, 8 C.B. N.S. 477; 29 L.J. C.P. 305.

(*s*) *Jones* v. *Carter*, 8 Q.B. 134; 15 L.J. Q.B. 96; *Bluck* v. *Siddaway*, 15 L.J. Q.B. 359; *Robbins* v. *Fennell*, 11 Q.B. 248; 17 L.J. Q.B. 77; *Foster* v. *Green*, 7 H. & N. 881; 31 L.J. Ex. 158.

(*t*) Martin, B., *Aiken* v. *Short*, 1 H. & N. 215; 25 L.J. Ex. 321.

(*u*) *Follett* v. *Hoppe*, 17 L.J. C.P. 76; 5 C.B. 226.

(*x*) *Watson* v. *Russell*, 5 B. & S. 968; 34 L.J. Q.B. 93.

(*y*) *Colonial Bank* v. *Exchange Bank of Nova Scotia*, 11 App.Cas. 84; 55 L.J. P.C. 14.

or agents represent that they have funds in their hands belonging to the parties for whom they act, and allow them to draw out the same and spend it as their own, the trustees or agents cannot recover back the money. Neither can they retain other monies in their hands belonging to these same parties by way of indemnity (*z*). The law raises no implied promise in respect of money had and received, where the rights of the receiver of the money have been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount (*a*). Nor can money be recovered back which was allowed by mistake on a settlement of accounts, where there were cross demands, and the settlement was made on the basis of adjusting differences between the parties (*b*).

Money improperly received and wrongfully detained.—If one man has obtained money from another through the medium of extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, money received for the use of the injured party. It is not the money of the wrongdoer; he has no right to retain it; and the law, therefore, implies a promise from him to return it to the rightful owner, whose title to it cannot be destroyed by the fraudulent dispossession (*c*). It has been held, that the defendant is indebted to the plaintiff in respect of "money had and received by the defendant for the use of the plaintiff," in the following cases: where a man, having a claim or lien to a certain amount on goods in his possession, unlawfully refuses to give them up without receiving more than he is strictly entitled to claim, or, having no lien at all upon them, wrongfully refuses to give them up without being paid for so doing, and the owner, in order to get the goods, is obliged to satisfy and discharge the extortionate demand (*d*); where a railway company or carrier makes excessive charges for the conveyance of goods, and the consignee, in order to get possession of the goods, pays the extortionate demand (*e*); where a married man, pretending to be single, marries a lady, and, under colour of such pretended marriage, gets possession of her estates, and receives the rents (*f*); where one man takes and wrong-

(*z*) *Skyring* v. *Greenwood*, 4 B. & C. 281, 290; *Shaw* v. *Picton*, 4 B. & C. 715; 4 L.J. (O.S.) K.B. 29; *Shaw* v. *Dartnall*, 6 B. & C. 56, 65; 5 L.J. (O.S.) K.B. 35; *Shaw* v. *Woodcock*, 7 B. & C. 73, 85; 5 L.J. (O.S.) K.B. 296; *Reg.* v. *Treasury* (*Lords*), 16 Q.B. 357, 362; 20 L.J. Q.B. 305; Gibbs, J., *Brisbane* v. *Dacres*, 5 Taunt. 152; and see *Cave* v. *Mills*, 7 H. & N. 913; 31 L.J. Ex. 265.

(*a*) *Watson* v. *Moore*, 33 L.T. (O.S.) 121; *Shand* v. *Grant*, 15 C.B. N.S. 324.

(*b*) *Lee* v. *Merrett*, 8 Q.B. 820; 15 L.J. Q.B. 289.

(*c*) *Neate* v. *Harding*, 6 Exch. 349; 20 L.J. Ex. 250; *Chowne* v. *Baylis*, 31 L.J. Ch. 757; 31 Beav. 351.

(*d*) *Astley* v. *Reynolds*, 2 Str. 915; *Shaw* v. *Woodcock*, 7 B. & C. 73; 5 L.J. (O.S.) K.B. 296.

(*e*) *Ashmole* v. *Wainwright*, 2 Q.B. 837; 11 L.J. Q.B. 79; *Kent* v. *G. W. Ry.*, 3 C.B. 714; 16 L.J. C.P. 72; *Parker* v. *Bristol & Exeter Ry.*, 6 Exch. 702; *Baxendale* v. *G. W. Ry.*, 16 C.B. N.S. 137; 33 L.J. C.P. 197; *G. W. Ry.* v. *Sutton*, L.R. 4 H.L. 226; 38 L.J. Ex. 177.

(*f*) *Hasser* v. *Wallis*, Salk. 28.

fully pledges (*g*), or sells, the goods of another, and receives the price (*h*); or claims or receives rents or money under a false or pretended authority (*i*), or under the coercion of threatened penal proceedings (*k*); or wrongfully usurps the office of another, and receives the fees annexed thereto (*l*); or receives a masquerade ticket to be sold or re-delivered, and refuses to re-deliver it, the presumption being in such a case that he has sold it and received the money (*m*).

The action upon such implied promise lies also against an agent who wrongfully demands and receives money in the name and on behalf of his principal, although he may have paid the money over to the latter (*n*); or a principal who has obtained money through the medium of a fraud committed by his agent (*o*); or a solicitor who wrongfully exacts money, either on his own account or on behalf of his client, as the price of the liberation of deeds illegally detained by him on behalf of such client (*p*); or who extorts more than the principal and interest due on a mortgage deed, and the costs, under a threat of the exercise of a power of sale (*q*); or a parish clerk who demands and receives on behalf of the rector a greater sum for searches in the parish register than he is entitled to charge (*r*); or a vestry clerk who wrongfully receives and detains, by the direction of the vestry, burial fees which belong to the rector (*s*); or a steward of a manor who exacts exorbitant fees from tenants on their admittance (*t*); or who demands and receives an extravagant charge, as the condition of his producing deeds in his custody, which the party paying the money could not do without, and which the steward ought to have produced on tender of a reasonable compensation (*u*); or a broker in possession of goods under a distress who demands and receives unauthorised and excessive charges (*x*); or a sheriff who exacts a larger fee than the law allows for executing the King's writ (*y*); or who obtains

(*g*) *Allanson* v. *Atkinson*, 1 M. & S. 583.

(*h*) *Lamine* v. *Dorrell*, 2 Ld. Raym. 1216; *Edwards* v. *Scarsbrook*, 3 B. & S. 280; 32 L.J. Q.B. 45.

(*i*) *Robson* v. *Eaton*, 1 T.R. 62; *Dupen* v. *Keeling*, 4 C. & P. 102.

(*k*) *Unwin* v. *Leaper*, 1 M. & Gr. 752; 10 L.J. C.P. 41.

(*l*) *Howard* v. *Wood*, 2 Lev. 245; 2 Jon. 127; *Arris* v. *Stukeley*, 2 Mod. 263; *Hall* v. *Swansea (Mayor)*, 5 Q.B. 526, 548; 13 L.J. Q.B. 107; *Boyter* v. *Dodsworth*, 6 T.R. 681.

(*m*) *Longchamp* v. *Kenny*, 1 Doug. 137.

(*n*) *Snowden* v. *Davis*, 1 Taunt. 359; but see *Holland* v. *Russell*, 30 L.J. Q.B. 297, 308; 4 B. & S. 14.

(*o*) *Crockford* v. *Winter*, 1 Campb. 127.

(*p*) *Smith* v. *Sleap*, 12 M. & W. 585, 588; *Wakefield* v. *Newbon*, 6 Q.B. 280; 13 L.J. Q.B. 258.

(*q*) *Close* v. *Phipps*, 8 Sc.N.R. 381; 7 M. & G. 586; see *Fraser* v. *Pendlebury*, 31 L.J. C.P. 1.

(*r*) *Steele* v. *Williams*, 8 Exch. 625; 22 L.J. Ex. 225.

(*s*) *Spry* v. *Emperor*, 6 M. & W. 639; 10 L.J. Ex. 50.

(*t*) *Traherne* v. *Gardner*, 5 E. & B. 942; 25 L.J. Q.B. 201.

(*u*) *Spry* v. *Pigott*, cited 2 Esp. 723.

(*x*) *Hills* v. *Street*, 2 Moo. & P. 96, 103; 6 L.J. (O.S.) C.P. 215.

(*y*) *Dew* v. *Parsons*, 2 B. & Ald. 562.

money under the pressure of an illegal arrest (*z*); or under a threat to sell goods seized under a *fi. fa.* which he has no right to sell (*a*); or a justice of the peace who exacts a fee from a publican as the condition of granting him a licence (*b*); or a toll collector who exacts an illegal or unauthorised toll (*c*); or an overseer of the poor who levies money by seizing and selling goods upon a magistrate's conviction which is afterwards quashed (*d*); or a revenue officer who unlawfully seizes goods as forfeited, and unlawfully detains them, and takes money which he has no right to take as the condition of their release (*e*); or a nurse who, upon the death of a person she attends, carries away his money (*f*); or a creditor who has received money as the condition of his signing a bankrupt's certificate (*g*); or who has received money from a bankrupt as the price of his discharge from an arrest, having at the time notice of the bankruptcy (*h*); or who has openly joined other creditors in executing a deed of composition with a debtor consenting to take a composition, but has privately stipulated for and accepted payment of the residue of his debt, and the action is brought to recover back the amount so paid (*i*).

The action upon such implied promise lies, moreover, against all persons who extort money for doing what they are by law bound to do without payment or reward (*k*); and who take and wrongfully detain the money of another; "for," as it has been justly observed, "no man will venture to take, if he knows that he is liable to refund" (*l*). Upon a statement of claim properly framed for that purpose, the plaintiff may recover interest on the money detained by way of damages for being kept out of the use of the money (*m*).

Money received without consideration.—The law raises also an implied promise to pay back money that has been received without consideration, or upon a consideration that has failed; and an action may be maintained upon such implied promise by the

(*z*) *Payne* v. *Chapman*, 4 Ad. & E. 364; *Mesnil* (*Baron de*) v. *Dakin*, L.R. 3 Q.B. 18; 37 L.J. Q.B. 42.

(*a*) *Valpy* v. *Manley*, 1 C.B. 594; 14 L.J. C.P. 204.

(*b*) *Morgan* v. *Palmer*, 3 B. & C. 729; 2 L.J. (O.S.) K.B. 145.

(*c*) *Lewis* v. *Hammond*, 2 B. & Ald. 206; *Waterhouse* v. *Keen*, 4 B. & C. 200; 6 D. & R. 257.

(*d*) *Feltham* v. *Terry*, Bull. N. P. 131, a; cited 1 T.R. 387; *Lindon* v. *Hooper*, Cowp. 414, 419.

(*e*) *Irving* v. *Wilson*, 4 T.R. 485; *Atlee* v. *Backhouse*, 3 M. & W. 645; 7 L.J. Ex. 234.

(*f*) *Thomas* v. *Whip*, Bull. N. P. 130, a.

(*g*) *Smith* v. *Bromley*, 2 Doug. 697, in notis; *Sievers* v. *Boswell*, 4 Sc.N.R. 165, 173; 11 L.J. C.P. 14.

(*h*) *Follett* v. *Hoppe*, 17 L.J. C.P. 76; 5 C.B. 226.

(*i*) *Bradshaw* v. *Bradshaw*, 9 M. & W. 29; 11 L.J. Ex. 5; *Smith* v. *Cuff*, 6 M. & S. 160; *Atkinson* v. *Denby*, 7 H. & N. 934; 31 L.J. Ex. 362; *Clay* v. *Ray*, 17 C.B. N.S. 188; *Geere* v. *Mare*, 2 H. & C. 339; 33 L.J. Ex. 50; *Lenzberg's Policy, In re*, 7 Ch.D. 650; 47 L.J. Ch. 178.

(*k*) *Parker* v. *G. W. Ry.*, 7 Sc.N.R. 835, 874; 13 L.J. C.P. 105.

(*l*) *Jones* v. *Barkley*, 2 Doug. 690.

(*m*) *Per* Pollock, C.B., *Sutton* v. *S. E. Ry.*, L.R. 1 Ex. 32, 37; 35 L.J. Ex. 183.

grantee of an annuity to recover back money paid for an annuity which has been set aside, or has become void for want of registry or enrolment (*n*); also to recover money paid to an auctioneer as a deposit on the sale of an estate, when the title is defective, and the purchase consequently cannot be completed (*o*); or if the estate does not correspond with the description given of it in a printed particular (*p*); or money paid to a broker by his principal in the belief that an order has been duly executed, where the contract made by the broker is not in compliance with the order (*q*); also to recover money received as a consideration or bonus for a lease by a person who is subsequently found to have no right to grant the lease (*r*); or paid on a conditional sale which has been rescinded, and the goods returned (*s*); or on a purchase of a goodwill, or fixtures, shares or chattels, when the things contracted for, or some of them, have not been transferred or delivered (*t*); or on the purchase of goods sold by the vendor as his own, which the true owner has claimed from the purchaser (*u*); or money paid as a premium upon a policy of insurance, when the risk insured against was not run (*x*); or money paid on a bill of exchange, where there is no consideration for the bill (*y*), or the consideration has failed (*z*); or to the promoters of a scheme, who promise to carry out their plan for the benefit of the subscribers, but afterwards abandon it without their consent (*a*); or money paid to parish officers for the support of a bastard child, when the child dies before the money has been expended (*b*); or conduct money paid to a party upon a subpœna as a witness, where the cause is settled, and the subpœna is not acted upon (*c*); or to the holder of a bill, or bank-note, or other security, who has presented it to the plaintiff to be discounted, and got the money, and the bill turns out to be a forgery (*d*), if the plaintiff has given prompt notice of the

(*n*) *Shove* v. *Webb*, 1 T.R. 732; *Scurfield* v. *Gowland*, 6 East, 241; *Davis* v. *Bryan*, 6 B. & C. 651; 5 L.J. (O.S.) K.B. 237; *Waters* v. *Mansell*, 3 Taunt. 56; *Huggins* v. *Coates*, 5 Q.B. 432; 13 L.J. Q.B. 46; *Turner* v. *Browne*, 3 C.B. 157; 15 L.J. C.P. 223; *Weddell* v. *Lynam*, 2 Esp. 310.

(*o*) *Burrough* v. *Skinner*, 5 Burr. 2639.

(*p*) *Post*, p. 458.

(*q*) *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L.J. Ex. 142.

(*r*) *Cripps* v. *Reade*, 6 T.R. 606; *Wright* v. *Colls*, 19 L.J. C.P. 60; 8 C.B. 164.

(*s*) *Hurst* v. *Orbell*, 8 Ad. & E. 107; 7 L.J. Q.B. 138; *Street* v. *Blay*, 2 B. & Ad. 456, 462.

(*t*) *Anon.*, 1 Str. 407; *Wright* v. *Newton*, 2 Cr. M. & R. 127; *Wilkinson* v. *Lloyd*, 7 Q.B. 44; *Devaux* v. *Conolly*, 8 C.B. 640; 19 L.J. C.P. 71.

(*u*) *Eicholz* v. *Bannister*, 34 L.J. C.P. 105; 17 C.B. N.S. 708.

(*x*) *Stevenson* v. *Snow*, 3 Burr. 1240.

(*y*) *Cobden* v. *Kendrick*, 4 T.R. 432.

(*z*) *Hooper* v. *Treffry*, 1 Exch. 17; 16 L.J. Ex. 233. See 45 & 46 Vict. c. 61, ss. 29, 30, *post*, p. 1119.

(*a*) *Nockells* v. *Crosby*, 5 D. & R. 751; 3 B. & C. 814, 824; *Kempson* v. *Saunders*, 4 Bing. 5; 5 L.J. (O.S.) C.P. 6.

(*b*) *Chappell* v. *Poles*, 2 M. & W. 867.

(*c*) *Martin* v. *Andrews*, 7 E. & B. 1; 26 L.J. Q.B. 39.

(*d*) *Jones* v. *Ryde*, 5 Taunt. 488; 1 Marsh. 163; *Wilkinson* v. *Johnston*, 3 B. & C. 428; 3 L.J. (O.S.) K.B. 58; *Fuller* v. *Smith*, R. & M. 49; *Gurney* v. *Womersley*, 4 E. & B. 133; 24 L.J. Q.B. 46. See 45 & 46 Vict. c. 61, s. 58 (3), *post*, p. 1145.

forgery to the holder, and has not been guilty of *laches* (*e*). The action also may be maintained to recover back money received under a special contract which has been abandoned or rescinded, or the performance of which has been prevented by the wrongful act of the party who has received the money (*f*).

Money received under illegal contract.—The law also, so long as an illegal contract continues executory, implies from the person who has received money in furtherance of the execution of the contract, a promise to refund it in favour of the party who paid the money, and who repudiates the illegal transaction (*g*); and an action upon this implied promise may be maintained against a person who has received money upon an illegal insurance or wager, at any time before the happening of the event which is to decide the adventure (*h*); also against a stakeholder with whom money has been deposited to abide the event of an illegal wager, who has not paid over the money to the winner, or who pays it over after he has received notice not to do so from the party who has deposited the money in his hands (*i*); and against parish officers who wrongfully receive money under an illegal contract, although they have quitted office, and handed over the money received to their successors (*k*). If money has been paid or goods delivered for an illegal purpose, the person so paying the money or delivering the goods may recover them back before the illegal purpose has been carried out (*l*); but where the illegal purpose has been carried into effect in a material part, but part still remains unperformed, the money or goods cannot be recovered (*m*). An illegal contract cannot be directly enforced by specific performance, nor can it be indirectly enforced by claiming damages for a breach; but it does not follow that in some cases money cannot be recovered which has been paid over to third persons in pursuance of such contract, or that in some cases moneys may not be recovered from the parties to the contract which they have become possessed of by

(*e*) *Price* v. *Neal*, 3 Burr. 1357; 1 W. Bl. 390; *Smith* v. *Mercer*, 6 Taunt. 76; *Cocks* v. *Masterman*, 9 B. & C. 902; 8 L.J. (O.S.) K.B. 77.

(*f*) *Towers* v. *Barrett*, 1 T.R. 133; *Giles* v. *Edwards*, 7 T.R. 181; *Smith* v. *Mundy*, 29 L.J. Q.B. 172; *Ehrensperger* v. *Anderson*, 3 Exch. 148, 159; 18 L.J. Ex. 132.

(*g*) *Palyart* v. *Leckie*, 6 M. & S. 290.

(*h*) *Varney* v. *Hickman*, 17 L.J. C.P. 102; 5 C.B. 271; *Clarke* v. *Shee*, Cowp. 197; *Tenant* v. *Eliot*, 1 Bos. & P. 3; *Farmer* v. *Russell*, *ib.* 296; *Tappenden* v. *Randall*, 2 Bos. & P. 467; *Sykes* v. *Beadon*, 11 Ch.D. 170; 48 L.J. Ch. 322.

(*i*) *Hodson* v. *Terrill*, 1 Cr. & M. 797; 2 L.J. Ex. 282; *Robinson* v. *Mearns*, 6 D. & R. 26; *Hastelow* v. *Jackson*, 8 B. & C. 221; 6 L.J. (O.S.) K.B. 318; *Mearing* v. *Hellings*, 14 M. & W. 711; 15 L.J. Ex. 168; *Pickard* v. *Bankes*, 13 East, 20; *Bone* v. *Ekless*, 5 H. & N. 925; 29 L.J. Ex. 438; *Hampden* v. *Walsh*, 1 Q.B.D. 189; 45 L.J. Q.B. 238; *Shoolbred* v. *Roberts*, (1900) 2 Q.B. 497; 69 L.J. Q.B. 800; *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398; *Burge* v. *Ashley*, (1900) 1 Q.B. 744; 69 L.J. Q.B. 538.

(*k*) *Chappell* v. *Poles*, 2 M. & W. 867.

(*l*) *Taylor* v. *Bowers*, 1 Q.B.D. 291.

(*m*) *Kearley* v. *Thomson*, 24 Q.B.D. 742; 59 L.J. Q.B. 288.

representations that the contract was legal, and which belonged to the persons who seek to recover them (*n*). The law also implies a promise to refund money received under an illegal contract, where the plaintiff does not stand *in pari delicto* with the defendant. Where contracts, for example, are prohibited by statute, for the purpose of preventing one set of men from taking advantage of the necessities of others, and money is paid upon such contracts by one of those whom the law intended to protect, the person who has so paid his money does not stand *in pari delicto* with the person who has received it, and may, after the forbidden transaction is completed, bring an action upon a promise implied by law from the person who has got the money to refund it (*o*). An action upon such implied promise may be maintained to recover back money privately paid to a creditor to induce him to sign a bankrupt's certificate (*p*), or to recover from a creditor money paid to the indorsee of a bill of exchange, or the assignee of a policy of insurance, originally given to the creditor to induce him to sign a composition deed (*q*), or money paid to a lottery-office keeper for insuring tickets contrary to the statute (*r*).

Money received by agents.—If a broker or commission agent, employed to sell, effects a sale and receives the purchase-money, and refuses to pay over the amount to his employer after deducting his commission, an action for money had and received may be maintained against him (*s*); also against a sharebroker who has received money from his principal to buy shares, and the authority to buy is countermanded, before the purchase has been made (*t*); but not where the commission has been executed before countermand, and the shares have been bought, although they may subsequently turn out to be forgeries (*u*). If an agent refuses to account for goods delivered to him for sale, it shall be presumed after a reasonable time that he has sold them and received the proceeds in money (*x*). A solicitor employed to sell real estate, who, as the agent of the vendor, receives a deposit from the purchaser, is not entitled to retain it as a stakeholder until the completion of the purchase, but must pay it over to the vendor on demand (*y*).

(*n*) *Sykes* v. *Beadon*, 11 Ch.D. 170; 48 L.J. Ch. 322.

(*o*) *Williams* v. *Hedley*, 8 East, 378.

(*p*) *Lowry* v. *Bourdieu*, 2 Doug. 472; *Atkinson* v. *Denby*, 7 H. & N. 934; 31 L.J. Ex. 362; *Lenzberg's Policy*, *In re*, 7 Ch.D. 650; 47 L.J. Ch. 178.

(*q*) *Smith* v. *Cuff*, 6 M. & S. 165, 166; *Alsager* v. *Spalding*, 4 Bing. N.C. 407; 7 L.J. C.P. 225; *Smith* v. *Bromley*, 2 Doug. 695.

(*r*) *Jaques* v. *Withy*, 1 H. Bl. 65; 2 Bl. R. 1073; *Clarke* v. *Shee*, Cowp. 197; *Browning* v. *Morris*, *ib.* 790.

(*s*) *Bousfield* v. *Wilson*, 16 M. & W. 185; 16 L.J. Ex. 44.

(*t*) *Fletcher* v. *Marshall*, 15 M. & W. 755, 763.

(*u*) *Lamert* v. *Heath*, 15 M. & W. 486; 15 L.J. Ex. 297.

(*x*) *Hunter* v. *Welsh*, 1 Stark. 224.

(*y*) *Edgell* v. *Day*, L.R. 1 C.P. 80; 35 L.J. C.P. 7.

The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes no liability upon the agent to such third person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received (*z*). Whenever one man agrees to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money if it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of the other (*a*). If an agent authorised to receive money for his principal employs a third party to receive it, there is, it seems, no implied promise from the latter to pay over the money to the principal, but only to his own immediate employer, the agent. Therefore, if a client in the country employs a country solicitor to recover a debt, and the money is received by the town agent of the country solicitor, such money is not money had and received by him for the use of the client, but for the use of his own employer; and the client consequently cannot recover it from the town agent (*b*). But the town agent may, under certain circumstances, make himself liable to the client in respect of money received by him; and the court in the exercise of its summary jurisdiction over its own officers will often compel a London agent to pay such money to the client, "to enforce justice according to the equity of the individual case" (*c*).

It is a general rule of law that, if money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent, if it appears that the principal has the least colour of right to the money; for the courts will not try the right of the principal in an action against the agent. But, if the payment of the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it over at the time he receives notice of the mistake, or if he has not given credit in account to his principal for it, and the account has not been stated and settled between them on that footing (*d*). If, however, he has got money into his own hands by a wrongful

(*z*) *Ante*, p. 330.

(*a*) *Griffith* v. *Young*, 12 East, 51.

(*b*) *Cobb* v. *Becke*, 6 Q.B. 930; 14 L.J. Q.B. 108; *Robbins* v. *Fennell*, 11 Q.B. 248; 17 L.J. Q.B. 77; *Hurley* v. *Baker*, 16 M. & W. 26; 16 L.J. Ex. 273. See *post*, p. 892.

(*c*) *Robbins* v. *Heath*, 12 Jur. 158; *Hanby* v. *Cassan*, 11 Jur. 1088; *Robbins* v. *Fennell*, 17 L.J. Q.B. 79; 11 Q.B. 428. See *post*, p. 892.

(*d*) *Holland* v. *Russell*, 4 B. & S. 14; 32 L.J. Q.B. 297; *Shand* v. *Grant*, 15 C.B. N.S. 324; *Lloyd* v. *Sandilands*, Gow. 13.

detainer of goods, or by his own illegal act, he cannot discharge himself from liability by paying it over (*e*). When the person who has received the money is in ignorance of the facts which entitle the other party to recover it back, the obligation to repay it does not arise until after demand has been made (*f*).

Receipt of foreign money.—It is immaterial whether the money received by the defendant was English money or foreign currency (*g*).

Sub-section IV.

IMPLIED PROMISES IN RESPECT OF ACCOUNTS STATED.

Implied promise in respect of account stated.—If an account has been stated and settled between persons who have cross claims against each other, the law implies a promise from those against whom the balance appears to pay over the amount of such balance to the others; and any admission made by the defendant of some definite balance being against him, or of a sum certain being due from him to the plaintiff, will be evidence of an "account stated," and raise an implied promise to pay over the amount (*h*). And the promise will be implied where the account is stated in respect of one item only as well as in the case of a plurality of items (*i*); but a general admission of liability to a pecuniary demand, without specifying the amount of it, will not support an "account stated," and will not entitle the plaintiff to recover nominal damages (*k*). Nor is an offer to pay a sum less than the sum claimed, if unaccepted, any evidence of an account stated in an action for the larger sum (*l*). An I O U, being a distinct admission of a sum due, is *primâ facie* evidence of an account stated, and of a promise to pay the amount to the person who is in possession of the document (*m*): but the effect of it may be got rid of, where it is the

(*e*) Addison on Torts, p. 32 (ed. 7).

(*f*) *Freeman* v. *Jeffries*, L.R. 4 Ex. 189; 38 L.J. Ex. 116.

(*g*) *Ehrensperger* v. *Anderson*, 3 Exch. 148, 157; 18 L.J. Ex. 132.

(*h*) *Knowles* v. *Michel*, 13 East, 249; *Laycock* v. *Pickles*, 4 B. & S. 497; 33 L.J. Q.B. 43; *Prouting* v. *Hammond*, 8 Taunt. 688; Gow. 41; *Ashby* v. *Ashby*, 3 Moo. & P. 186; 7 L.J. (O.S.) C.P. 221; *Porter* v. *Cooper*, 1 Cr. M. & R. 394, 395; 3 L.J. Ex. 330; *Davies* v. *Wilkinson*, 10 Ad. & E. 98; 8 L.J. Q.B. 228; *Chisman* v. *Count*, 2 Sc. N.R. 569; 10 L.J. C.P. 124; *Purdon* v. *Purdon*, 10 M. & W. 562; 12 L.J. Ex. 3; *Penny* v. *Slade*, 15 L.J. Q.B. 10; 8 Q.B. 115.

(*i*) *Highmore* v. *Primrose*, 5 M. & S. 67.

(*k*) *Lane* v. *Hill*, 21 L.J. Q.B. 318; 18 Q.B. 252; *Bernasconi* v. *Anderson*, 1 M. & M. 183.

(*l*) *Atkinson* v. *Woodall*, 31 L.J. M.C. 174; 1 H. & C. 170.

(*m*) *Payne* v. *Jenkins*, 4 C. & P. 324; *Curtis* v. *Rickards*, 1 Sc. N.R. 155; 9 L.J. C.P. 240; *Gould* v. *Coombs*, 1 C.B. 543; 14 L.J. C.P. 175; *Fesenmayer* v. *Adcock*, 16 M. & W. 449.

only item of evidence of account, by showing that there was no debt and no demand which could be enforced by virtue of it (*n*). Where the plaintiff lent money to A. upon B.'s promise to become surety for its repayment, and, on the money being advanced, A. and B. signed and delivered to the plaintiff the following memorandum—"We jointly and severally owe you 60*l.*," it was held to be evidence of an account stated by A. and B. jointly (*o*). The law also will imply a promise to pay over money, where the drawer of a bill overdue and unpaid has promised to pay the indorsee and holder (*p*); also, where partners have settled accounts on the close of their partnership, and an ascertained balance is admitted to be due from the one to the other. Wherever the defendant has got the benefit of the fulfilment of a contract, performance of which could not have been enforced by reason of the Statute of Frauds, and has subsequently admitted that a certain sum is due to the plaintiff in respect thereof, the debt so admitted may be recovered on an account stated (*q*). Thus, where the defendant agreed to pay the plaintiff 100*l.* if the plaintiff would surrender a farm to the defendant, and get the landlord to accept the defendant as tenant in the place of the plaintiff, and the change of tenancy was effected, and the defendant afterwards admitted that he owed the plaintiff the 100*l.*, it was held that the plaintiff was entitled to recover the money on the account stated (*r*). But the law implies no promise from an infant, or lunatic, or person incapable of contracting, in respect of an account stated (*s*). Nor can a claim which is absolutely void by reason of an illegality or immorality in the consideration, or for want of consideration, as a promise to pay money to counsel for services connected with litigation, be relied upon in support of a count upon an account stated (*t*). And an admission by the defendant of a debt due to a solicitor for his services as such will not enable the solicitor to recover on an account stated so as to defeat the provisions of the statute requiring a signed bill to be delivered by the solicitor before action (*u*).

Account stated with trustees.—If a trustee states an account with his *cestui que trust*, and admits that he has money in his hands applicable to a claim made on him by the latter, he is no longer a trustee merely of that money, but becomes liable as a debtor to the

(*n*) *Lemere* v. *Elliott*, 6 H. & N. 656; 30 L.J. Ex. 350.
(*o*) *Buck* v. *Hurst*, L.R. 1 C.P. 297.
(*p*) *Oliver* v. *Dovatt*, 2 M. & Rob. 230.
(*q*) *Salmon* v. *Watson*, 4 Moore, 73.
(*r*) *Cocking* v. *Ward*, 1 C. B. 858; 15 L.J. C.P. 245; *Griffith* v. *Young*, 12 East, 514, *ante*, p. 24; *Seago* v. *Deane*, 4 Bing. 459; 1 Moo. & P. 227.
(*s*) *Tarbuck* v. *Bispham*, 2 M. & W. 2, 7; 6 L.J. Ex. 49.
(*t*) *Kennedy* v. *Broun*, 13 C.B. N.S. 677; 32 L.J. C.P. 137; *Lubbock* v. *Tribe*, 3 M. & W. 607, 613; 7 L.J. Ex. 158.
(*u*) *Brooks* v. *Bockett*, 9 Q.B. 847; 16 L.J. Q.B. 178; *Scadding* v. *Eyles*, 9 Q.B. 858; 15 L.J. Q.B. 364.

cestui que trust (*x*). If he acknowledges that he owes the latter a specific sum, the law implies a promise from him to pay the amount. But, so long as the trust remains open, and the accounts are unadjusted, and an ascertained balance has not been admitted to be due, or if admitted has been the result of a clear mistake, no such implied promise arises (*y*). Where a creditor received goods from his debtor upon trust to sell and apply the proceeds in liquidation of the debt due to him, and hand over any balance that might remain to the debtor after the sale, and the goods were sold, and the creditor admitted that he had a balance in hand of 5*l.* 19*s.*, it was held that he was liable for the amount on an "account stated" (*z*). But, where trustees for the separate use of the wife admitted that they had received and held a certain sum to her separate use, and refused to pay it over without her separate receipt, it was held that an action on an account stated would not lie by the husband and wife for the sum so admitted to be due to her (*a*).

A defendant who has admitted that he owes a certain sum of money to the plaintiff, and has recognised the title of the latter to the money, cannot of his own accord set up a *jus tertii* for the purpose of defeating the plaintiff's claim (*b*); but, if the plaintiff was only an agent in the transaction dealing on behalf of an undisclosed principal, and the latter intervenes and gives the defendant notice not to pay the debt to the plaintiff, the defendant's liability to the latter is discharged (*c*).

Settlement of mutual accounts.—Where there are mutual accounts and mutual debts and credits, and the parties meet and settle their respective claims and liabilities and strike a balance, the account cannot be re-opened on the ground of the existence of overcharges or insufficient charges, or on the ground of some mistake as to legal rights (*d*), or on the ground that some of the claims and demands so taken into account were demands for which no action could have been maintained, or were only equitable or moral claims. It is not necessary, in order to make out an account stated of this sort, that the debts should be debts *in præsenti*, or that they should be legal debts (*e*), or be legally recoverable; for, where parties having cross demands against each other settled and balanced their accounts, and an action was brought for the balance, it was held that the settlement bound the defendant, and that he could not set up as a defence that some of the items of the account with which he had

(*x*) *Topham* v. *Morecraft*, 8 E. & B. 972, 983.

(*y*) *Roper* v. *Holland*, 3 Ad. & E. 99; 4 L.J. K.B. 156.

(*z*) *Howard* v. *Brownhill*, 23 L.J. Q.B. 23.

(*a*) *Bond* v. *Nurse*, 16 L.J. Q.B. 196; 10 Q.B. 244.

(*b*) *Peacock* v. *Harris*, 10 East, 107.

(*c*) *Post*, p. 882.

(*d*) *Dawson* v. *Remnant*, 6 Esp. 24.

(*e*) *Laycock* v. *Pickles*, 4 B. & S. 506; 33 L.J. Q.B. 47.

been debited were not recoverable by reason of the statute regulating the sale of spirituous liquors (*f*), or by reason of the Statute of Frauds (*g*). In these cases of a real account stated, the claims and demands on either side are merged in the account stated, so that the parties cannot afterwards resort to them. Thus, if A. sells his horse to B. for 10*l.*, and, there being divers other dealings between them, they come to an account upon the whole, and B. is found in arrear 5*l.*, A. must sue for the balance upon the account stated, for his claim for the price of the horse is discharged (*h*).

Mistakes in accounts.—A party who has admitted the correctness of an account is not conclusively bound by it (*i*). He may show that the admission was made under a mistake of fact (*k*), or that certain items were miscalculated or founded in error (*l*), provided the correction is promptly made before the other party has innocently acted upon the faith of the correctness of the account, and altered his previous position so as to render it inequitable to call upon him to refund the money (*m*). Although under certain circumstances the giving credit in account may be treated as so far equivalent to payment under mistake of law as to prevent sums wrongly credited being recoverable at law, yet in equity they may be sometimes recovered (*n*).

(*f*) *Dawson* v. *Remnant*, 6 Esp. 24.
(*g*) *Laycock* v. *Pickles*, *supra*.
(*h*) *Milward* v. *Ingram*, 2 Mod. 44; *Laycock* v. *Pickles*, *supra*.
(*i*) *Shand* v. *Grant*, 15 C.B. N.S. 324.
(*k*) *Thomas* v. *Hawkes*, 8 M. & W. 140; 10 L.J. Ex. 240.
(*l*) *Rose* v. *Savory*, 2 Sc. 199; 4 L.J. C.P. 275; *Cox* v. *Prentice*, 3 M. & S. 344; *Lucas* v. *Worswick*, 1 Moo. & R. 295.
(*m*) *Spurraway* v. *Rogers*, 12 Mod. 517; *Dawson* v. *Remnant*, 6 Esp. 24; *Knox* v. *Whalley*, 1 Esp. 1; *Skyring* v. *Greenwood*, 4 B. & C. 281; *Shaw* v. *Picton*, 4 B. & C. 715; 4 L.J. (O.S.) K.B. 29; *Lee* v. *Merrett*, 8 Q.B. 820; 15 L.J. Q.B. 289; *Shand* v. *Grant*, *supra*.
(*n*) *Daniell* v. *Sinclair*, 6 App.Cas. 181; 50 L.J. P.C. 50.

BOOK II.

THE LAW OF PARTICULAR CONTRACTS.

CHAPTER I.

THE CONTRACT OF SALE.

SECTION I.

CONTRACTS FOR THE SALE OF LANDS.

Contracts of Sale.—The contract of purchase and sale is founded upon a mutuality of engagement, or upon mutual promises, the promise of the one party to sell being the consideration for the promise of the other to buy. It is rendered binding, consequently, if properly authenticated, by the bare consent of the parties, and ranks amongst that class of contracts called bilateral contracts. It is essential to the creation of a contract of sale that there be a price consisting of a sum of money to be paid by the buyer to the seller (*a*).

Sale of lands and corporeal hereditaments.—No action can be brought whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the contract, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorised to sign it (*ante*, p. 21); it is, however, not necessary to show that the memorandum of the agreement has been signed by both the parties to it, in order to render the one who has signed it liable upon the contract (*ante*, p. 34). The note or memorandum need not be

(*a*) As to sale of goods, see 56 & 57 Vict. c. 71, s. 1 (1), and *post*.

drawn up in technical language, but both the subject-matter of the sale and the price to be paid for it must be specified; and it must also mention who is the purchaser (*b*). If, therefore, upon a treaty for the purchase and sale of an estate, the owner writes a letter which amounts to a distinct offer to sell the property upon certain terms, and the party to whom the letter is addressed answers it and accepts the offer within a reasonable period, the contract is complete; and an action for damages may be maintained upon it, or the owner may be compelled to perform it *in specie* (*c*). But, if there has not been a clear offer and acceptance of one and the same set of terms—if the property has not been clearly defined, or any material particulars are left unsettled between the parties—there is not a concluded contract capable of supporting an action for damages or specific performance (*d*). Where a draft agreement had on the back of it, "We approve of this draft," and this was signed by the intended parties to the agreement, it was held that it merely amounted to evidence of something they intended to agree to, and not to an actual agreement. "If the words," observes Lord Tenterden, "imported an agreement, there would never be any necessity for any other instrument" (*e*). "Still," observes Lord St. Leonards, "where the parties themselves, not being professional persons, sign such a memorandum, it is a question to be decided in each case whether they signed in that form as simply approving of the draft as such, or whether they intended to give validity to it as an agreement" (*f*). "It is not necessary that the note in writing, to be binding under the statute, should be contemporary with the agreement. It is sufficient, if it has been made at any time and adopted by the party afterwards; and anything under the hand of the party expressing that he has entered into the agreement will satisfy the statute, which was only intended to protect persons from having oral agreements imposed upon them" (*g*).

Signature of the writing.—The various modes of signing contracts by the party to be charged, so as to satisfy the requirements of the Statute of Frauds, have already been considered (*ante*, p. 37).

Sales by auction.—In the case of sales by auction, the assent of the parties to the contract of sale is manifested by the knocking

(*b*) *Saunders* v. *Wakefield*, 4 B. & Ald. 601; *Blagden* v. *Bradbear*, 12 Ves. 466; *Seagood* v. *Meale*, Pre. Ch. 560; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Shardlow* v. *Cotterell*, 20 Ch.D. 90; 50 L.J. Ch. 613; *Plant* v. *Bourne*, (1897) 2 Ch. 287; 66 L.J. Ch. 643.

(*c*) *Coleman* v. *Upcot*, 5 Vin. Abr. 527, pl. 17; *Dunlop* v. *Higgins*, 1 H.L.C. 381.

(*d*) *Kennedy* v. *Lee*, 3 Mer. 451; *Thomas* v. *Blackman*, 1 Coll. Ch. 301, 312.

(*e*) *Doe* v. *Pedgriph*, 4 C. & P. 312.

(*f*) Sugd. V. & P. 144 (ed. 14).

(*g*) *Shippey* v. *Derrison*, 5 Esp. 192.

down of the auctioneer's hammer; the bidding is a mere offer to buy at the price named by the bidder, which offer may be retracted at any time before the hammer is down and the offer has been accepted (*h*). A stipulation in the conditions of sale, to the effect that no person shall retract their biddings, would not, at common law, prevent the bidder from retracting, if he thinks fit so to do, before his offer has been accepted and a contract has been actually made. The vendor may, if he thinks fit, be his own auctioneer; but he cannot, unknown to the bidders, privately depute a third party to attend the sale and bid progressively for the property on his account, as a defensive precaution to prevent it from being sold at an undervalue. The employment of a single person to bid on behalf of the vendor will avoid the sale, unless the fact is notified to the assembled bidders (*i*). And, if the vendor publicly reserves to himself the right "to make one bidding and no more," through a person who is named, and then secretly employs another person to make general and repeated biddings, this is a fraud and imposition upon the parties who attend the sale, and entitles the person who is eventually declared the purchaser to abandon the contract (*k*). Formerly there was a conflict between the courts of law and equity in respect of the validity of sales by auction, where a puffer had bid, although no right of bidding was reserved, the former holding that all such sales were absolutely illegal, and the latter giving effect to them under some circumstances, although the rule was unsettled (*l*); but, by 30 & 31 Vict. c. 48, s. 4, "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." Sect. 5 of the same Act requires that the particulars or conditions of sale shall state whether the land is to be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that land will be sold without reserve, or to that effect, it is unlawful for the seller to employ any person to bid at the sale, or for the auctioneer knowingly to take any bidding from such person. If a right to bid is reserved, the seller, or any person on his behalf, may bid as he may think proper (*m*). But there is a distinction between a reserved bidding and a reserved right to bid, and in order to reserve to the vendor the right to bid up to the

(*h*) *Payne* v. *Cave*, 3 T.R. 148; *Warlow* v. *Harrison*, 1 E. & E. 314; 29 L.J. Q.B. 14.

(*i*) Parke, B., *Thornett* v. *Haines*, 15 M. & W. 372; 15 L.J. Ex. 230; *Green* v. *Baverstock*, 32 L.J. C.P. 181; 14 C.B. N.S. 204.

(*k*) *Rex* v. *Marsh*, 3 Y. & J. 331.

(*l*) *Mortimer* v. *Bell*, L.R. 1 Ch. 10; 35 L.J. Ch. 25.

(*m*) 30 & 31 Vict. c. 48, s. 6. These sections are not to affect sales of land under the order of the Court of Chancery. As to such sales, see sect. 7, and *Bartlett, In re*, 16 Ch.D. 561; 50 L.J. Ch. 205.

reserve price such right must be expressly stipulated for, and it is not sufficient to state in the conditions that the sale is subject to a reserve bidding (*n*). The effect of employing any one to bid when the sale is "without reserve is, that the sale is void, and the purchaser is entitled to recover back his deposit from the auctioneer" (*o*). The term "without reserve" is understood "to exclude all interference by the vendor, or those coming under him, with the right of the public to have the property at the highest bidding." Any arrangement, therefore, between the vendor and a third party, the result of which is to prevent the property from being sold under a fixed sum, will render the sale null and void (*p*). When the vendor inserts in the conditions of sale that the property is to be sold "without reserve," he, by so doing, contracts with the highest *bonâ fide* bidder that the sale shall be without reserve. If, therefore, a bid is made by or on behalf of the vendor or the owner of the property, the latter may render himself responsible in damages to the highest *bonâ fide* bidder for a breach of the conditions of sale (*q*). But the auctioneer is not responsible for a breach of the condition, unless he has himself made a representation false to his knowledge, and has thereby induced the plaintiff to incur expense and loss, as there is no contract between the auctioneer and the highest bidder that the property offered for sale shall be knocked down to him (*r*). It is no defence to an action for specific performance brought by the vendors against the purchaser that unknown to the vendors a fictitious bidding was made and that the purchaser was thereby induced to give more than he otherwise would have done (*s*).

As, on the one hand, the seller cannot employ secret bidders to run up the price, and delude the purchaser with a fictitious contest, so, on the other hand, if a purchaser by his conduct induces other persons not to bid, the sale will not be binding on the vendor (*t*). Where the known agent of the vendor was employed by the purchaser to attend a sale by auction and bid for him, and was thought by the assembled company to be a puffer, which deterred other persons from bidding, and the estate was knocked down to the agent, under the false impression that he was acting for the vendor, the Court of Chancery refused to assist

(*n*) *Gilliat* v. *Gilliat*, L.R. 9 Eq. 60; 39 L.J. Ch. 142.

(*o*) *Meadows* v. *Tanner*, 5 Mad. 34; *Thornett* v. *Haines*, 15 M. & W. 367; 15 L.J. Ex. 230; *Warlow* v. *Harrison*, 1 E. & E. 295, 316; 29 L.J. Q.B. 14.

(*p*) *Robinson* v. *Wall*, 16 L.J. Ch. 401; 2 Ph. 372.

(*q*) *Warlow* v. *Harrison*, *supra*; *Johnston* v. *Boyes*, (1899) 2 Ch. 73; 68 L.J. Ch. 425.

(*r*) *Mainprice* v. *Westley*, 6 B. & S. 420; 34 L.J. Q.B. 229.

(*s*) *Union Bank* v. *Munster*, 37 Ch.D. 51; 57 L.J. Ch. 124.

(*t*) *Fuller* v. *Abrahams*, 6 Moore, 316; 3 B. & B. 116.

the purchaser to enforce the contract, as the employment of the vendor's agent by the purchaser had hurt the sale and had been detrimental to the vendor (*u*). As soon as the hammer of the auctioneer is down, and the bidding has been accepted, an agreement for the sale and purchase should be signed by the parties themselves, or by the auctioneer as their agent, inasmuch as sales by auction are, as we have before seen, within the Statute of Frauds, and must, whenever the subject-matter of the sale consists of an estate or interest in land, be authenticated by a signed writing (*ante*, pp. 21, 440). The printed conditions of sale, containing the terms on which the purchaser bids and the vendor accepts his bidding for the estate, form, when signed, a written contract between the vendor and purchaser sufficient to satisfy the requirement of the Statute of Frauds; and the auctioneer's receipt for the deposit, signed by him, will amount to an agreement binding upon the seller, if it contains the names of the seller and purchaser, a description of the estate sold, and the price to be paid; or if it refers to the conditions or particulars of sale, so as to enable the court to read them together as one contract (*ante*, pp. 34—37).

When an estate is sold by auction in separate lots, a separate contract is created as to each lot (*x*). But it is otherwise, if a contract is made for the purchase of several lots at one aggregate price; or, if the several lots are so connected together that the possession of all is essential to the use and enjoyment of any one or more of them, and they have consequently been purchased by the vendee as one property (*y*). We have already seen that an auctioneer effecting a sale by auction, or an auctioneer's clerk taking down the bidding, is deemed to be the authorized agent both of the vendor and purchaser, so as to be enabled to bind both or either of the parties by signing their names to the printed conditions of sale; but, until the hammer goes down, the auctioneer is exclusively the agent of the vendor (*z*); and, when the sale is over, the auctioneer is no longer the agent of either party (*a*). But he is not necessarily the agent of both parties; for it may be shown that the purchaser bought under an express contract between him and the vendor, and not under the conditions of sale (*b*). The auctioneer generally puts down the pur-

(*u*) *Twining* v. *Morrice*, 2 Bro. Ch. C. 331.

(*x*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *James* v. *Shore*, 1 Stark. 426; *Roots* v. *Dorner* (*Lord*), 4 B. & Ad. 77.

(*y*) *Chambers* v. *Griffiths*, 1 Esp. 150; *Gibson* v. *Spurrier*, 2 Peake, N.P.C. 49; *Boyer* v. *Blackwell*, 3 Anstr. 657; *Dykes* v. *Blake*, 4 Bing. N.C. 463; 7 L.J. C.P. 282.

(*z*) *Warlow* v. *Harrison*, 1 E. & E. 295, 316; 29 L.J. Q.B. 14.

(*a*) *Mews* v. *Carr*, 1 H. & N. 488; 26 L.J. Ex. 39.

(*b*) *Bartlett* v. *Purnell*, 4 Ad. & E. 792.

chaser's name in his catalogue or in the conditions or particulars of sale, with the amount of the bidding opposite the lot purchased; or he makes an entry of the particulars in his books, inserting the name of the purchaser. In either case the latter will be bound. If the conditions of sale are posted up in a conspicuous position in the auction-room, the purchaser will be bound by the terms and conditions, although it cannot be proved that he read them (*c*). Where an auctioneer corrects a material misdescription in the particulars of sale before the biddings commence, but such correction is not heard by the purchaser, the court will rescind the contract notwithstanding a condition for compensation in that behalf (*d*). These conditions cannot be contradicted, added to, or altered by verbal declarations made by the auctioneer at the time of the sale (*e*). The reading of a lease at an auction by an auctioneer is no excuse for a misdescription of the terms of the lease in the particulars or conditions of sale (*f*). If the estate is sold by order of the Court of Chancery and a bidder who is declared the purchaser sells again in the auction-room at an additional price, the court will order a re-sale (*g*). If the auctioneer at a sale does not disclose the name of the vendor, but makes the contract in his own name, he will himself be personally responsible for the fulfilment of the contract (*h*). Even where he does disclose the name of the principal, yet if it appears from the terms of the contract that he is dealing personally with the purchaser he will be personally bound (*i*).

Enforcement of oral contracts for sale and purchase of estates.—If livery of seisin is made to a purchaser under an oral contract for the sale of a freehold estate, or of a leasehold estate exceeding three years in duration, and he is actually put into possession of the property agreed to be sold to him, yet he will have only an estate or lease at will, by reason of sect. 4 of the Statute of Frauds, which enacts that all estates of freehold, or terms of years, or any uncertain interest in lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put into writing and signed by the parties creating them or their agents, shall have the force and effect of leases or estates at will only, excepting leases not exceeding the term of three years from the making thereof. But the purchaser so let into possession will

(*c*) *Mesnard* v. *Aldridge*, 3 Esp. 271; *Bywater* v. *Richardson*, 1 Ad. & E. 508; 3 L.J. K.B. 164.

(*d*) *Hare's Contract, In re*, (1901) 1 Ch. 93; 70 L.J. Ch. 45.

(*e*) *Higginson* v. *Clowes*, 15 Ves. 521.

(*f*) *Jones* v. *Edney*, 3 Campb. 285; *Flight* v. *Booth*, 1 Bing. N.C. 370, 379; 4 L.J. C.P. 66.

(*g*) *Holroyd* v. *Wyatt*, 2 Coll. C.C. 327.

(*h*) *Franklyn* v. *Lamond*, 16 L.J. C.P. 221; 4 C. B. 637.

(*i*) *Woolfe* v. *Horne*, 2 Q.B.D. 355. See *ante*, p. 321.

be entitled to a conveyance of the estate; and the court will compel the vendor to execute such a conveyance, notwithstanding the provisions of the Statute of Frauds, on the ground that there has been a part performance of the contract, and that, possession having been given and accepted in fulfilment of the bargain, it would be fraudulent in either party to withdraw therefrom without the consent of the other (*k*). The equity arising from part performance operates against a company in like manner as against an individual, the enactments of the Companies Clauses Act, 1845, as to the mode in which contracts may be entered into on behalf of a company, not precluding the enforcement against a company of the ordinary equity based on part performance (*l*). The mere naked transfer of the possession of land alone is not, it has been said, sufficient to justify the courts in enforcing the performance of an oral contract for the purchase of the freehold and inheritance of such land on the ground that the transfer of the possession is a part performance of such oral contract. Acts done in performance, it has been observed, must be such as could have been done with no other view or design than to fulfil the particular contract sought to be enforced (*m*). If, indeed, the change of possession is accompanied by the payment of money on the part of the occupier to the owner, under circumstances giving rise to the presumption that it was an instalment of purchase-money, and not a rent paid in advance, there would undoubtedly be a part performance of a contract, which could be no other than a contract of sale (*n*). So, if the change of possession has been accompanied by the exercise of acts of ownership, such as the expenditure of money in building, repairs, drainage, and lasting improvements, quite inconsistent with the notion of a contract for a yearly tenancy, it is evident, from the acts done, that there has been a part performance, either of a contract for the purchase of the fee (*o*), or for the grant of a lease for a long term of years (*p*). Such acts as are ordinarily introductory to contracts for the purchase and sale of an estate or

(*k*) *Butcher* v. *Stapely*, 1 Vern. 364; *Pyke* v. *Williams*, 2 *ib.* 455; Fonblanque, 175, n.; *Reynolds* v. *Waring*, 1 Younge, 352; *Caton* v. *Caton*, L.R. 1 Ch. 137, 148; 35 L.J. Ch. 292, 295. A condition giving the vendor a right to rescind in the event of his being unable or unwilling to give a conveyance is not in general good: *Hardman* v. *Child*, 28 Ch.D. 712; 54 L.J. Ch. 695.

(*l*) *Wilson* v. *West Hartlepool Ry.*, 2 De G. J. & S. 475; 34 L.J. Ch. 241.

(*m*) *Gunter* v. *Halsey*, Ambl. 586; *Cole* v. *White*, cited 1 Bro. Ch.C. 409; *Alderson* v. *Maddison*, 8 App.Cas. 467; 52 L.J. Q.B. 737; *Reynolds* v. *Waring*, 1 Younge, 350; *O'Reilly* v. *Thompson*, 2 Cox, 273; *Watt* v. *Evans*, 4 Y. & Coll. 579; but see *Wilson* v. *West Hartlepool Ry.*, 2 De G. J. & S. 475; 34 L.J. Ch. 241; *Humphreys* v. *Green*, 10 Q.B.D. 148; 52 L.J. Q.B. 140.

(*n*) *Main* v. *Melbourne*, 4 Ves. junr. 720; *Coles* v. *Trecothick*, 9 *ib.* 234.

(*o*) *Borrett* v. *Gomeserra*, Bunb. 94.

(*p*) *Sutherland* v. *Briggs*, 1 Hare, 26; 11 L.J. Ch. 36; *Thornton* v. *Ramsden*, 4 Giff. 519; *Nunn* v. *Fabian*, L.R. 1 Ch. 35; 35 L.J. Ch. 146.

interest in land, such as the giving of directions for a conveyance to be prepared, making valuations, or fixing upon parties to value fixtures or stock, or the making of admeasurements, or the preparing of maps or plans, are not acts of performance of an oral agreement for the purchase or sale of an estate or interest in land, sufficient to take the contract out of the statute (*q*). But, if "the purchaser of lands under an oral contract files a bill against the vendor to carry such contract into execution, and the vendor puts in an answer admitting the contract as stated, it takes it entirely out of the mischief of the Statute of Frauds, and, there being then no danger of perjury, the court would decree it to be performed" (*r*).

Transfer of estate in equity before execution of conveyance.—The execution of a simple contract in writing for the sale and purchase of an estate in fee, although accompanied by livery and seisin, or delivery of possession of the land to the purchaser, does not, since the passing of 8 & 9 Vict. c. 106, transfer to the latter the legal estate or interest agreed to be sold. The written contract, if it amounts to a grant of the fee, would be a feoffment, and would be avoided by the section of the Act (*s*) which enacts that "a feoffment (other than a feoffment made under a custom by an infant) shall be void unless evidenced by DEED." A right to have a conveyance of the land passes by the contract to the purchaser, but not any legal estate or interest in the land itself beyond an estate at will. It is not necessary, however, for the alienation of property that there should be a formal deed of conveyance; a contract for a valuable consideration, by which it is agreed to make a transfer of particular specified property, passes the beneficial interest, provided the contract is one which would be specifically enforced (*t*). "The estate, from the signing of the contract, becomes the real property of the vendee. It is vendible as his, chargeable as his, capable of being incumbered as his, devised as his; it may be assets, and will descend to his heir" (*u*). The purchaser, therefore, in such a case, is said to have the equitable interest in the land, whilst the vendor has the legal estate, and is deemed to be a trustee for the purchaser holding the land upon trust to convey it to the latter upon the terms and conditions of the contract of sale (*x*), whilst the purchaser is a trustee of the pur-

(*q*) *Clerk* v. *Wright*, 1 Atk. 13; *Cooke* v. *Tombs*, 2 Anstr. 420; *Whitchurch* v. *Bevis*, 2 Bro. Ch.C. 559; *Redding* v. *Wilkes*, 3 Bro. Ch.C. 400; *Phillips* v. *Edwards*, 33 Beav. 440.

(*r*) *Att.-Gen.* v. *Day*, 1 Ves. senr. 220; *Gunter* v. *Halsey*, Ambl. 586; *Rondeau* v. *Wyatt*, 2 H. Bl. 68.

(*s*) 8 & 9 Vict. c. 106, s. 3.

(*t*) *Holroyd* v. *Marshall*, 10 H.L.C. 191; 33 L.J. Ch. 193.

(*u*) Lord Eldon, *Seton* v. *Slade*, 7 Ves. 274.

(*x*) *Davie* v. *Beardsham*, 1 Ch.C. 39; see *Phillips* v. *Silvester*, L.R. 8 Ch. 173; 42 L.J. Ch. 225; *Clarke* v. *Ramuz*, (1891) 2 Q.B. 456; 60 L.J. Q.B. 679.

chase-money for the vendor (*y*). Where the vendor of a farm could not complete and the farm was left without a tenant, it was held the duty of the vendor as trustee for the purchaser to re-let it (*z*).

This transfer of the equitable ownership is naturally accompanied with a corresponding transfer of the risk of loss, so that, if lands and houses are agreed to be sold, and the houses are burned down by fire, or destroyed by an earthquake, between the time of the making of the contract of sale and the execution of a conveyance of the legal estate, the loss will fall upon the purchaser, who will be compelled to accept a conveyance of the land without the houses, and to pay the full amount of the purchase-money to the vendor (*a*); nor will he be entitled to the benefit of any insurance effected by the vendor in the absence of an express stipulation to that effect in the agreement for the purchase (*b*). So, if a simple contract be entered into for the sale of an estate holden for two lives, and one of the lives drops before the conveyance is executed, the loss will be the loss of the purchaser (*c*). And, if a man signs an agreement for the purchase of an annuity, payable during the life of a third party, and the latter "happens to die before the annuity is legally transferred to the purchaser, the death can form no objection to the specific performance of the contract" (*d*), and the purchaser must pay his money, although he can never enjoy that for which it was agreed to be paid. If, on the other hand, any profit or gain accrues, it will belong to the purchaser. Therefore, if a reversionary interest is agreed to be purchased, and lives drop between the time of the making of the agreement and the execution of a conveyance, the purchaser will have the benefit of it (*e*). If an estate is sold for an annuity to be paid by the purchaser during the life of the vendor, and the vendor dies after the signing of the agreement and before the execution of the conveyance, the purchaser will nevertheless remain the equitable owner of the property, and will be entitled to call upon the heir-at-law of the vendor for a conveyance of the legal estate; and he may thus acquire the property without the payment of a single shilling of money (*f*). But he must not sleep over his rights (*g*). And it must be observed that,

(*y*) *Green* v. *Smith*, 1 Atk. 572; *Pollexfen* v. *Moore*, 3 Atk. 273.

(*z*) *Egmont* (*Earl*) v. *Smith*, 6 Ch.D. 469; 46 L.J. Ch. 356.

(*a*) *Harford* v. *Purrier*, 1 Mad. 538, 539; *Rawlins* v. *Burgis*, 2 Ves. & B. 387; *Paine* v. *Meller*, 6 Ves. 353; *Cass* v. *Rudele*, 2 Vern. 280; *Poole* v. *Adams*, 33 L.J. Ch. 639.

(*b*) *Poole* v. *Adams*, *supra*; *Collingridge* v. *Royal Exch. Assur. Co.*, 3 Q.B.D. 173; *Edwards* v. *West*, 7 Ch.D. 858; 47 L.J. Ch. 463; *Rayner* v. *Preston*, 18 Ch.D. 1; 50 L.J. Ch. 472; *Castellain* v. *Preston*, 11 Q.B.D. 380; 52 L.J. Q.B. 366.

(*c*) *White* v. *Nutts*, 1 P. Wms. 62.

(*d*) *Kenney* v. *Wexham*, 6 Mad. 357.

(*e*) *Manning*, *Ex parte*, 2 P. Wms. 410.

(*f*) *Mortimer* v. *Capper*, 1 Bro. C.C. 156; *Jackson* v. *Lever*, 3 *ib.* 604.

(*g*) *Wyvill* v. *Exeter* (*Bishop*), 1 Pr. 292.

if the annuity becomes due before the death of the vendor, and the purchaser has neglected to pay it or tender payment, the court will render him no assistance (*h*). But the simple contract of purchase and sale must, of course, be a complete and concluded contract, in order to transfer the right of property and the risk of loss to the purchaser. In the case of judicial sales by the court in the Master's office, the contract of sale is not considered to be concluded until the Master's report is confirmed as to the party who is the best purchaser, and the title is accepted, and in some cases not until the purchase-money is brought into court or paid into the bank (*i*). In order to transfer the right of property and the risk of loss, it must also appear that the vendor had a good title at the time of the making of the contract, or before the disaster happened, and that he was clothed with the estate or interest he agreed to sell; for, if he had not himself got the estate, it cannot, of course, have passed to the purchaser. Where a vendor had himself purchased property from a railway company which the company had no right to sell, and one condition of the re-sale was that the purchaser must send in his objections to title in seven days, and he did not object until after seven days, it was held that he was too late, and must forfeit his deposit; for the vendor had something more than a revocable licence, he had a possessory title to the thing he proposed to sell (*k*). A purchaser who exercises acts of ownership over the land agreed to be purchased must pay interest on the purchase-money, although he receives no actual profits, and the delay in completion may be caused by the vendor (*l*).

Title under Land Transfer Acts.—By the Land Transfer Act, 1875 (*m*), and the Land Transfer Act, 1897 (*n*), provisions are made with respect to the registration of freehold land or leasehold held under a lease derived out of freehold (*o*), and for the transfer of such lands (*p*), and their transmission on death, or bankruptcy, or marriage (*q*).

Production and proof of vendor's title.—It is the first duty of the vendor, when an executory contract of sale has been concluded, to prepare and show to the purchaser satisfactory evidence of title. "An agreement to make out a good title is implied from every contract for the sale of realty" (*r*); and a purchaser is not bound to

(*h*) *Pope* v. *Roots*, 1 Bro. P.C. 370.
(*i*) *Twigg* v. *Fifield*, 13 Ves. 518; *Vincent* v. *Going*, 3 Dru. & W. 75; *Mackrell* v. *Hunt*, 2 Mad. 34, n.
(*k*) *Rosenberg* v. *Cook*, 8 Q.B.D. 162; 51 L.J. Q.B. 170.
(*l*) *Ballard* v. *Shutt*, 15 Ch.D. 122; 49 L.J. Ch. 618.
(*m*) 38 & 39 Vict. c. 87.
(*n*) 60 & 61 Vict. c. 65.
(*o*) 38 & 39 Vict. c. 87, s. 2, customary freehold in certain cases shall not be deemed freehold.
(*p*) Sects. 29—39.
(*q*) Sects. 41—48, 87.
(*r*) *Hall* v. *Betty*, 4 M. & Gr. 410;

accept a doubtful title. If no precise time is fixed within which the title is to be deduced, the vendor will have a reasonable time for its establishment (*s*). He may, if he thinks fit, stipulate for the sale of an estate with such a title only as he happens to have; and in such a case the purchaser will be bound to take whatever interest the vendor has in the premises, whether freehold, leasehold, or copyhold (*t*). By the Conveyancing Act, 1881, s. 3 (6), on a sale of any property, the expenses of production of documents not in the vendor's possession, or of taking copies of documents retained by the vendor, are to be borne by the purchaser. By section 2 (2), recitals, &c. contained in deeds, &c. twenty years old shall, unless proved to be inaccurate, be taken to be true (*u*); (3) inability of vendor to give a legal covenant to produce title shall not be an objection if on completion the purchaser will have an equitable right to the production; (4) covenants required by purchaser are to be at his expense; (5) where vendor retains part of estate he may retain the documents referring to it.

A delivery of the vendor's title-deeds themselves is not equivalent to the delivery of an abstract of title (*x*). But the right of the purchaser to have an abstract may, of course, be waived; and, if the agreement for the purchase provides for the delivery of an abstract to the purchaser at the vendor's expense, this stipulation may be waived by an acceptance on the part of the purchaser of the title-deeds themselves, and a perusal of them and approval of the title on the part of the purchaser's counsel; but the fact of the approval and of the waiver of the delivery of the abstract must be established through the medium of written evidence of the same legal character as that by which the contract itself is authenticated, and cannot be established through the medium of oral testimony.

A proviso that, in case the vendor cannot deduce a good title or the purchaser shall not pay the money on the appointed day, the agreement shall be void, does not enable either party to vitiate the agreement by refusing to perform his part of it. The meaning is that, if the vendor cannot make out a title, the purchaser shall be at liberty to be off the bargain; and so *e contra*, if the purchaser is not ready with the money, the vendor may refuse to carry out the contract; but "the purchaser cannot say, 'I am not ready with my money; therefore I will avoid the contract;' nor can the vendor say, 'My title is not good; therefore I will be

11 L.J. C.P. 256; *Dick* v. *Donald*, 1 Bligh, N.S. 655.

(*s*) *Samson* v. *Rhodes*, 6 Bing. N.C. 261; 9 L.J. C.P. 145.

(*t*) *Freme* v. *Wright*, 4 Mad. 364; *Duke* v. *Barnett*, 2 Coll. C.C. 337.

(*u*) See *Bolton* v. *London School Board*, 7 Ch.D. 766; 47 L.J. Ch. 461.

(*x*) *Horne* v. *Wingfield*, 3 Sc. N.R. 340; 10 L.J. C.P. 295.

off'" (*y*). Where there is a proviso that, if the purchaser shall raise objections to the title which the vendor shall not be able or willing to remove, the vendor shall be at liberty to rescind the contract, the vendor, when the objections are sent in, must determine which of the two courses he will adopt. If he expresses his willingness to remove the objections, he is for ever thereafter precluded from exercising the option given him to rescind the contract (*z*). If the time for making objections to the title is limited, the limitation is waived by the vendor's receiving and considering the objections after the time appointed, provided the fact can be established through the medium of any evidence in writing (*a*). Where, after notice of rescinding the contract, a correspondence on the title is continued under protest, this gives to the transaction the character of a treaty for the renewal of the rescinded contract (*b*). If it is provided that no further evidence of the identity of the parcels shall be required beyond what is afforded by the title-deeds and documents abstracted, and the descriptions in the documents differ, the purchaser is entitled to further proof of identity (*c*). If it is provided that no other title shall be required than that deduced by a particular abstract, the purchaser is not precluded from objecting to the title as it appears upon the face of the abstract (*d*). If a party sells an estate without having a title, but before he is called upon to make a conveyance gets such an estate as will enable him to make a title, that is sufficient (*e*).

Title to realty.—Changes of an important character have been effected with regard to questions of title by the Conveyancing Act, 1881; but wherever sect. 3 of the Act is referred to, the reader must remember that—(1) the section applies only to sales properly so called; (2) only if and as far as the contract of sale does not interfere; (3) only to sales made after 31st December, 1881; and (4) lastly, the purchaser need not complete if, on a contract containing stipulations similar to the section, specific performance would not be enforced.

An agreement to sell a house or land generally, not specifying the estate or interest of the vendor, is in contemplation of law an agreement to sell an estate in fee; and the purchaser may refuse to complete his contract, if the vendor is unable to make out a title to, and convey, such an estate (*f*). But, if the abstract of

(*y*) *Roberts* v. *Wyatt*, 2 Taunt. 277.
(*z*) *Tanner* v. *Smith*, 10 Sim. 410.
(*a*) *Cutts* v. *Thodey*, 13 Sim. 206.
(*b*) *Southcomb* v. *Exeter* (*Bishop*), 6 Hare, 213; 16 L.J. Ch. 378.
(*c*) *Flower* v. *Hartopp*, 6 Beav. 476; 12 L.J. Ch. 39; *Nicholl* v. *Chambers*, 21 L.J. C.P. 54; 11 C.B. 996.
(*d*) *Sellick* v. *Trevor*, 11 M. & W. 729; 12 L.J. Ex. 401. See also Wolstenholme's Conveyancing Acts, pp. 18—26 (ed. 8).
(*e*) *Thompson* v. *Miles*, 1 Esp. 185.
(*f*) *Hughes* v. *Parker*, 8 M. & W. 244; 10 L.J. Ex. 297.

title, when delivered, shows that the vendor is possessed only of a life estate or a term of years, and the purchaser, after the delivery of such abstract, proceeds with the purchase and accepts the title, the contract will be deemed to be a contract for the sale and purchase of the estate and interest disclosed upon the face of the abstract. So if a vendor contracts for the sale of leasehold property held under a lease, he must show that it is held under an original lease; but where the particulars and conditions of sale show that the property is held under a derivative lease, the purchaser cannot refuse to complete or claim compensation (*g*). If the agreement specifies the precise nature of the estate or interest agreed to be sold, and the abstract discloses a title to a different estate in the same land, and the purchaser accepts the title in writing, the contract for the purchase of the first-named estate will be deemed to be abandoned, and a new contract set up for the purchase of the interest disclosed upon the face of the abstract. But an oral acceptance of the title, and an oral agreement to accept such subsequently disclosed interest in lieu of the estate originally bargained for, cannot be set up in opposition to the original contract (*h*). A contract to make a good title to an estate means, of course, a title good both at law and in equity (*i*). If, therefore, the vendor has only a naked legal title as a trustee, or a mere equitable interest without the legal estate, the contract as to title is not fulfilled (*k*). A title may be good, and the purchaser be compelled to complete the purchase, although there may be no title-deeds to produce. "There are good titles in which the origin cannot be shown by any deed or will: but then you must show something that is satisfactory to the mind of the court, that there has been such a long uninterrupted possession, enjoyment and dealing with the property as affords a reasonable presumption that there is an absolute title in fee-simple" (*l*). Although a conveyance, voluntary upon the face of it, is *primâ facie* void against a subsequent purchaser for value, yet it may become valid by force of subsequent events (*m*); and, therefore, a purchaser is not bound to take a title where there appears to have been such a conveyance, but may decline to complete, and may recover his deposit (*n*). If a conveyance to a purchaser has been accidentally burned, the

(*g*) *Camberwell Building Society* v. *Holloway*, 13 Ch.D. 754; 49 L.J. Ch. 361.

(*h*) *Deverell* v. *Bolton* (*Lord*), 18 Ves. 510.

(*i*) *Maberley* v. *Robins*, 1 Marsh. 258; 5 Taunt. 625; *Jeakes* v. *White*, 21 L.J. Ex. 265; 6 Exch. 873; *Boyman* v. *Gutch*, 7 Bing. 379; 9 L.J. (O.S.) C.P. 63.

(*k*) *Elliot* v. *Edwards*, 3 Bos. & P. 181, 183; *Cane* v. *Baldwin*, 1 Stark. 65.

(*l*) *Cottrell* v. *Watkins*, 1 Beav. 365; *Scott* v. *Nixon*, 3 Dru. & W. 405.

(*m*) *Prodgers* v. *Langham*, 1 Sid. 133.

(*n*) *Clarke* v. *Willott*, L.R. 7 Ex. 313; 41 L.J. Ex. 197; *Marsh, In re*, 21 Ch.D. 11; 53 L.J. Ch. 81.

vendor, if living, will be compelled to execute a fresh conveyance, and supply the defect in the title occasioned by the accident (*o*).

By the Conveyancing Act, 1881 (which took effect from the 31st day of December, 1881), s. 3 (2), where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*p*). Where land sold is held by lease (not including underlease) the purchaser is to assume the lease was duly granted, and, on production of receipt for rent, that all covenants have been performed (*q*). In case of underlease he is to assume that it and every superior lease were duly granted, and, on production of receipt for rent under underlease, that all covenants have been performed, and that rent due under superior leases has been paid (*r*).

Period for which title ought to be shown.—By the Vendor and Purchaser Act, 1874 (*s*), forty years is substituted for sixty years for the commencement of title which a purchaser may require subject to any stipulation in the contract to the contrary (*t*). As an estate for life may last sixty years, and thirty years more may be required, in case of disabilities, to bar the claim of the remainderman, it is obvious that the period of sixty years for which the title is, by the general practice of the profession, required to be carried back is not too long, and that a purchaser would not be safe in limiting his researches to a shorter space of time. The Real Property Limitation Act, 1833 (*u*), consequently—although it has made a sixty years' title a better title than it was before—has in no wise abridged the time for which the title must be shown; and every purchaser is still entitled, if he makes a contract to that effect, to the production of a sixty years' title on the part of the vendor (*x*). An oral stipulation that the title is not to be made out beyond a limited period cannot, as previously mentioned, be engrafted upon a written contract which makes no mention of such a stipulation; but, if a notice in writing to that effect can be proved to have been given to the purchaser prior to the making of the contract, the latter must accept the title as limited unless he can show that he has refused to be bound by the notice, and had declined to treat on the terms sought to be imposed

(*o*) *Bennett* v. *Ingoldsby*, Finch, 262.

(*p*) 44 & 45 Vict. c. 41, s. 3 (2); nor can he require the production of deeds, &c. recited in the enfranchisement: sect. 3 (3).

(*q*) Sect. 3 (4).

(*r*) Sect. 3 (5).

(*s*) 37 & 38 Vict. c. 78, s. 1.

(*t*) Any question arising between vendor and purchaser as to any requisitions or objections may be dealt with summarily in chambers: see sect. 9; see *Ford, In re*, 10 Ch.D. 365; 48 L.J. Ch. 327.

(*u*) 3 & 4 Will. 4, c. 27.

(*x*) *Cooper* v. *Emery*, 1 Phil. 388.

upon him (*y*). By the Conveyancing Act, 1881, a purchaser is not to require the production, or any abstract, or copy of any document, nor make inquiry as to such, dated before the time fixed by law or contract for the commencement of the title, notwithstanding reference to such being made in deeds, &c. produced, and he is to assume recitals and executions to be correct (*z*).

Title to leaseholds.—By sect. 2 of the Vendor and Purchaser Act, 1874 (*a*), it is enacted that in the completion of any contract made after the 31st of December, 1874, and subject to any stipulation to the contrary in the contract, under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold. By the Conveyancing Act, 1881, under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion (*b*). On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion (*c*); but on the grant of a sub-lease by a lessee, the intending sub-lessee has a right to inspect the lessee's lease (*d*). If an agreement is made for the sale of leasehold property (not being a church lease), the vendor is bound to establish the lessor's title to grant the lease, unless there is an express stipulation to the contrary in the contract (*e*); and no agreement to dispense with the production of the lessor's title will be implied from the antiquity of the lease (*f*), the shortness of the term for which the lease is granted, the small value of the property, or the absence of a premium (*g*). But there is no such implied engagement in the case of a bargain for the purchase of an agreement for a lease (*h*). If the vendor stipulates that he shall not be obliged to produce the lessor's title, this stipulation does not, of course, preclude the purchaser from taking any objection derived from another source to the validity of that title (*i*). But, if the purchaser agrees to take the title that the vendor has, and to purchase

(*y*) *Ogilvie* v. *Foljambe*, 3 Mer. 65; *Best* v. *Hamand*, 12 Ch.D. 1; 48 L.J. Ch. 503.

(*z*) 44 & 45 Vict. c. 41, s. 3 (3).

(*a*) 37 & 38 Vict. c. 78, s. 2.

(*b*) 44 & 45 Vict. c. 41, s. 3 (1).

(*c*) 44 & 45 Vict. c. 41, s. 13.

(*d*) *Gosling* v. *Woolf*, (1893) 1 Q.B. 39.

(*e*) *Hume* v. *Bentley*, 5 De G. & S. 525; 21 L.J. Ch. 760; *Scott* v. *Alvarez*, (1895) 2 Ch. 603; 64 L.J. Ch. 821.

(*f*) *Frend* v. *Buckley*, L.R. 5 Q.B. 213; 39 L.J. Q.B. 90.

(*g*) *Souter* v. *Drake*, 5 B. & Ad. 992; 3 L.J. K.B. 31; *Hall* v. *Betty*, 4 M. & Gr. 410; 11 L.J. C.P. 256; *Purvis* v. *Rayer*, 9 Pr. 488; *Deverell* v. *Bolton* (*Lord*), 18 Ves. 505.

(*h*) *Kintrea* v. *Preston*, 1 H. & N. 357; 25 L.J. Ex. 287.

(*i*) *Shepherd* v. *Keatley*, 1 C. M. & R. 117; 3 L.J. Ex. 288; *Waddell* v. *Wolfe*, L.R. 9 Q.B. 515; 43 L.J. Q.B. 138; *Smith* v. *Robinson*, 13 Ch.D. 148; 49 L.J. Ch. 20.

the lease as holden by him, he will be precluded from objecting to the title (*j*). The obligation to produce the lessor's title does not, it seems, extend to church leases and bishops' leases (*k*). Upon the sale of a leasehold for lives, expressed to have been granted by a corporation in consideration of the surrender of a prior lease, the title to the surrendered lease must be shown (*l*). When a man professes to grant or sell a lease, it is, of course, understood to be a lease which the lessee or purchaser may insist upon as good against all the world. If, therefore, a covenant or condition has been broken, and a right to re-enter has accrued to the superior landlord, and the vendor is unable to put the purchaser into possession of a good lease, he is responsible in damages for a breach of contract (*m*). If the consent of the original lessor is essential to the validity of the transfer or assignment of the lease to the purchaser, it is, of course, the duty of the vendor to procure that consent (*n*). When leaseholds, consisting of several houses held under the same lease, are sold in several lots to distinct purchasers, and the lease contains covenants affecting the whole, with a proviso enabling the landlord to re-enter in case of the breach of any one covenant, the purchaser of one lot may be evicted without any default on his own part, but solely through the default of another purchaser (*o*). Very great inconveniences may arise and great risk be run of the loss of the entire purchase from such a state of circumstances: the covenants of the original lease, therefore, should be strictly examined. When such covenants exist, the purchaser is not bound to accept the title with an indemnity (*p*). But when an agreement has been entered into for the purchase of an existing lease or underlease, the purchaser is not affected with notice of the covenants, and is not bound to complete if the covenants are onerous and unusual, unless before entering into the agreement he had a fair opportunity of ascertaining the terms of the covenants for himself (*q*). By the Land Transfer Acts (*r*), provisions are made for the registration of titles to leaseholds.

(*j*) *Spratt* v. *Jeffery*, 10 B. & C. 249; 8 L.J. (O.S.) K.B. 114; *Best* v. *Hamand*, 12 Ch. D. 1; 48 L.J. Ch. 503; *Nat. Prov. Bank of England and Marsh's Contract, In re*, (1895) 1 Ch. 190; 64 L.J. Ch. 255.

(*k*) *Fane* v. *Spencer*, 2 Mad. 438.

(*l*) *Hodgkinson* v. *Cooper*, 9 Beav. 304; 15 L.J. Ch. 160.

(*m*) *Penniall* v. *Harborne*, 11 Q.B. 368; 17 L.J. Q.B. 94; *Nouaille* v. *Flight*, 7 Beav. 521; 13 L.J. Ch. 414; *Brewer* v. *Broadwood*, 22 Ch.D. 105; 52 L.J. Ch. 136.

(*n*) *Lloyd* v. *Crispe*, 5 Taunt. 249; *Mason* v. *Corder*, 7 *ib.* 9; 2 Marsh. 332.

(*o*) *Paterson* v. *Long*, 6 Beav. 590, 597; 13 L.J. Ch. 1.

(*p*) *Blake* v. *Phinn*, 3 C.B. 976; 16 L.J. C.P. 159.

(*q*) *Hyde* v. *Warden*, 3 Ex.D. 72; 47 L.J. Ex. 121; *Reeve* v. *Berridge*, 20 Q.B.D. 523; 57 L.J. Q.B. 265; *Davis and Cavey, In re*, 40 Ch.D. 601; 58 L.J. Ch. 143; *White's Contract, In re*, (1896) 1 Ch. 637; 65 L.J. Ch. 481; *Haedicke's Contract, In re*, (1901) 2 Ch. 666; 70 L.J. Ch. 811.

(*r*) 38 & 39 Vict. c. 87, s. 11. See 60 & 61 Vict. c. 65, Sched. I.

Waiver of proof of title and of objections to title.—Where a person contracted for the purchase of a lease of a public-house, and of the stock and goodwill, and entered into possession, paid part of the purchase-money and mortgaged his interest, it was held that he had waived his right to call for the production of the lessor's title (*s*). The taking of possession is not of itself a waiver, but is some evidence of acceptance of title which may be rebutted by other circumstances (*t*). But, if possession is given under the contract, and the abstract of title is delivered, and the purchaser continues in possession for a lengthened period, making no objections at all to the title, or only frivolous objections with a view of delaying payment of the purchase-money, the court will decree payment without going into any investigation of title unless the title is clearly shown to be bad (*u*). Proof of title to transfer the estate agreed to be sold is a condition precedent to the vendor's right to the purchase-money; and the court cannot, of course, make a purchaser accept a title which does not exist, and will not compel him to pay the purchase-money, when it cannot give him the estate for which he agreed to pay it (*x*). A purchaser cannot be held to have waived objections to title because his counsel has approved of the title (*y*). And, even if he expressly accepts the title as satisfactory, such acceptance does not preclude him from subsequently showing that the vendor has no title at all, and that the acceptance had been made under a misapprehension and a mistake (*z*). If it is stipulated by the contract that objections to title are to be considered as waived unless made within a certain time, the time is made of the essence of the contract; so that, if the objection is not sent in within the time, the vendor has the right to take the benefit of the condition, and say that the title has been accepted, unless the abstract is so defective that no title is shown upon the face of it (*a*). If the purchaser takes possession under the contract, and afterwards rejects the title, he may be turned out of possession by the vendor, and cannot, in general, claim compensation for improvements (*b*). Lastly, it may be observed that, whenever a third person, having any title to lands about to be sold, knows of the sale and of his own title, and neglects to give the purchaser notice thereof, "he shall never afterwards be admitted

(*s*) *Haydon* v. *Bell*, 1 Beav. 337.

(*t*) *Hyde* v. *Warden*, 3 Ex.D. 72; 47 L.J. Ex. 121; *Burroughs* v. *Oakley*, 3 Swanst. 171.

(*u*) *Anspach* (*Margravine*) v. *Noel*, 1 Mad. 310; *Hall* v. *Laver*, 3 You. & C. 196.

(*x*) *Blachford* v. *Kirkpatrick*, 6 Beav. 232, 236; 12 L.J. Ch. 108.

(*y*) *Deverell* v. *Bolton* (*Lord*), 18 Ves. 505.

(*z*) *Warren* v. *Richardson*, 1 You. 1; *Ward* v. *Trathen*, 14 Sim. 82; *Bousfield* v. *Hodges*, 33 Beav. 90.

(*a*) *Blacklow* v. *Laws*, 2 Hare, 40; *Oakden* v. *Pike*, 34 L J. Ch. 620.

(*b*) *Nicloson* v. *Wordsworth*, 2 Swanst. 365.

to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser; and, in such case, infancy and coverture shall be no excuse" (*c*). A purchaser may, by taking possession of the estate agreed to be sold to him after the delivery of an abstract apprising him of the existence of certain incumbrances, waive his right of objecting to the title, on the ground of the existence of such incumbrances. Where, for example, a purchaser took possession of an estate after the delivery of an abstract of title, on the face of which it appeared that part of the estate was subject to a right of sporting, it was held that he had waived his right to object to the title on the ground of the existence of such a right (*d*). But where the defect is removable by the vendor, as in the case of a mortgage, there would be no waiver (*e*). Where the contract provides that a good title shall be shown, the purchaser is entitled to insist upon it, though he knows of defects (*f*); but, if the contract is silent as to title, notice of defects to the purchaser will affect his right to insist upon a good title (*g*).

Production of title-deeds.—After the title, as disclosed upon the abstract, has been approved of and accepted by the purchaser or his legal advisers, the title-deeds themselves must be produced for inspection and verification with the abstract. If they are not produced, the purchaser will not be bound to complete his purchase. In the case of a sale of a copyhold estate, the copies of court-roll are the documents of title, and must be furnished to the purchaser for comparison with the abstract (*h*); and see now as to copyholds, *ante*, p. 453. The vendor is in all cases bound to produce and show to the purchaser all deeds and writings in his possession or under his control that in anywise concern the property agreed to be sold, whatever be their date or age; but he is not in general bound, as we shall presently see, to furnish an abstract of any deed of an earlier date than sixty years. If the deeds abstracted refer to prior deeds, settlements, or wills not in the possession or under the control of the vendor, and the absence of the deed so referred to throws a serious doubt upon the title, the purchaser will not be bound to complete his purchase. "When the title under the conveyance which contains the recital is fortified by sixty years' undisputed possession, the loss of the deed recited throws no reasonable doubt upon the title" (*i*). If a deed or will in the abstract

(*c*) *Savage* v. *Foster*, 9 Mod. 38; *Sharpe* v. *Foy*, L.R. 4 Ch. 35.

(*d*) *Burnell* v. *Browne*, 1 Jac. & Walk. 168.

(*e*) *Gloag's Contract, In re*, 23 Ch.D. 320; 52 L.J. Ch. 654.

(*f*) *Cato* v. *Thompson*, 9 Q.B.D. 616.

(*g*) *Gloag's Contract, In re, supra.* See also *Ellis* v. *Rogers*, 29 Ch. D. 661.

(*h*) *Whitbread* v. *Jordan*, 1 You. & C. 318; 4 L.J. Ex. 38.

(*i*) *Prosser* v. *Watts*, Mad. & Geld. 60; *Moulton* v. *Edmonds*, 29 L.J. Ch. 181.

professed to have been made in execution of a power of appointment contained in a previous deed or will more than sixty years old, and not abstracted, the purchaser was entitled to call for the production of the deed, if it was in the possession of the vendor, to see that the power had been properly executed. But, if there had been sixty years' undisputed possession by the parties entitled under the appointment, and the deed creating the power was not in the possession or under the control of the vendor, the presumption was in favour of a valid execution of the power, and the purchaser was compelled to complete his contract, unless he would bring forward evidence impeaching the validity of the appointment, and throwing a reasonable doubt upon the title. By the Conveyancing Act, 1881, a purchaser is not to require the production of any abstract or copy of any document, nor make inquiry as to such, dated before the time fixed by law or contract for the commencement of the title, notwithstanding reference to such being made in deeds, &c. produced, and he is to assume recitals and executions to be correct (*k*). The expenses of production, inspection, &c. of documents not in the vendor's possession are to be borne by the purchaser (*l*).

Loss of title-deeds after delivery of abstract.—If the title-deeds are destroyed by accident after approval of the title, the vendor must furnish the purchaser with the means of proving the actual existence of the deeds, their contents, and that they were duly delivered and executed by all necessary parties. If the abstract of title has been delivered and compared with the deeds themselves prior to their destruction, this may afford the means of proving the contents of the deeds; but it must then be shown who the attesting witnesses were, and that the deeds were duly executed and delivered, and the purchaser must be furnished with the means of proof thereof, for the purpose of asserting his title and defending his possession. If no such proof is afforded, the purchaser is discharged (*m*). If, after the making of the contract, the purchaser is let into possession, and the contract is abandoned or rescinded, the purchaser cannot be treated as a lessee, and cannot be compelled to pay rent, or to pay for the use and enjoyment of the property (*n*).

Effect of misdescriptions.—The vendor must be prepared to convey to the purchaser an estate or interest substantially corresponding with that bargained for, both as regards the tenure and

(*k*) 44 & 45 Vict. c. 41, s. 3 (3); but this will not protect a vendor where a defect appears in the title: see Wolstenholme's Conveyancing Acts, p. 21 (ed. 8).

(*l*) Sect. 3 (6). See *Moody's Contract, In re*, 30 Ch.D. 344; 54 L.J. Ch. 886; and *Johnston's Contract, In re*, 30 Ch.D. 42; 54 L.J. Ch. 889; *Stuart's Contract, In re*, (1896) 2 Ch. 328; 65 L.J. Ch. 576; *Duthy's Contract, In re*, (1898) 1 Ch. 419; 67 L.J. Ch. 218.

(*m*) *Bryant* v. *Busk*, 4 Russ. 4.

(*n*) *Kirtland* v. *Pounsett*, 2 Taunt. 145, *post*.

the situation and natural advantages of the property. Any misdescription of the estate or interest, or of the nature, or situation, or extent, or value of the property in a material point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the contract would never have been made, at once releases the purchaser from the bargain (*o*). If the conditions of sale provide that errors and misstatements shall not vitiate the sale, but that an abatement shall be made in the purchase-money by way of compensation, the provision will extend only to unintentional errors and misstatements in matters of detail, not amounting to fraud (*p*), and not materially altering the nature of the subject-matter of the contract itself; for no man is bound to take an estate or interest essentially different from that which he agreed to purchase (*q*). Where there are such conditions, and an error is discovered after the conveyance has been executed, the purchaser is entitled to compensation (*r*); but this is not so if he might have discovered the defect, and if there was no agreement as to compensation (*s*). If an infinitesimal portion of the estate sold cannot be given to the purchaser, he may be compelled to complete with compensation, but not when the estate given is substantially different (*t*).

A general agreement to sell a house or land means that the owner of the property will sell an estate in fee. The purchaser, therefore, may refuse to complete the purchase, if the vendor is unable to transfer a freehold property; but, if he chooses to take such an estate as the vendor has in the land, the latter will be bound to transfer his whole interest to the purchaser (*u*). And, if an abstract of title has been delivered to the purchaser, showing that the vendor has a different estate and interest from that bargained for, and the purchaser returns the abstract and accepts the title in writing, the purchaser will be deemed, as we have already seen (*ante*, p. 452), to have assented to take the estate and interest disclosed upon the face of the abstract. So, where there was a contract to sell the residue of a lease, of which twelve and

(*o*) *Dimmock* v. *Hallett*, L.R. 2 Ch. 21; 36 L.J. Ch. 146; *Aberaman Iron Works* v. *Wickens*, L.R. 4 Ch. 101.

(*p*) *Dimmock* v. *Hallett*, *supra*; *Whittemore* v. *Whittemore*, L.R. 8 Eq. 603; 38 L.J. Ch. 17. The difference between the grounds for specific performance and rescission must, however, be noted: see *Terry's Contract*, *In re*, 32 Ch.D. 14; 55 L.J. Ch. 345.

(*q*) *Flight* v. *Booth*, 1 Bing. N.C. 370; 4 L.J. C.P. 66; *Hart* v. *Swaine*, 7 Ch.D. 42; 47 L.J. Ch. 5; *Fawcett and Holmes*, *In re*, 42 Ch.D. 150; 58 L.J. Ch. 763; *Jacobs* v. *Revell*, (1900) 2 Ch. 858; 69 L.J. Ch. 879; *Puckett's Contract*, *In re*, (1902) 2 Ch. 258; 71 L.J. Ch. 666.

(*r*) *Turner and Skelton*, *In re*, 13 Ch. D. 130; 49 L.J. Ch. 114; *Bos* v. *Helsham*, L.R. 2 Ex. 72; 36 L.J. Ex. 20; *Palmer* v. *Johnson*, 13 Q.B.D. 351; 53 L.J. Q.B. 348; *Debenham* v. *Sawbridge*, (1901) 2 Ch. 98; 70 L.J. Ch. 525.

(*s*) *Clayton* v. *Leech*, 41 Ch.D. 103. As to misleading conditions of sale, see *Sandbach's Contract*, *In re*, (1891) 1 Ch. 99; 60 L.J. Ch. 60.

(*t*) *Arnold*, *In re*, 14 Ch.D. 270.

(*u*) *Bower* v. *Cooper*, 2 Hare, 408.

a-half years were unexpired, but it turned out that the lessors had an option to determine at the end of five years, it was held that the purchaser might rescind the contract and recover the deposit (*x*); and it was held, where a ground rent was omitted to be mentioned (*y*), and also where a restrictive covenant was omitted (*z*), that the purchaser of the lease was discharged. Every document that forms a link in the vendor's title should be abstracted in chief (*a*).

If, pending a negotiation for the sale of real property, the vendor affirms the rents to be more than they really are, and the person to whom the affirmation is made relies upon it and purchases the property, the vendor is liable to an action for deceit whether he knew or did not know of the falseness of the affirmation at the time it was made, and although a conveyance is subsequently executed which contains no notice of any such affirmation. A representation of this sort has been held to amount to a warranty of the fact, on the ground that the vendor had better means of knowledge than the purchaser, who relied upon the truth of the statement and was deceived by it. "If," observes Holt, C. J., "the vendor gives in a particular of the rents, and the vendee says he will trust him and inquire no further, but rely upon his particular, there, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have an action, though the particular be false, because he did not rely upon the particular" (*b*). And even if the rent stated is literally true, but the fact is that the property had been only let for one year at the rent stated, which was far above its value, so that the statement is calculated to mislead, the vendee is entitled to be relieved from his purchase (*c*). On the other hand, a statement which is not literally true, but which does not substantially mislead, is not ground for annulling a contract: as where a vendor of a leasehold house stated himself as a lessee for twenty-four years, whereas he was an under-lessee for that period, less three days (*d*). Where the vendor of a public-house made, pending the treaty for the sale of the house, sundry false representations to the plaintiff concerning the amount of business done in the house, and the rent received for part of the premises, whereby the plaintiff was induced to give a larger sum than he would otherwise have given for the

(*x*) *Weston* v. *Savage*, 10 Ch.D. 736; 48 L.J. Ch. 239.

(*y*) *Jones* v. *Rimmer*, 14 Ch.D. 588; 49 L.J. Ch. 775.

(*z*) *Higgin's Contract, In re*, 21 Ch.D. 95; 51 L.J. Ch. 772; *Ebsworth's Contract, In re*, 42 Ch.D. 23; 58 L.J. Ch. 665; *Cox's Contract, In re*, (1891) 2 Ch. 109.

(*a*) *Stamford Bank's Contract, In re*, (1900) 1 Ch. 289; 69 L.J. Ch. 127.

(*b*) *Lysney* v. *Selby*, 2 Ld. Raym. 1120; see *Bos* v. *Helsham*, L.R. 2 Exch. 72; 36 L.J. Ex. 20.

(*c*) *Dimmock* v. *Hallett*, L.R. 2 Ch. 21; 36 L.J. Ch. 146.

(*d*) *Duddell* v. *Simpson*, L.R. 2 Ch. 102; 36 L.J. Ch. 70; see *Aberaman Iron Works* v. *Wickens*, L.R. 4 Ch. 101.

property, it was held that the plaintiff was entitled to maintain an action against the defendant for the deceit (*e*).

If an estate is subject to a right of sporting, or of common, or to dig for mines, or a right on the part of third persons to have extensive underground watercourses, and to enter upon the land to repair such watercourses, and the purchaser contracts for the estate in ignorance of these rights, he may refuse to complete his purchase as soon as he is aware of their existence; and he cannot be compelled to take the estate with an abatement on the amount of the purchase-money (*f*). If a man contracts for the purchase of a house *and* wharf, or a wharf *and* jetty, he may refuse to take the house without the wharf, or the wharf without the house, or without the jetty, if they are contiguous to each other, and were clearly intended to go together (*g*). And, whenever mansion-houses, farms, woods, or meadows are sold together as one estate, and the hope of possessing the one was the inducement to the purchaser to buy the others, he may insist upon having the whole or none (*h*). "The Court will determine as a jury would the question: 'Did or did not the party purchase the one with reference to the other? Would he or would he not have taken the one, had he not reckoned also upon having the other?'" (*i*). If a purchaser has contracted for the purchase of a freehold interest, he is not bound to accept a copyhold estate (*j*), nor a leasehold interest, however long the duration of the term (*k*). If he has bargained for a fee simple in possession, he is not bound to take a remainder in fee expectant upon the determination of a life estate, however advanced in life the tenant for life may be, or however liberal may be the compensation offered in the shape of an abatement of the purchase-money (*l*). If he has bargained for the purchase of a lease having eight years to run, he cannot be compelled to take a lease of only six, although the vendor may offer him a proportionate reduction in the amount of the purchase-money (*m*). But, if there is only a slight difference in the duration of the term, as between the lease offered to be assigned and that bargained for—if it substantially corresponds with the description given of it in the contract for the sale—the purchaser will be bound to take it, and the deficiency

(*e*) *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L.J. (O.S.) K.B. 89; *Canham* v. *Barry*, 15 C.B. 597; 24 L.J. C.P. 100.

(*f*) *Shackleton* v. *Sutcliffe*, 12 Jur. 199; 1 De G. & S. 609.

(*g*) *Peers* v. *Lambert*, 7 Beav. 546.

(*h*) *Poole* v. *Shergold*, 2 Bro. C.C. 118; *Gibson* v. *Spurrier*, 2 Peake, 49; *Dykes* v. *Blake*, 4 Bing. N.C. 463; 7 L.J. C.P. 282; *Chambers* v. *Griffiths*, 1 Esp. 151.

(*i*) *Casamajor* v. *Strode*, 2 Myl. & K. 706, 730; *Lewin* v. *Guest*, 1 Russ. 325, 330.

(*j*) *Hick* v. *Phillips*, Pr.Ch. 575.

(*k*) *Drewe* v. *Corp*, 9 Ves. 368; *Wright* v. *Howard*, 1 Sim. & Stu. 190; 1 L.J. (O.S.) Ch. 94; *Price* v. *Ley*, 4 Giff. 235; 32 L.J. Ch. 530.

(*l*) *Collier* v. *Jenkins*, 1 You. 295.

(*m*) *Farrer* v. *Nightingal*, 2 Esp. 639; *Long* v. *Fletcher*, 2 Eq.Ca.Abr. 5, pl. 4.

must be compensated for in an abatement of the price (*n*). If, therefore, the purchaser bargains for a term of ninety-nine years in land, and the vendor has only ninety-eight or ninety-seven years, the purchaser will be bound to take the smaller term, receiving a proportionate abatement in the amount of the purchase-money (*o*). If he has bargained for a lease of the whole property, and finds that the vendor can only give a title to a moiety, he may have a decree for that moiety, and an abatement of the rent (*p*).

If a man has not the entirety of the estate he professes to sell, the purchaser is not bound to accept at a proportionate price the share which he actually has in the estate. And, if tenants in common of an estate contract for the sale of it, and one of them dies, the purchaser cannot be compelled to take the share of the survivors without the share of the deceased (*q*). If the purchaser elects to take such an interest as the vendor has in the land agreed to be sold, subject to a fair and proportionate abatement in the amount of the purchase-money, the vendor is not entitled to object to his so doing. The purchaser is entitled to take what he can get, with compensation for what he ought to have had, but cannot obtain (*r*), provided the contract is capable of being carried out by a decree for specific performance (*s*). Where, however, the purchaser knows that the land is in the occupation of a tenant, he is not entitled to specific performance with compensation if the tenant has a lease (*t*). But neither, on the other hand, can the vendor enforce the contract, if the terms of tenancy are materially misdescribed in the particulars of sale (*u*). Quit rents, being incidents of tenure, are proper subjects of compensation by abatement of the purchase-money. An omission, therefore, of the fact of an estate being charged with a quit-rent will not invalidate the contract for the sale of it; but it is otherwise if the charge is a rent-charge (*v*). Conditions of sale must not be misleading, and a condition is misleading if it requires the purchaser to assume what the vendor knows to be false, or if it states that the title is not accurately known when in fact it is accurately known to the vendor (*x*).

The following misstatements and misdescriptions have been

(*n*) *Belworth* v. *Hassell*, 4 Campb. 140.
(*o*) *Halsey* v. *Grant*, 13 Ves. 77; *Mortlock* v. *Buller*, 10 Ves. 305.
(*p*) *Burrow* v. *Scammell*, 19 Ch.D. 175; 51 L.J. Ch. 296.
(*q*) *Att.-Gen.* v. *Day*, 1 Ves. senr. 218.
(*r*) *Wood* v. *Griffith*, 1 Wils. Ch.C. 45; *Thomas* v. *Dering*, 1 Kee. 744; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Graham* v. *Oliver*, 3 Beav. 124; *Barnes* v. *Wood*, L.R. 8 Eq. 424; 38 L.J. Ch. 683.
(*s*) *Price* v. *Griffith*, 1 De G. M. & G. 80; 21 L.J. Ch. 78.
(*t*) *James* v. *Lichfield*, L.R. 9 Eq. 51; 39 L.J. Ch. 248.
(*u*) *Caballero* v. *Henty*, L.R. 9 Ch. 447; 43 L.J. Ch. 635.
(*v*) *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 122; *Bowles* v. *Waller*, 1 Hayes, 441.
(*x*) *Banister, In re*, 12 Ch.D. 131; 48 L.J. Ch. 837.

held so far material and important as to entitle the purchaser to refuse to complete his contract, and to enable him to recover back his deposit, on the ground that the vendor had not tendered him that which he bargained for and intended to buy, although the contract contained the usual provision that errors and misstatements should not vitiate the sale:—*i.e.*, a public-house described in the printed conditions as a "free public-house," whereas it was held upon the terms that all the beer should be taken from a particular brewer (*y*)—a lease described as containing a restriction against offensive trades, whereas it contained a restriction, not only against offensive trades, but also against some trades that were perfectly inoffensive (*z*)—houses described as Nos. 3 and 4, whereas they were Nos. 2 and 3 (*a*)—a reversionary estate described as "absolute on the death of a person aged sixty-six," whereas the party was only sixty-four, and the reversion was not absolute (*b*)—a public-house and yard described as being holden for a term, of which twenty-three years were unexpired, at a rent of 55*l.* per annum, whereas the yard was held distinct from the public-house, under a demise from year to year only, at an additional rent of 8*l.* per annum (*c*)—a redeemable estate, or a redeemable annuity issuing out of land, described generally as "an estate," or "an annuity," no notice being taken of its being subject to redemption (*d*)—a plot of ground described generally on a plan, without notice of any right of way over it, or right of sporting, whereas it was held subject to a right of sporting (*e*), or to a right of way on the part of the occupiers of an adjoining house, their servants and families (*f*)—leases described as containing particular covenants on the part of the lessees, whereas no such covenants existed (*g*)—or described as leasehold renewable by custom, when no custom to renew existed (*h*)—dwelling-houses described as being holden on a ground-rent lease at a net annual ground-rent of 42*l.*, whereas the rent was a rack-rent (*i*)—a dwelling-house described as a brick-built dwelling-house, whereas parts of the external walls were composed of only lath and plaster (*k*)—a steam factory described as being well supplied with "water," whereas there was no natural

(*y*) *Jones* v. *Edney*, 3 Campb. 285.

(*z*) *Flight* v. *Booth*, 1 Bing. N.C. 370; 4 L.J. C.P. 66.

(*a*) *Leach* v. *Mullett*, 3 C. & P. 115.

(*b*) *Sherwood* v. *Robins*, 3 C. & P. 339; Mood. & M. 194.

(*c*) *Dobell* v. *Hutchinson*, 3 Ad. & E. 355; 4 L.J. K.B. 201.

(*d*) *Coverley* v. *Burrell*, 5 B. & Ald. 257; *Ballard* v. *Way*, 1 M. & W. 520; 5 L.J. Ex. 207.

(*e*) *Burnell* v. *Brown*, 1 Jac. & W. 168.

(*f*) *Dykes* v. *Blake*, 4 Bing. N.C. 463; 7 L.J. C.P. 282; if the right of way is patent and obvious, the principle of *caveat emptor* applies: *Bowles* v. *Round*, 5 Ves. 509.

(*g*) *Waring* v. *Hoggart*, Ry. & M. 39.

(*h*) *Newby* v. *Painter*, 22 L.J. Ch. 871; 17 Jur. 483.

(*i*) *Stewart* v. *Alliston*, 1 Mer. 26.

(*k*) *Robinson* v. *Musgrove*, 2 Moo. & R. 92.

supply, but all the water was furnished at very great cost by a water company (*l*)—a house described as being held at a low ground-rent of 15*l.* per annum, whereas the ground-rent was 35*l.* per annum (*m*)—a lease described as an original lease, whereas it was an under-lease (*n*)—and described as in the occupation of a tenant, whereas the occupier was a hostile claimant (*o*)—meadows described generally, without notice of any right of common over them, whereas one of the meadows was held subject to the exercise of such a right every third year (*p*)—a timber estate described as comprising a wood of sixty-five acres of fine oak timber trees of the average size of fifty feet, whereas the average size of the trees appeared to be only twenty-two feet (*q*)—a freehold garden described as "inclosed by a rustic wall with tradesman's side entrance," whereas the wall was not part of the property and the entrance was only used on sufferance (*r*)—a sum in gross payable under a covenant described as a freehold ground-rent (*s*). Where a purchaser surveyed the property with a plan in his hand, which had been furnished to him by the vendors, and was naturally misled into thinking that the boundary included certain trees which it did not include, the court held that he had been misled by the fault of the vendors, and refused to decree specific performance against him (*t*).

But, if the thing tendered to the purchaser substantially corresponds with the description given in the contract of sale, and there only exists some trifling defect, easily measurable by a pecuniary standard, the purchaser will be bound to complete his contract, on receiving a proportionate abatement of the purchase-money. Thus, where a piece of meadow-land, imperfectly watered, was described by a vendor as "uncommonly rich water-meadow," and where a leasehold estate was represented to be nearly equal to freehold, being renewable upon a small fine, whereas the fine was a large one, it was held that the misrepresentation did not avoid the contract, but afforded ground for compensation to the purchaser (*u*). And if the purchaser must have known the true state and condition of the property, and could not have been misled or deceived by the misdescription, he will not be permitted to avail himself of it for the purpose of defeating the contract.

(*l*) *Leyland* v. *Illingworth*, 3 De G. F. & J. 248; 29 L.J. Ch. 611.

(*m*) *Mills* v. *Oddy*, 6 C. & P. 728.

(*n*) *Mason* v. *Corder*, 2 Marsh. 336.

(*o*) *Lachlan* v. *Reynolds*, 23 L.J. Ch. 8; Kay, 52.

(*p*) *Gibson* v. *Spurrier*, Peake's Ad.Cas. 49.

(*q*) *Brooke* (*Lord*) v. *Rounthwaite*, 5 Hare, 298; 15 L.J. Ch. 332.

(*r*) *Brewer* v. *Brown*, 28 Ch.D. 309; 54 L.J. Ch. 605.

(*s*) *Robins* v. *Evans*, 2 H. & C. 410; 33 L.J. Ch. 68.

(*t*) *Denny* v. *Hancock*, L.R. 6 Ch. 1; 40 L.J. Ch. 193.

(*u*) *Scott* v. *Hanson*, 1 Sim. 13; *Fenton* v. *Browne*, 14 Ves. 144; *Trower* v. *Newcombe*, 3 Mer. 704.

So, too, if he proceeds with the treaty after he is aware of the misstatement or misdescription, and makes no objection, he will be deemed to have waived his right to object, and to have assented to take the estate as it is, and not as it was described to be, subject in certain cases to an abatement in the amount of the purchase-money. If the misrepresentation, moreover, does not in anywise affect the value or enjoyment of the property, it will not invalidate the contract. Thus, where fines payable to the lord of a manor were described as arbitrary, whereas they were both arbitrary and certain, but the annual value of the property was correctly stated, it was held that the purchaser had no ground for refusing to complete the purchase (*x*). If the price of an estate is not regulated by the acreage of the property, but by its peculiar situation or adventitious value, and the quantity is stated as mere matter of description or opinion, and not as the result of actual admeasurement, the purchaser may be compelled to take the estate, and will not be entitled to any abatement of his purchase-money, if the actual quantity falls short of the estimated quantity. If the price has been regulated by the acreage, and the quantity has been innocently misrepresented by the vendor, "the purchaser has a right to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation. This is the rule, though the land is neither bought nor sold professedly by the acre, the presumption being that, in fixing the price, regard was had on both sides to the quantity which both supposed the estate to consist of" (*y*). But, where a mistake of quantity is of such a nature that it cannot equitably be made the subject of compensation, it is not a case for compensation, but a ground for avoiding the contract (*z*). If the purchaser has never seen the estate, but relies solely on the representations made to him by the vendor, and there is any material difference between the actual and represented quantity, the purchaser will not be bound to complete his purchase. The words, "more or less," or "thereabouts," will only cover a moderate excess or deficiency, and will never be suffered to be the instrument of fraud (*a*). If the vendor makes a mistake against his own interest, as if he sells an estate with the timber, and the timber is by mistake sold at too low a price, he cannot have the sale reopened, and the purchaser is entitled to his bargain (*b*). Where an

(*x*) *White* v. *Cuddon*, 8 Cl. & Fin. 785.
(*y*) *Hill* v. *Buckley*, 17 Ves. 401; *King* v. *Wilson*, 6 Beav. 129; *Terry's Contract*, *In re*, 32 Ch.D. 14; 55 L.J. Ch. 345.
(*z*) *Durham* (*Earl*) v. *Legard*, 34 L.J. Ch. 589; 34 Beav. 611.
(*a*) *Day* v. *Fynn*, Owen, 133; *Winch* v. *Winchester*, 1 Ves. & B. 377; *Portman* v. *Mill*, 2 Russ. 570. See *Joliffe* v. *Baker*, 11 Q.B.D. 255; 52 L.J. Q.B. 609.
(*b*) *Griffiths* v. *Jones*, L.R. 15 Eq. 279; 42 L.J. Ch. 468.

auctioneer innocently represented that there was a right of way to a property when there was none, it was held by Denman, J., that no action to recover compensation could be had against the vendor after completion of the purchase (*c*).

Alterations in condition of property.—The vendor must be prepared also to transfer the estate in the same condition that it was in at the time of the making of the agreement for the sale; otherwise the purchaser may repudiate the contract and recover his deposit. Thus, where the vendor removed a summer-house, it was held that the purchaser might refuse to complete the purchase and recover back the deposit (*d*). So, where the vendor cut down some ornamental timber, it was held that the purchaser might refuse to complete his contract (*e*). If a man contracts for the sale of the land and trees, the purchaser is not bound to take the estate without the timber (*f*). If it is stipulated that the purchaser shall pay for timber growing on the land, he must pay for all trees which are considered to be timber by the custom of the country (*g*).

Time and mode of performance.—By the Judicature Act, 1873, s. 25 (7), stipulations in contracts as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contract in a Court of Equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity. The time appointed for the conveyance of the legal estate, or the delivery of the abstract of title, or the performance of the other preliminaries, is not of the essence of the contract; and the parties, although precise days are fixed, will be allowed a reasonable time for performance, regard being had to all the circumstances of the case, and the nature of the title to be made (*h*). If the vendor will not complete his part of the contract within a reasonable time, the purchaser may withdraw from the contract, and decline to have anything further to do with it (*i*).

Time may, however, be made of the essence of the contract, before the sale, by a proper condition (*j*), and, after the sale, by giving a proper notice of completion or rescission by a limited time (*k*), if there has been no unreasonable delay (*l*); and, if it

(*c*) *Brett* v. *Clowser*, 5 C.P.D. 376.
(*d*) *Granger* v. *Worms*, 4 Camp. 83.
(*e*) *Magennis* v. *Fallon*, 2 Moll. 588.
(*f*) *St. Albans* (*Duke*) v. *Shore*, 1 H.Bl. 280.
(*g*) *Chandos* (*Duke*) v. *Talbot*, 2 P. Wms. 601; *Aubrey* v. *Fisher*, 10 East, 446.
(*h*) *Hipwell* v. *Knight*, 1 You. & Coll. 416; 4 L.J. Ex. 52; *Hearne* v. *Tenant*, 13 Ves. 287.
(*i*) *Macbryde* v. *Weekes*, 22 Beav. 533, 539; *Nott* v. *Riccard*, *ib.* 307; 25 L.J. Ch. 618.
(*j*) *Hudson* v. *Temple*, 29 Beav. 536; 30 L.J. Ch. 251.
(*k*) *Taylor* v. *Brown*, 2 Beav. 180; 9 L.J. Ch. 14; *Wells* v. *Maxwell*, 32 Beav. 408; 33 L.J. Ch. 45. Such notice must be reasonable, *Crawford* v. *Toogood*, 13 Ch.D. 153; 49 L.J. Ch. 108; *Green* v. *Sevin*, 13 Ch.D. 589; 49 L.J. Ch. 166; *Compton* v. *Bagley*, (1892) 1 Ch. 313; 61 L.J. Ch. 113.
(*l*) *Green* v. *Sevin*, *supra*.

plainly appears to have been the intention of the parties that time should be of the essence of the contract (*m*), or that the sale should be conditional, and be made to depend on the performance of the contract by an appointed period, the court will not decree performance after the time has elapsed (*n*). Thus, in a condition that objections to the vendor's title are to be sent in within a given period, time is of the essence of the contract (*o*). But, if a vendor does not deliver the abstract of title within the time specified, the purchaser is not bound to send in his objections within the specified time (*p*). Time is considered to be material, and, to a very considerable extent, to be of the essence of the contract, from the nature of the property or the surrounding circumstances (*q*), as where the subject-matter of the sale is exposed to daily variations in value, such as stock, shares, scrip (*r*), reversionary estates (*s*), mines, factories and buildings used for trading purposes (*t*), and public houses (*u*), and in the case of contracts made with ecclesiastical corporations, where the value of the subject-matter of the contract, and the persons who are to participate in the benefit of it, are liable to constant change (*x*). If a person, seeking to enforce a contract for the sale of land, has himself been guilty of delay—if he has slept over his rights, and allowed an unreasonable time to elapse before seeking for performance—the court will not assist him (*y*). Where a purchaser agrees that if, "from any cause whatever," the purchase shall not be completed on the day fixed, he will pay interest, he must pay such interest, unless the delay has been occasioned by misconduct on the part of the vendor (*z*). He cannot relieve himself from this liability by setting apart the unpaid purchase-money and giving notice thereof to the vendor (*a*).

(*m*) *Darnley* (*Earl*) v. *L. C. & D. Ry.*, 33 L.J. Ch. 9; 1 De G. J. & S. 204.

(*n*) *Reynolds* v. *Nelson*, Mad. & Geld. 26; *Hudson* v. *Bertram*, 3 Mad. 440; *Hipwell* v. *Knight*, 1 Y. & C. 401; 4 L.J. Ex. 52; *Ranelagh* (*Lord*) v. *Melton*, 34 L.J. Ch. 227; 2 Dr. & Sm. 278.

(*o*) *Oakden* v. *Pike*, 34 L.J. Ch. 620.

(*p*) *Upperton* v. *Nicholson*, L.R. 6 Ch. 436; 40 L.J. Ch. 401.

(*q*) *Roberts* v. *Berry*, 3 De G. M. & G. 284; 22 L.J. Ch. 398: *Tilley* v. *Thomas*, L.R. 3 Ch. 61.

(*r*) *Doloret* v. *Rothschild*, 1 Sim. & St. 590; 2 L.J. (O.S.) Ch. 125.

(*s*) *Newman* v. *Rodgers*, 4 Bro. C.C. 391; unless where a contrary intention can be gathered, *Patrick* v. *Milner*, 2 C.P.D. 342; 46 L.J. C.P. 537.

(*t*) *Coslake* v. *Till*, 1 Russ. 376; *Walker* v. *Jeffreys*, 1 Hare, 348; 11 L.J. Ch. 209.

(*u*) *Cowles* v. *Gale*, L.R. 7 Ch. 12; 41 L.J. Ch. 14.

(*x*) *Carter* v. *Ely* (*Dean, &c.*), 7 Sim. 211; 4 L.J. Ch. 132.

(*y*) *Lloyd* v. *Collett*, cited 4 Ves. 690; *Guest* v. *Homfray*, 5 Ves. 818; *Watson* v. *Reid*, 1 Russ. & Myl. 236; *Colby* v. *Gadsden*, 34 Beav. 416.

(*z*) *Williams* v. *Glenton*, L.R. 1 Ch. 200; 35 L.J. Ch. 284; *Palmerston* (*Lord*) v. *Turner*, 33 Beav. 524; 33 L.J. Ch. 457; *Young and Harston's Contract, In re*, 31 Ch.D. 168; *Bennett* v. *Stone*, (1902) 1 Ch. 226; 71 L.J. Ch. 60. As to meaning of "wilful default," see *Hetling's Contract, In re*, (1893) 3 Ch. 269; 62 L.J. Ch. 783; *London Corporation's Contract, In re*, (1894) 2 Ch. 524; 67 L.J. Ch. 430; *Wilson's Contract, In re*, (1894) 3 Ch. 546; 63 L.J. Ch. 863; *Strafford's* (*Lord*) *Contract, In re*, (1896) 1 Ch. 235; 65 L.J. Ch. 124; *Woods' Contract, In re*, (1898) 2 Ch. 211; 67 L.J. Ch. 475; *Bennett* v. *Stone*, *supra*.

(*a*) *Riley, In re*, 34 Ch.D. 386; 56 L.J. Ch. 442.

Where time is of the essence of the contract, mutual promises or covenants between a vendor and purchaser, for the conveyance of an estate on the one hand, and the payment of the purchase-money on the other, at an appointed period, constitute mutual conditions to be performed at the same time; so that, "if one party was ready and willing, and offered to perform his part of the contract and the other neglected or refused to perform his, he who was ready and willing has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act" (*b*). It is a sufficient performance, however, of the vendor's part of the contract, if he is "ready and willing" to execute a conveyance, inasmuch as it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution (*c*), unless the latter has previously declared that he will never execute it, or has refused to deliver the abstract, and intimated his intention not to complete the purchase, or has sold the estate to another person, or done any other act incapacitating himself from fulfilling his engagement (*d*). The conveyance, when tendered, must be a conveyance of the estate and interest bargained for and agreed to be sold, or the vendor will not be bound to execute it (*e*). On a sale the purchaser is not entitled to have the conveyance executed in his presence or his solicitor's, but at his own cost may have the signature attested (*f*).

If one time has been appointed for the execution of the conveyance and another for the payment of the purchase-money, the mutual promises do not constitute mutual conditions, but the several acts must be strictly performed in the order of time agreed upon. And, if a time is appointed for the payment of the purchase-money, but no time has been specified for the execution of the conveyance, the purchaser is bound to pay the money at the time appointed, whether he has or has not obtained a conveyance of the property. In such a case the execution of the conveyance is not a condition precedent to, or concurrent with, the payment of the purchase-money; and the vendor may consequently sue for the money, if it is not paid at the time appointed, without offering to execute a conveyance (*g*).

Enlargement of time of performance.—The time limited for the performance of a contract required to be in writing by the Statute

(*b*) *Jones* v. *Barkley*, 2 Doug. 684; *Kingston* v. *Preston*, cited *ib.* 691.

(*c*) *Poole* v. *Hill*, 6 M. & W. 835; 10 L.J. Ex. 81.

(*d*) *Franklyn* v. *Lamond*, 4 C.B. 637; 16 L.J. C.P. 221.

(*e*) *Vonhollen* v. *Knowles*, 12 M. & W. 602; 13 L.J. Ex. 140.

(*f*) 44 & 45 Vict. c. 41, s. 8.

(*g*) *Mattock* v. *Kinglake*, 10 Ad. & E. 50; 8 L.J. Q.B. 215.

of Frauds cannot be extended by a mere oral agreement; "for to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent oral agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land, partly in writing signed by the parties, and partly not in writing but by parol only, and amounts to a contravention of the Statute of Frauds" (*h*). Where a contract for the sale and purchase of land provided that a good title to the land should be produced, and a defect was discovered in the title which could not be cured, and the purchaser then agreed by word of mouth, to waive the defect, and take the land with such a title as the vendor himself possessed, but afterwards, repenting his subsequent promise, he refused to complete the purchase, it was held that the oral waiver could not be given in evidence; that it had the effect of creating a new contract altogether different from the original contract, and ought to have been authenticated by writing (*i*). But, even where time is of the essence of the contract, it may be waived by the conduct and actions of the parties, and by the contract being treated and acted upon as a continuing contract after the appointed period (*k*).

Non-performance by vendor.—Where the vendor has reserved to himself a right to rescind the contract if the purchaser raises objections to the title which the vendor is unable or unwilling to remove, the vendor cannot refuse to complete the contract, if the purchaser is willing to waive the objections he has made (*l*). But, if the purchaser, with the knowledge of the inability or unwillingness of the vendor to remove the objection, continues to insist upon it, and notice of rescission is then given, nothing done afterwards on the part of the purchaser—no subsequent waiver of the objection—will restore the contract (*m*). The word "unwilling" in a condition of sale of this description is not to be considered as giving an arbitrary power to the vendor to annul the contract. The vendor must show some reasonable ground for the unwillingness, as, for instance, that, if he proceeds to comply with a requisition, he will be involved in expenses far beyond what he ever contemplated, or be involved in litigation and expense which he never contemplated, and for avoiding which he reserved to himself the power of annul-

(*h*) *Stowell* v. *Robinson*, 3 Bing. N.C. 928, 937; 6 L.J. C.P. 326.

(*i*) *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 65; 2 L.J. K.B. 127; *Harvey* v. *Grabham*, 5 Ad. & E. 61, 74; 5 L.J. K.B. 235.

(*k*) *Webb* v. *Hughes*, L.R. 10 Eq. 281; 39 L.J. Ch. 606.

(*l*) *Turpin* v. *Chambers*, 29 Beav. 104; 30 L.J. Ch. 470.

(*m*) *Duddell* v. *Simpson*, L.R. 2 Ch. 102; 36 L.J. Ch. 70.

ling the contract (*n*). A condition that if the purchaser should "make any objection to or requisition on the title," which the vendors should be "unable or unwilling to remove or comply with," the vendors might annul the contract, was held to exonerate the vendors from stating their reasons for rescinding the contract, and it was held that though the word "unwilling" ought to be interpreted "reasonably unwilling," yet in the absence of anything to show *mala fides* the Court ought not to infer that the vendors were acting unreasonably (*o*). If the purchaser intends to sue for the recovery of a deposit paid by him under the contract, and for general damages, by reason of the non-performance of the contract by the vendor at the time agreed upon, the purchaser should give the vendor notice of his intention, and allow the latter a reasonable time, from the date of the notice, to complete the contract (*p*). If there has been a general breach of contract by the vendor, independently of the question as to the time of performance, or the title to relief has been barred by notice, an action is maintainable for the recovery of the deposit, with interest, when the deposit has been paid into the hands of the vendor himself. If the vendor has no title to the property agreed to be sold, or if he has a naked legal title, or an equitable interest only, the deposit is recoverable (*q*), unless there is an express agreement to the contrary (*r*); and so it is if the estate is shown to be subject to an equitable incumbrance (*s*). The purchaser, in these cases, is entitled to recover the costs and expenses incurred by him in investigating the title (*t*); also the costs of preparing and tendering a conveyance where that has been done; and, where the vendor has acted with bad faith, and wilfully refused to fulfil his contract, damages for the loss of his bargain. It will be no defence to the action that the vendor has a title at the time of the trial, or after the commencement of the action (*u*). Where a purchaser paid a deposit on a contract for the purchase of a lease of a house, and afterwards discovered that the house was comprised with another in an original lease, under which the lessor had a right to re-enter for breach of covenants in respect of either house, it was held that the purchaser might rescind the contract and sue for his deposit and expenses (*x*).

(*n*) *Duddell* v. *Simpson*, *ante*, p. 469. See *Dames' Contract*, *In re*, 39 Ch.D. 626; 54 L.J. Ch. 771; *Spindler's Contract*, *In re*, (1901) 1 Ch. 908; 70 L.J. Ch. 420.

(*o*) *Starr-Bowkett Building Society*, *In re*, 42 Ch. D. 377; 58 L.J. Ch. 651; *Woolcott* v. *Peggie*, 15 App.Cas. 42; 59 L.J. P.C. 44.

(*p*) *Parkin* v. *Thorold*, 16 Beav. 59; 22 L.J. Ch. 175; *King* v. *Wilson*, 6 Beav. 124, 126.

(*q*) *Maberly* v. *Robins*, 1 Marsh, 258; 5 Taunt. 625; *Cane* v. *Baldwin*, 1 Stark. 65; *Roper* v. *Coombes*, 6 B. & C. 534; 5 L.J. (O.S.) K.B. 223.

(*r*) *Ashworth* v. *Mounsey*, 23 L.J. Ex. 73; 9 Exch. 175.

(*s*) *Elliot* v. *Edwards*, 3 Bos. & P. 181.

(*t*) *Richardson* v. *Chasen*, 16 L.J. Q.B. 341; 10 Q.B. 756.

(*u*) *Cornish* v. *Rowley*, 1 Selw. N.P. 219 (ed. 13).

(*x*) *Blake* v. *Phinn*, 3 C.B. 976; 16 L.J. C.P. 159.

In order to entitle himself to maintain an action against the vendor for the damages resulting from the non-execution of the conveyance, the purchaser must prove a tender of a conveyance to the vendor for execution, and his own readiness and willingness to pay the purchase-money, unless the vendor has incapacitated himself from executing a conveyance by selling the estate to another, and has thus discharged the purchaser from his obligation (*y*). But it is not necessary for the purchaser to prepare and tender a conveyance, in order to entitle himself to maintain an action for the recovery of his deposit, and the expenses of investigating the title (*z*). If the vendor's failure to make out a good title arises from circumstances over which he has no control, and is not the result of fraud or *mala fides* on his part, the purchaser will not be entitled to recover damages in respect of the presumed or fancied value of his bargain; but, if the vendor's conduct has been fraudulent, the case is otherwise. If the title has been made out and accepted by the purchaser, and the latter has then re-sold to a second purchaser, and the original vendor refuses to execute a conveyance on being tendered the purchase-money, the purchaser will be entitled, on tendering a conveyance, to recover the profit realised on the re-sale, and all the costs and expenses attending it, in addition to his costs of investigating the title. If the purchaser sues the vendor, upon the contract, for the recovery of his deposit as part of the damages resulting from the vendor's neglect to complete the sale, he will be entitled to recover interest upon his deposit (*a*); and he may also, in certain cases, recover interest upon the purchase-money, if it has been lying idle, awaiting the vendor's acceptance (*b*). But, if it should turn out that the contract was not binding upon the vendor by reason of its not being properly authenticated by writing, or if the contract has been abandoned or rescinded by mutual consent, interest on the deposit cannot be recovered, nor any of the costs and expenses incurred in the investigation of the title (*c*). It is frequently stipulated in contracts for the sale and purchase of estates that, if either party shall neglect to fulfil his part of the contract, he shall pay to the other a fixed, ascertained sum of money, as the liquidated and agreed damages. The amount so agreed to be paid may, as we have already seen, under certain circumstances and with certain qualifications, be recovered by action (*d*). And,

(*y*) *Knight* v. *Crockford*, 1 Esp. 193.
(*z*) *Lowndes* v. *Bray*, Sugd. V. & P. 364 (ed. 14).
(*a*) *Weston* v. *Savage*, 10 Ch.D. 736; 48 L.J. Ch. 239.
(*b*) *Farquhar* v. *Farley*, 7 Taunt. 592; 1 Moore, 322; *Hodges* v. *Litchfield* (*Earl*), 1 Sc. 443; 1 Bing. N.C. 492; *Gardom* v. *Lee*, 34 L.J. Ex. 113; 3 H. & C. 651.
(*c*) *Walker* v. *Constable*, 1 Bos. & P. 306; *Goshell* v. *Archer*, 2 Ad. & E. 500; 4 L.J. K.B. 78; *Casson* v. *Roberts*, 32 L.J. Ch. 105; 31 Beav. 613.
(*d*) *Ante*, p. 264.

where the vendor is in default, the purchaser will generally be held to be entitled to a lien on the estate for his deposit and interest (*e*).

Non-performance by the purchaser—Forfeiture of deposit.—In case of the non-performance of the contract by the purchaser, the deposit is forfeited (*f*), but, to entitle the vendor to retain the deposit, he must show that he has faithfully fulfilled his own part of the contract, and has not done anything amounting to a waiver of his right to take advantage of the forfeiture. If he has himself prevented the purchaser from fulfilling the contract at the time appointed, or has himself asked for delay, or has induced the purchaser to incur the forfeiture by fraudulent statements, he will not be permitted to take advantage of such forfeiture (*g*). Where it was stipulated by the contract that objections to the title not made within twenty-one days should be considered as waived, and the deposit forfeited, and the vendor at liberty to re-sell in case of the non-completion of the purchase by the purchaser, and the vendor's solicitor received the objections long after the twenty-one days, and entered into a written correspondence respecting them, it was held that the vendor had waived his right to insist on the forfeiture of the deposit and to re-sell the estate (*h*). The personal representative of the purchaser, and not his heir, is the proper party to be made plaintiff in an action brought for the recovery of the deposit (*i*). A purchaser who is entitled to a return of his deposit cannot be compelled to take the stock in which it may have been invested, unless the investment was made with his assent or under the authority of the court. His assent to the investment cannot be inferred from the fact of notice having been given him thereof, and no reply having been made to such notice (*k*). A stipulation for the forfeiture of the deposit, in case of the non-completion of the contract by the purchaser, does not preclude the vendor from suing the purchaser for the recovery of the general damages resulting from the breach of contract; but, if the deposit has been paid to the vendor and forfeited, it must be treated as so much money paid to the vendor on account of such damages (*l*); unless it was clearly the intention of the parties that the purchaser,

(*e*) *Rose* v. *Watson*, 33 L.J. Ch. 385; 10 H.L.C. 672; *Whitbread* v. *Watt*, (1902) 1 Ch. 835; 71 L.J. Ch. 424.

(*f*) *Barrell, Ex parte*, L.R. 10 Ch. 512; 44 L.J. Bankr. 138; *Howe* v. *Smith*, 27 Ch.D. 89; 53 L.J. Ch. 1055; *Soper* v. *Arnold*, 14 App.Cas. 429; 59 L.J. Ch. 214; *Smith* v. *Butler*, (1900) 1 Q.B. 694; 69 L.J. Q.B. 521.

(*g*) *Carpenter* v. *Blandford*, 8 B. & C. 575; 7 L.J. (O.S.) K.B. 58.

(*h*) *Cutts* v. *Thodey*, 13 Sim. 206.

(*i*) *Orme* v. *Broughton*, 4 Moo. & Sc. 417; 10 Bing. 533.

(*k*) *Roberts* v. *Massey*, 13 Ves. 561.

(*l*) *Ockenden* v. *Henly*, E. B. & E. 485; 27 L.J. Q.B. 361; as to when the forfeit of the deposit can be treated as liquidated damages, see *Lea* v. *Whitaker*, L.R. 8 C.P. 70.

if in default, should pay the damages as well as forfeit the deposit (*m*).

Deposits in hands of auctioneers and third parties.—When a deposit has been paid into the hands of an auctioneer, solicitor, or any third party, the latter stands in the position of a stakeholder, and is responsible for the payment of the amount to the vendor in case of the completion of the contract, and also for the return of it to the purchaser in case of the abandonment of the contract, or the neglect of the vendor to complete his part of it. The depositary, therefore, should not part with the deposit until the sale has been abandoned, or until it has been duly completed, and it appears by the result to whom the deposit properly belongs (*n*). If he pays it over to the vendor, and the title turns out to be defective, he will be bound to make good the amount to the purchaser (*o*), unless it appears to have been the intention of the parties that the amount should be paid over to the vendor, and it has accordingly been done (*p*); as, for instance, where the deposit is to be paid to the vendor's solicitor "as agent for the vendor," in which case the solicitor is not a stakeholder, but must pay the deposit to the vendor on demand (*q*). If the auctioneer makes away with the deposit, and becomes bankrupt, the loss will in general fall upon the vendor, who appoints him, and constitutes him his agent for the keeping of the money (*r*). No notice need be given to the auctioneer of the abandonment of the contract, or of the default made by the vendor, prior to the commencement of the action against him for the recovery of the deposit (*s*). When the action for the return of the deposit is brought against the auctioneer, interest thereon is not recoverable by the purchaser, although the money has been placed in the funds and interest has been made (*t*). But it is otherwise, as we have already seen, when the deposit has been paid to the vendor, and the action for its recovery is brought against him (*ante*, p. 470).

Rights of the vendor.—Before the vendor can maintain an action for the recovery of damages by reason of the neglect of the purchaser to tender and accept a conveyance of the estate and pay the purchase-money, he must produce a good title to the estate agreed to be sold, and it must appear that he was ready and willing to

(*m*) *Essex* v. *Daniell*, L.R. 10 C.P. 538.
(*n*) *Post*, p. 783.
(*o*) *Gray* v. *Gutteridge*, 1 M. & R. 614.
(*p*) *Hurley* v. *Baker*, 16 M. & W. 26; 16 L.J. Ex. 273.
(*q*) *Edgell* v. *Day*, L.R. 1 C.P. 80; 35 L.J. C.P. 7; *Ellis* v. *Goulton*, (1893) 1 Q.B. 350; 62 L.J. Q.B. 232.
(*r*) *Annesley* v. *Muggeridge*, 1 Mad. 593; *Smith* v. *Jackson*, 1 Mad. 618.
(*s*) *Duncan* v. *Cafe*, 2 M. & W. 244; 6 L.J. Ex. 81.
(*t*) *Harington* v. *Hoggart*, 1 B. & Ad. 577; 9 L.J. (O.S.) K.B. 14; *Curling* v. *Shuttleworth*, 6 Bing. 121; 8 L.J. (O.S.) C.P. 113; *Gaby* v. *Driver*, 2 Y. & J. 549.

execute a conveyance thereof to the purchaser, on receiving payment of the purchase-money (*u*). But, if he can prove this, he is entitled, as we shall presently see, to recover all the damages he has sustained by the breach of contract, and all the costs and expenses he has incurred. Before he brings an action to recover such damages by reason of the non-payment of the purchase-money at the time appointed, he should give notice to the purchaser, and require the latter to pay the money within a reasonable time. If the purchaser takes possession of the estate, and receives the rents and profits, he will, in general, be compelled to pay interest on the purchase-money from the time that he became possessed of the property. If he neglects to fulfil his part of the contract at the time appointed, or within a reasonable period after request if no time was appointed, the vendor will be entitled, after a reasonable notice, to re-sell the estate and sue for damages. If a second purchaser has taken a conveyance and paid his purchase-money without notice of a prior sale, he has equal equity with the first purchaser; and, having clothed himself with the legal estate, he comes within the rule that, where parties have equal equity, he who has the legal title shall prevail. But, if such second purchaser had notice of the first contract, the court will, if the first purchaser's right to a specific performance has not been barred, compel such second purchaser to convey the estate to the first purchaser. To obviate objections to a re-sale, it has been usual to insert in agreements for the sale of realty a stipulation to the effect that, if the purchaser shall fail to complete the purchase and pay the price at the time appointed, the agreement shall be utterly void, and the vendor be at liberty to re-sell the estate, and that the deficiency, if any, by such re-sale, together with the costs and charges attending the same, shall be made good by the defaulter (*x*). This stipulation, and also a vendor's notice of re-sale, may be waived, and the right to take advantage of it lost, if objections to title made by the purchaser have been considered by the vendor or his solicitor subsequently to the time fixed for the re-sale, and if it be shown, through the medium of written evidence, that the vendor, after such time of re-sale had elapsed, still continued to deal with the purchaser as a purchaser, and still continued to treat the contract as a subsisting contract (*y*). When the vendor has re-sold and conveyed the property under these circumstances, he will be considered as selling it for the benefit of the original purchaser, for

(*u*) *Martin* v. *Smith*, 6 East, 555; *Hallewell* v. *Morrell*, 1 M. & Gr. 367; *Poole* v. *Hill*, 6 M. & W. 835; 10 L.J. Ex. 81; *Phillips* v. *Fielding*, 2 H. Bl. 132.

(*x*) *Hunter, Ex parte*, 6 Ves. 94.

(*y*) *Cutts* v. *Thodey*, 13 Sim. 206; 1 Col. 223.

whom, by the first agreement, he became trustee, and he will be compelled to account to him for the purchase-money (*z*).

Damages from breach of contract for sale of realty—Non-performance by purchaser.—If an estate agreed to be sold has been actually conveyed by the vendor to the purchaser, and has become the property of the latter, and the vendor sues for the non-payment of the purchase-money, the measure of damages is the price agreed to be paid, with interest; but, if no conveyance has been executed, and the estate still remains the property of the vendor, the measure of damages is the difference between the price agreed to be paid and the marketable value of the property; for the vendor cannot have both the estate and the purchase-money (*a*). So long as the right of property in the thing agreed to be sold has not passed to the purchaser, the vendor is entitled (*ante*, p. 474), in case of the non-completion of the contract by the purchaser, to re-sell it; and, if the re-sale has taken place within a reasonable period from the breach of contract, the difference between the price realised on the re-sale and that agreed to be paid by the purchaser will be the measure of damages which the vendor will be entitled to recover in addition to the costs and expenses of the re-sale. If the vendor does not re-sell the estate, but elects to keep it in his own hands, he will then be entitled to recover the difference between the agreed price and the presumed marketable value of the property, together with his costs and expenses. Amongst these charges may be included the expense of making out the title; for, although the expense is, by custom, defrayed by the vendor, yet that is done upon the understanding that the contract will be duly fulfilled by the purchaser. In many cases of sales of realty there will be no difference between the contract price and the marketable value of the property; and in such cases, if the vendor elects to keep the property in his own hands, he will be entitled to recover nominal damages only in respect of the loss of the purchase, in addition to the costs he has incurred in completing his part of the contract.

Damages for non-performance by vendor.—If a person enters into a contract for the sale of real estate, whether under the belief that he has a good title, or knowing that he has no title, nor any means of acquiring one, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract: he can only obtain other damages by an action for deceit when there is fraud (*b*). But where the vendor has a part-

(*z*) *Daniels* v. *Davison*, 16 Ves. 255.

(*a*) *Laird* v. *Pim*, 7 M. & W. 478; 10 L.J. Ex. 259.

(*b*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, L.R. 7 H.L. 158; 43 L.J. Ex. 243, overruling *Hopkins* v.

interest, he may be decreed to perform specifically so much of the contract as he has power to perform (*c*). The rule does not apply to the case of a vendor who can make a good title, but will not; so where the vendor of leaseholds did not do his best to procure the lessor's licence, and such licence was necessary, the purchaser was entitled to damages (*d*); so also when the vendor had not used reasonable diligence to perform his contract (*e*). Expenses incurred in getting a survey made of the estate, or plans prepared before the contract was actually entered into, cannot be recovered by the purchaser, nor can the expense of a conveyance prepared before the title has been approved of, and before it is known whether objections raised to the title can be answered by the vendor (*f*). And, if there has been no written contract of sale binding on the vendor, but the matter rests merely upon an oral agreement rendered invalid by the Statute of Frauds, the purchaser has no means of recovering the expenses incurred by him in investigating the title. He may, however, recover the deposit and auction duty, as money paid upon a consideration that has failed (*g*).

In the case of the non-performance of an agreement for the sale of an estate, damages for non-performance are not given in addition to specific performance, except where special damage has occurred from the delay (*h*). But where a purchaser lost rent, which he would otherwise have obtained, he was allowed the same as compensation as well as damages for the deterioration of the property (*i*).

Specific performance.—As the estate agreed to be sold vests in equity in the purchaser from the time of the signing of the agreement, the court will, in all ordinary cases, decree a specific performance by the vendor of all such acts as are necessary to be done by him to transfer the legal estate to the purchaser, and clothe the latter with the legal as well as the equitable ownership of the property, and thus carry the contract into complete effect. If the vendor has no title, a specific performance cannot be decreed, as he cannot be compelled to convey an estate which he has not got (*k*).

Grazebrook, 6 B. & C. 31; 5 L.J. (O.S.) K.B. 65, and other cases following that decision; see also *Gray* v. *Fowler*, L.R. 8 Ex. 249; 42 L.J. Ex. 61; *Gas Light Co.* v. *Towse*, 35 Ch.D. 519; 56 L.J. Ch. 889.

(*c*) *Burrow* v. *Scammell*, 19 Ch.D. 175; 51 L.J. Ch. 296.

(*d*) *Day* v. *Singleton*, (1899) 2 Ch. 320; 68 L.J. Ch. 593.

(*e*) *Jones* v. *Gardiner*, (1902) 1 Ch. 191; 71 L.J. Ch. 93.

(*f*) *Hodges* v. *Litchfield* (*Earl*), 1 Sc. 443; 1 Bing. N.C. 492. As to expenses of producing documents, &c., not in vendor's possession, see 44 & 45 Vict. c. 41, s. 3 (6).

(*g*) *Gosbell* v. *Archer*, 2 Ad. & E. 500; 4 L.J. K.B. 78.

(*h*) *Chinnock* v. *Ely*, 34 L.J. Ch. 399; 2 H. & M. 221; *Rudd* v. *Lascelles*, (1900) 1 Ch. 815; 69 L.J. Ch. 396. Also in the case of a sale of a right of way: *Rowe* v. *London School Board*, 36 Ch.D. 619; 57 L.J. Ch. 179.

(*i*) *Royal Bristol Building Society* v. *Bomath*, 35 Ch.D. 390; 56 L.J. Ch. 840.

(*k*) *Nicloson* v. *Wordsworth*, 2 Swanst. 369.

If, therefore, he has signed an agreement for the sale of property under the impression that he was seised in fee, and it subsequently appears that he has only a life estate, or only a moiety of the property, a specific performance of the contract cannot be decreed; but the purchaser may, if he pleases, have a decree for the conveyance of the life estate or of the moiety with compensation by way of reduction of the amount of the purchase-money (*l*). If the remainder, after the determination of the vendor's life interest, is vested in his wife for life, with remainder to his son in fee, the court will not compel him to use his marital and parental authority to induce the wife and son to part with their interests in the property (*m*). The court will not compel a purchaser to take a doubtful title; and a title is regarded as doubtful where there has been a decision adverse to it or the principle upon which it depends, or in favour of it, which the court is of opinion is wrong, or where there is a known difficulty in the title, or when the validity of the title depends upon a fact or facts, of the exact accuracy of which the court has no means of judging (*n*).

A contract established through the medium of letters may be enforced in specie; but it must appear to be a complete and concluded contract (*o*); and it must be sufficiently certain (*p*). The courts grant the decree only in those cases where there is a mutuality of obligation, and where the remedy is mutual. If, therefore, an infant signs a contract for the purchase of an estate, the court will not decree specific performance in his favour, because he is not himself bound by the contract, by reason of his infancy (*q*). Specific performance will not be decreed in favour of a person who has been guilty of an unreasonable delay in fulfilling his part of the engagement, or who has slept for a lengthened period over his rights, and comes forward at last, when circumstances have changed in his favour, to enforce a stale demand (*r*). If the contract of sale provides that immediate possession shall be given to the purchaser, and possession is accordingly taken by him, and the vendor afterwards evicts him, the latter forfeits his right to a specific performance (*s*). If there is a mistake between the parties as to what was sold, or as

(*l*) *Barnes* v. *Wood*, L.R. 8 Eq. 424; 38 L.J. Ch. 683; *Hooper* v. *Smart*, L.R. 18 Eq. 683; 43 L.J. Ch. 704; *Horrocks* v. *Rigby*, 9 Ch.D. 180; 47 L.J. Ch. 800.

(*m*) *Howel* v. *George*, 1 Mad. 6; *Castle* v. *Wilkinson*, L.R. 5 Ch. 534; 39 L.J. Ch. 843.

(*n*) *Mullings* v. *Trinder*, L.R. 10 Eq. 449; 39 L.J. Ch. 883.

(*o*) *Huddlestone* v. *Briscoe*, 11 Ves. 591; *Stratford* v. *Bosworth*, 2 Ves. & B. 341; *Cowley* v. *Watts*, 22 L.J. Ch. 591; 17 Jur. 172; *ante*, pp. 14, 15.

(*p*) *Rummens* v. *Robins*, 3 De G. J. & S. 88; *Dear* v. *Verity*, 38 L.J. Ch. 297, 486.

(*q*) *Flight* v. *Bolland*, 4 Russ. 298, 301; *Hills* v. *Croll*, 14 L.J. Ch. 444; 2 Ph. 62, n. (*b*).

(*r*) *Lloyd* v. *Collett*, 4 Bro. C.C. 469; *Alley* v. *Deschamps*, 13 Ves. 225; *Southcomb* v. *Exeter* (*Bishop*), 6 Hare, 213; 16 L.J. Ch. 378; *Colby* v. *Gadsden*, 34 Beav. 416; *Moore* v. *Marrable*, L.R. 1 Ch. 217.

(*s*) *Knatchbull* v. *Grueber*, 3 Mer. 124.

to the quantity sold, or the price, the court will not in general interfere in favour of either of them (*t*). If there has been surprise on third parties at a sale by auction, and they have been deterred from bidding, or if the purchaser has made false statements which have kept persons away from the sale, the decree will not be granted in his favour (*u*); nor will it be granted in any case where there has been misrepresentation, fraud, or deceit, or the plaintiff does not appear before the court with "clean hands" (*x*); nor where the conditions of sale have been misleading (*y*); nor where there has been a misapprehension by the defendant to which the plaintiff has by his acts, even unintentionally, contributed (*z*), nor where a person has been induced to sign an agreement whilst he was in a state of complete intoxication (*a*); but, if the defendant was only a little drunk and knew what he was about, and there was no fraud, the decree will be made (*b*). If a person knowingly contracts for the sale of an estate without a title, and the owner offers to make the seller a title, yet the court will not force the buyer to take it: for every seller ought to be a *bonâ fide* contractor (*c*); but, if the vendor has contracted *bonâ fide* in ignorance of the defect of title, and procures a good title within a reasonable time, and then calls upon the purchaser to complete his contract, and the latter refuses, a decree for specific performance will be granted against the purchaser (*d*). Extravagance, or inadequacy of price, form no ground, in general, for refusing the specific performance of a contract, unless "it is such as shocks the conscience and amounts in itself to conclusive evidence of fraud in the transaction" (*e*). But an exception is made in favour of heirs dealing with their expectancies, and in the case of sales of reversions by them, which are generally discountenanced (*f*).

Specific performance will also be decreed in favour of a prin-

(*t*) *Clowes* v. *Higginson*, 1 Ves. & B. 524; *Neap* v. *Abbott*, Coop. Ch. Pr. 333; *Durham (Earl)* v. *Legard*, 34 L.J. Ch. 589; 34 Beav. 611; *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L.J. Ch. 652; *Day* v. *Wells*, 30 Beav. 220; *Tamplin* v. *James*, 15 Ch.D. 215; *Van Praagh* v. *Everidge*, (1902) 2 Ch. 266; 71 L.J. Ch. 266; see *ante*, p. 121.

(*u*) *Twining* v. *Morrice*, 2 Bro. C.C. 330; *Mortlock* v. *Buller*, 10 Ves. 305.

(*x*) *Cadman* v. *Horner*, 18 Ves. 10; *Clermont* v. *Tasburgh*, 1 Jac. & Walk. 120; *Phillips* v. *Bucks (Duke)*, 1 Vern. 227.

(*y*) *Heywood* v. *Mallalieu*, 25 Ch.D. 357; 53 L.J. Ch. 492; *Nottingham Brick Co.* v. *Butler*, 16 Q.B.D. 778; 55 L.J. Q.B. 280.

(*z*) *Baskcomb* v. *Beckwith*, L.R. 8 Eq. 100; 38 L.J. Ch. 586.

(*a*) *Cooke* v. *Clayworth*, 18 Ves. 12; *Say* v. *Barwick*, 1 Ves. & B. 195.

(*b*) *Lightfoot* v. *Heron*, 3 You. & C. 590.

(*c*) *Tendring* v. *Loudon*, 2 Eq. Cas. Abr. 680.

(*d*) *Boehm* v. *Wood*, 1 Jac. & Walk. 421; *Chamberlain* v. *Lee*, 10 Sim. 444; 8 L.J. Ch. 266; *Eyston* v. *Simonds*, 1 You. & C. C.C. 608.

(*e*) *Coles* v. *Trecothick*, 9 Ves. 246; but see *Baker* v. *Monk*, 33 Beav. 419.

(*f*) Sugd. V. & P. 276—287 (ed. 14); see, however, 31 Vict. c. 4, s. 2, by which no purchase, &c., made *bonâ fide*, without fraud or unfair dealing, of any reversionary interest in real or personal estate, is to be opened or set aside merely on the ground of undervalue.

cipal who purchased through the medium of an agent, although the agency was not known or disclosed until after the contract had been signed, unless there was some fraud or misrepresentation in the matter (*g*).

If the price to be paid for an estate is to be fixed by a third party, there can, of course, be no action for damages, or decree for specific performance, until the price is fixed (*h*). Neither party can be compelled to appoint an arbitrator to name the price (*i*); and if an arbitrator is actually appointed, the death of either party before award made will revoke the submission (*j*), unless there be mutual covenants between the parties for themselves and their heirs, executors, and administrators, for the conveyance of the estate and payment of the money to be awarded to the vendor (*k*). When the person who is to make the valuation is named in the agreement for the sale, the court will compel the vendor to permit the valuation to be made according to the contract (*l*). If a party, having power to revoke the authority given to the arbitrator to name a price, exercises his power contrary to good faith, the court will not give him any aid in furtherance of his misconduct (*m*). A revocation of the submission after it has been made a rule of court is a contempt (*n*). If an action is brought for specific performance, and a valid contract of sale is clearly established, the court will grant an injunction to prevent either of the parties from doing any act which may be injurious to the estate, such as cutting down timber, removing boundaries, pulling down buildings and walls, presenting to a living, &c. (*o*); and the vendor will, in general, be restrained from re-selling the estate and executing a conveyance of the legal estate in the property to a third person (*p*). But, if the validity of the contract is brought into doubt, or there is good reason for thinking that a final agreement had not been entered into, the court will decline to interfere by way of injunction.

Sales by trustees will not be enforced by the court, if they are improvident sales. "If the trustee has been negligent, not taking that care to preserve the interest of his *cestui que trust* which he ought to have done, it will not permit the party dealing with him to take advantage of that negligence;" for the court will not

(*g*) *Hall* v. *Warren*, 9 Ves. 605.

(*h*) *Wilks* v. *Davis*, 3 Mer. 507; *Vickers* v. *Vickers*, L.R. 4 Eq. 529: 36 L.J. Ch. 946.

(*i*) *Agar* v. *Macklew*, 2 Sim. & St. 418; 4 L.J. (O.S.) Ch. 16.

(*j*) *Blundell* v. *Brettargh*, 17 Ves. 232.

(*k*) *Belchier* v. *Reynolds*, 2 Ken. Ch.C. part 2, 87.

(*l*) *Morse* v. *Merest*, Mad. & Geld. 26; *Smith* v. *Peters*, L.R. 20 Eq. 511; 44 L.J. Ch. 613.

(*m*) *Pope* v. *Duncannon* (*Lord*), 9 Sim. 177, 179.

(*n*) *Harcourt* v. *Ramsbottom*, 1 Jac. & W. 511. See now Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 1.

(*o*) *Crockford* v. *Alexander*, 15 Ves. 138; *Nicholson* v. *Knapp*, 9 Sim. 326; 7 L.J. Ch. 219.

(*p*) *Echliff* v. *Baldwin*, 16 Ves. 267.

enforce any contract involving a breach of trust (*q*). If trustees are empowered to sell at the request of a tenant for life, the trustees have a discretion which the court has no power to control; and they cannot, consequently, be compelled to give effect to a contract entered into by the tenant for life, without their concurrence, for the sale of the estate (*r*). If trustees, acting in the exercise of a power of sale, make an agreement for the sale of an estate, the contract binds the estate; and though, by subsequent events, it cannot be executed under the power, yet it will be decreed to be specifically performed by those who have acquired the interest in the estate (*s*). If an agent, authorised to sell by public auction, sells by private contract, a specific performance will not be decreed against the principal, although the estate was sold for a greater price than he required for it (*t*). An agreement by one of two joint tenants to sell his share of the joint estate amounts to a severance of the joint tenancy; and a specific performance of the contract will be decreed as against the survivor (*u*).

If, after making a contract of sale, the vendor has re-sold the estate and executed a conveyance to the second purchaser, and the latter has bought and accepted the conveyance, and paid the purchase-money, in ignorance of the first contract of sale, a specific performance of such first contract will not be decreed. But, if the second purchaser has bought with notice of the first sale, the first purchaser is entitled to a decree for a specific performance against the vendor and the second purchaser, the latter being considered to take subject to the equity of the first purchaser to have the premises conveyed to him at the price originally agreed upon (*v*). If the vendor re-sells, without having any right in equity so to do, he will be considered as a trustee for the purchaser, re-selling the estate for the benefit of the latter, and will be compelled to account to him for the purchase-money (*x*). If the vendor is seised in fee or *pur autre vie*, and dies before a conveyance is executed, his heir-at-law will be decreed to perform the agreement *in specie*, and will be compelled to execute a conveyance of the estate (*y*), although the purchase-money is not payable to him but to the personal representatives of the vendor. If the latter is only tenant in tail, his agreement to sell cannot be enforced in equity against the issue in tail, although he may have entered into the strongest covenants to that effect, and although a decree of specific performance may have been obtained against him in his lifetime, and he may have

(*q*) *Ord* v. *Noel*, 5 Mad. 440; *Thompson* v. *Blackstone*, 6 Beav. 470, 472.
(*r*) *Thomas* v. *Dering*, 1 Keen, 729; 6 L.J. Ch. 267.
(*s*) *Mortlock* v. *Buller*, 10 Ves. 315.
(*t*) *Daniel* v. *Adams*, Ambl. 495.
(*u*) *Brown* v. *Raindle*, 3 Ves. 257.
(*v*) *Daniels* v. *Davison*, 17 Ves. 433.
(*x*) *Daniels* v. *Davison*, 16 Ves. 255.
(*y*) *Gell* v. *Vermedum*, 2 Freem. 199.

died in contempt and in prison for not obeying the decree, and although he may have received part or even the whole of the purchase-money (*z*); for the issue in tail claim *per formam doni* from the creator of the estate tail, and not from the tenant in tail himself; and the court cannot take away their rights by title paramount. But, if the entail is barred by the vendor in his lifetime, and his estate is thus converted into a fee, then, as there are no issue in tail, a specific performance will be decreed as against his heir-at-law. By 3 & 4 Will. 4, c. 74, it is provided (s. 47) that, in cases of dispositions of lands by tenants in tail under that Act, the jurisdiction of courts of equity shall be altogether excluded in regard to specific performance and the supplying of defects in the execution of the powers of disposition given to tenants in tail by the Act, and that no disposition thereof by a tenant in tail in equity shall be of any force, unless such disposition would at law be an effectual disposition under the Act. This provision, therefore, prevents the court from treating a contract or covenant to bar an estate tail as an actual bar of the estate, and prohibits a decree for the specific performance of any such contract as against the issue in tail; yet it does not prohibit the exercise of the old power of enforcing a specific performance of a contract against the tenant in tail himself. By 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule (15), the court itself may execute the decree against a tenant in tail in custody for a contempt (*a*).

Payment of purchase-money into court.—In certain cases, where an action has been brought for a specific performance, and the purchaser has been let into possession of the property, the purchase-money will be ordered to be paid into court. This has been done where an unexpected delay occurred in making out the title, and the purchaser insisted on his right to retain possession and receive the profits of the land during the delay (*b*)—where the purchaser became insolvent, and attempted to re-sell the estate (*c*)—where the purchaser, after being let into possession, dealt improperly with the land, cut down timber and underwood, and opened and worked mines (*d*)—where the title was accepted, and the purchaser made frivolous objections, still keeping possession of the property. In some cases where a purchaser retains possession, and unexpected delay has occurred in the completion of the title, an occupation rent has been decreed by the court, after deducting interest on the

(*z*) *Fox* v. *Crane*, 2 Vern. 306; *Frank* v. *Mainwaring*, 2 Beav. 115, 126; 3 & 4 Will. 4, c. 74, s. 47.

(*a*) Sugd. V. & P. 205 (14th ed.).

(*b*) *Gibson* v. *Clarke*, 1 Ves. & B. 500. See *Greenwood* v. *Turner*, (1891) 2 Ch. 144; 60 L.J. Ch. 351.

(*c*) *Hall* v. *Jenkinson*, 2 Ves. & B. 125.

(*d*) *Cutler* v. *Simons*, 2 Mer. 103; *Buck* v. *Lodge*, 18 Ves. 450; *Pope* v. *G. E. Ry.*, 36 L.J. Ch. 60; 3 L.J. Eq. 171; but see *Robertshaw* v. *Bray*, 35 L.J. Ch. 844.

deposit (*e*); in others a receiver has been appointed (*f*); and in others the purchaser has been ordered to give up possession or pay the purchase-money into court (*g*).

Assignment of contract to purchase land.—A vendor of land may receive the balance of the purchase-money, and convey the estate to the purchaser without regard to the receipt of a notice that the purchaser has agreed to assign the contract; for the vendor is not bound to see that the purchaser carries out his agreement with the sub-vendee; but it would be otherwise if the vendor had notice that the contract had been actually assigned, and that the sub-vendee insisted on its being completed with him instead of with the purchaser (*h*).

Invalid sales—Want of title in vendor—Eviction of purchaser.—We have already seen that, whilst a contract of sale remains executory, and before a transfer or conveyance under seal has been executed, a purchaser is entitled to recover any deposit he may have paid, if it turns out that the vendor is unable from want of title to transfer the estate or interest he has agreed to sell (*ante*, p. 476); and, if the whole purchase-money has been paid in advance, the whole is recoverable. Thus, where a contract, for the sale and purchase of the residue of a term of 1,900 years was entered into, and a deed of assignment of the lease prepared and executed by some of the vendors, and the purchase-money paid and possession given, but, before the deed had been completely executed, it was discovered that the vendors had no title to the lease, and the purchaser was evicted, it was held that he was entitled to recover the purchase-money, as the vendors had never transferred to him that which they had agreed to sell, and he to buy (*i*). But if, after a deed of conveyance has been executed, and the purchase-money paid, it appears that the vendor had no title, and the purchaser is evicted, the latter cannot recover back the purchase-money, or obtain compensation for the damages he has sustained, if the ordinary covenants for title are not inserted in the deed, and it does not appear upon the face of the conveyance that any particular estate or interest in the land was bargained for, and covenanted or agreed to be sold. For the purchaser might have protected himself by proper covenants for title; and, if he has neglected to do so, he will be deemed to have been content to take such estate or interest in the land as the vendor actually possessed; and, having got that, he has got all he bargained for (*k*).

(*e*) *Smith* v. *Jackson*, 1 Mad. 618.
(*f*) *Hall* v. *Jenkinson*, 2 Ves. & B. 125.
(*g*) *Curling* v. *Austin*, 2 Dr. & Sm. 129.
(*h*) *Shaw* v. *Foster*, L.R. 5 H.L. 321; 42 L.J. Ch. 49.
(*i*) *Johnson* v. *Johnson*, 3 Bos. & P. 162; *Farrer* v. *Nightingal*, 2 Esp. 639; *Cripps* v. *Reade*, 6 T.R. 666.
(*k*) *Bree* v. *Holbech*, 2 Doug. 655;

If he might, by a careful investigation of the title, have discovered that he was buying another man's property and not the estate of the vendor, he is concluded by his own laches, unless there has been actual fraud on the part of the vendor (*l*).

Qualified covenants for title.—With respect to conveyances made after 31st December, 1881, provisions are contained in the Conveyancing Act, 1881, whereby in most conveyances covenants relating to title, "right to convey," "quiet enjoyment," "freedom from incumbrance," "further assurance," "validity of lease," "payment of rent and performance of covenants," are to be implied in certain cases (*m*). If the vendor by the conveyance transfers the premises so far as he himself possesses them or can grant them, and covenants that, notwithstanding any act done by him, he hath in himself good right to grant and assure, &c., he limits his covenants for title to that which he actually has, or but for his own act would have had, to convey, and does not give a general and absolute warranty of title (*n*).

By the common law the words "give" or "grant" in a deed of feoffment, or any equivalent words passing the estate, raised an implied covenant on the part of the grantor to warrant, and defend, and secure to the grantee the estate or interest granted, which implied covenant was annexed to the estate and ran with the land (*ante*, p. 218), so that the right to take advantage of it passed to the heirs and assigns of the grantee, who might, in case of eviction by title paramount, sue the grantor upon the covenant. Now, however, by 8 & 9 Vict. c. 106, s. 4, it is enacted, "that the word 'give' or the word 'grant' in a deed shall not imply any covenant in law in respect of any tenements or hereditaments except so far as the word 'give' or the word 'grant' may, by force of any Act of Parliament, imply a covenant." Consequently, if the purchaser of an estate be evicted, he has no longer any remedy against the grantor upon any implied covenant for title or quiet enjoyment (*o*). But, if the deed of conveyance recites that the vendor is seised of an estate in fee, and that he has agreed to sell such an estate, this amounts to an express covenant that he

Johnson v. *Johnson*, *supra*; *Duke* v. *Barnett*, 2 Coll. C.C. 337; 15 L.J. Ch. 173; *Wakeman* v. *Rutland* (*Duchess*), 3 Ves. 235; *Browning* v. *Wright*, 2 Bos. & P. 13, 23; *Thackeray* v. *Wood*, 34 L.J. Q.B. 226; 6 B. & S. 766; *Goodtitle* v. *Morgan*, 1 T.R. 762; *Roswell* v. *Vaughan*, Cro. Jac. 197; *Chapman* v. *Speller*, 14 Q B. 624; 19 L.J. Q.B. 239; *Maynard* v. *Moseley*, 3 Swanst. 655; *Clare* v. *Lamb*, L.R. 10 C.P. 334; 44 L.J. C.P. 177.

(*l*) *Anon.*, 2 Ch.C. 19; *Maynard* v. *Moseley*, 3 Swanst. 655.

(*m*) 44 & 45 Vict. c. 41, s. 7; amongst other exceptions, this section does not apply to a demise by way of lease at a rent (5).

(*n*) *Thackeray* v. *Wood*, 34 L.J. Q.B. 226; 6 B. & S. 766; *David* v. *Sabin*, (1893) 1 Ch. 523; 62 L.J. Ch. 347.

(*o*) The word "grant" is no longer necessary, and the word "convey" will probably be used: 44 & 45 Vict. c. 41, s. 49; and see sect. 7 as to implied covenants for title, &c. by beneficial owners, &c.

is so seised, and has a right to convey such an estate to the purchaser (*p*); and, if he was not seised in fee, and no fee in the lands passed by the conveyance, he would be responsible in damages for a breach of covenant. Where a man had bought his own estate in ignorance of his title, and accepted a conveyance thereof, and paid the purchase-money, the vendor was compelled to repay the amount; "for, there being a plain mistake, the court cannot suffer the vendor to run away with the money in consideration of the sale of an estate to which he had no right" (*q*). The defendant contracted to buy of the plaintiff, under condition that one E. M. was seised in fee in 1841. He then contracted to sell to a sub-purchaser. It was discovered that the defendant, and not E. M., was seised in fee, subject to a leasehold interest in the plaintiff. It was held that, as both parties had been under a misapprehension, there was a common mistake, and the court would relieve (*r*). If a man, having nothing at all to sell, bargains as if he had, and thereby prevails on another party to become a purchaser and pay him money or give him a bond, that is what is called a fraud in equity, although the vendor might have thought at the time that he had something to sell (*s*).

If a vendor affirms that he is the owner of certain property, believing what he says to be true, and so induces another party to buy, an action for deceit will not lie against him, if the purchaser was furnished with the means of ascertaining for himself the truth or falseness of the representation (*t*). The mere assertion by a vendor that he has a good title, on the faith of which the purchaser relies without investigation, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract, where, at the time of making the representation, he was ignorant of the defect in his title (*u*). But, if the vendor knew at the time that his title was defective, and kept back the fact from the purchaser, this is a fraudulent concealment which avoids the contract *ab initio*, and entitles the purchaser to recover back his purchase-money (*x*); and in such a case the court will not allow him to force the title upon the purchaser, although in the conditions of sale he has employed general words large enough to include the defect (*y*). In every contract of sale there is an implied

(*p*) *Severn* v. *Clerk*, 1 Leon. 122; *Barfoot* v. *Freswell*, 3 Keb. 465.

(*q*) *Bingham* v. *Bingham*, 1 Ves. sen. 126.

(*r*) *Jones* v. *Clifford*, 3 Ch.D. 779; 45 L.J. Ch. 809.

(*s*) *Hitchcock* v. *Giddings*, 4 Pr. 141; *Taylor* v. *Caldwell*, 3 B. & S. 837; 33 L.J. Q.B. 164.

(*t*) *Roswell* v. *Vaughan*, Cro. Jac. 196.

(*u*) *Hume* v. *Pocock*, L.R. 1 Ch. 379; 35 L.J. Ch. 731.

(*x*) *Edwards* v. *M'Leay*, Coop. Ch. 313; 2 Swanst. 287; *Early* v. *Garrett*, 9 B. & C. 932; 8 L.J. (O.S.) K.B. 76.

(*y*) *Edwards* v. *Wickwar*, L.R. 1 Eq. 68; 35 L.J. Ch. 48.

undertaking or covenant, according as the contract may or may not be under seal, that the vendor does *not*, at the time he assumes to be the owner of the property and to have a right to sell it, *know* that he is not the owner and has no right to sell; and, if the knowledge of his want of title can be brought home to him, there is a direct breach of this implied undertaking or covenant, which will enable the purchaser to recover all the damages he has sustained (*z*). If an action is brought by a vendor to compel a specific performance by a purchaser of a contract of sale, and the purchaser pays the purchase-money without putting in an answer, and afterwards discovers that he was deceived by the vendor, he is not precluded from bringing an action against the latter and recovering damages, if he comes speedily after discovering the fraud (*a*).

Damages for breach of covenants for title.—If, after the purchase has been completed by the execution of the conveyance and payment of the purchase-money, it is discovered that the vendor had no title to the estate he professed to sell, and the purchaser is evicted, and brings his action for a breach of the ordinary covenants for title and quiet enjoyment, the measure of damages will be the amount of purchase-money paid for the estate, and all incidental damages flowing from the breach of contract, such as the costs and expenses of preparing the conveyance and investigating the title. If the breach has not been followed by any eviction of the purchaser, the latter should wait until the ultimate damage has been sustained by eviction; and he may then recover the whole amount of purchase-money paid, with interest, and his costs and expenses; but he cannot do this so long as he has not been disturbed in his possession and enjoyment of the property (*b*).

If, between the time of the execution of the conveyance and the period of eviction, the purchaser has expended money upon the land in drainage, buildings, and improvements, he will not be allowed to recover from the vendor the amount of capital so expended, unless the latter has been guilty of a fraud in the sale of the estate (*c*); neither could he by the common law recover the money so expended from the party who evicted him; he sustained, therefore, in general, a dead loss of the amount. But, in equity, if the land was known to have been purchased for the erection of

(*z*) *Peto* v. *Blades*, 5 Taunt. 657; *Furnis* v. *Leicester*, Cro. Jac. 474; *Crosse* v. *Gardner*, Carth. 90; *Harding* v. *Freeman*, Styles, 310; *Warner* v. *Tallerd*, 1 Roll. Abr. 94; *Mostyn* v. *West Mostyn Coal Co.*, 1 C.P.D. 145; 45 L.J. C.P. 401.

(*a*) *Jendwine* v. *Slade*, 2 Esp. 572.

(*b*) 2 Saund. 181, b; Shep. Touch. 170; *King* v. *Jones*, 5 Taunt. 428; *ante*, p. 474.

(*c*) Dallas, C.J., and Richardson, J., *Lewis* v. *Campbell*, 8 Taunt. 715; 3 B. & Ald. 392; *Worthington* v. *Warrington*, 8 C.B. 134; 18 L.J. C.P. 350.

buildings, and the purchaser was evicted after having expended money in building, the purchaser had, in certain cases, a claim upon the land for the amount of his expenditure (*d*). If the purchaser has not been evicted, but has entered into a fair compromise with the real owner or party having title paramount, he will be entitled to recover the whole amount paid by way of compromise, together with his costs and expenses (*e*). If an estate has been sold as freehold, with a general covenant that the vendor is seised in fee, and the estate proves to be a copyhold estate, the measure of damages will be the difference between the value of a freehold and copyhold estate (*f*). When, after a conveyance of land with a covenant of title, a decree was made in Chancery that the land was subject to a general right of common, it was held that, without express evidence of the grant of such a right by the grantor, or his predecessors in title, there was no breach of the covenant (*g*); and where land was sold for building purposes and the purchaser having built a house upon it discovered that there was a right of way over a road forming part of the land which had been innocently undisclosed by the vendor, it was held that there had been a breach of the covenant for title, the damages in respect of which were the difference between the value of the property as conveyed and its value as the vendor had power to convey it (*h*).

Non-payment of purchase-money after execution of conveyance.—If the conveyance expresses, contrary to the fact, that the purchase-money is paid, though the legal estate passes, yet the purchaser will not be permitted to possess and enjoy the estate for his own use, benefit, and advantage, unless he pays down the purchase-money (*i*).

Sale of pretenced titles.—By 32 Hen. 8, c. 9, s. 2, no person shall bargain for, buy, or sell, or obtain, or grant, or covenant to have any "pretenced rights or titles" of any person to any lands, &c., unless he or his ancestors, or the parties through whom he claims, have been in possession of the same, or the reversion or remainder thereof, or taken the rents or profits thereof for one year. But persons in possession of lands, &c., and in receipt of the rents and profits thereof, may buy (s. 4) or acquire the pretenced title of other persons afterwards to be made. "A pretenced right or title is where one is in possession or receipt of the rents and profits of

(*d*) *Bunny* v. *Hopkinson*, 29 L.J. Ch. 93; 27 Beav. 565.

(*e*) *Smith* v. *Compton*, 3 B. & Ad. 407; 3 L.J. (O.S.) K B. 40.

(*f*) *Gray* v. *Briscoe*, Noy, 142.

(*g*) *Howard* v. *Maitland*, 11 Q.B.D. 695; 53 L.J. Q.B. 42.

(*h*) *Turner* v. *Moon*, (1901) 2 Ch. 825; 70 L.J. Ch. 822.

(*i*) *Winter* v. *Anson* (*Lord*), 3 Russ. 488; 6 L.J. (O.S.) Ch. 7; see *Brentwood Brick Co., In re*, 4 Ch.D. 562; 46 L.J. Ch. 554.

lands, &c. as owner, and another that is out of possession claims them" (*k*). A person, therefore, who has been turned out of possession and deprived of the rents and profits of land to which he is entitled has no saleable interest. He may enforce his right through the medium of an action; and when he has got possession of the land, he may then sell it; but he cannot sell or transfer his right of action (*l*). Since the passing of 8 & 9 Vict. c. 106, s. 6, a grant of lands to which the grantor has a title in fact, though he has never been in possession, will be valid although litigation is pending (*m*). The onus is on the plaintiff in an action for forfeiture under the statute to prove not only that the title was bad, but that the buyer knew it to be "pretenced" (*n*).

Fraudulent concealment—Avoiding sales of realty.—Where a vendor, knowing that he has no right or title to property, or being cognizant of the existence of incumbrances or outgoings upon it, or of latent defects materially lowering its value in the market, sells it, and neglects to disclose such defects to the purchaser (*o*), there is a fraudulent concealment vitiating the contract; and conditions of sale, not drawn *bonâ fide*, but intended to cover difficulties arising from such uncommunicated defects, will not preclude the purchaser from objecting to them (*p*). So it is where the vendor of a lease, which becomes forfeited if the premises are not put into repair after notice, receives such notice, and then sells the premises in a dilapidated state without informing the purchaser of the notice (*q*). There may also be a fraudulent concealment by a purchaser which will vitiate a sale, as where a person having secret information of the death of one of two tenants for life, went and purchased the reversion without disclosing the fact to the reversioners of whom he bought (*r*). But in a general sale of an estate, if the vendor has said or done nothing to throw the purchaser off his guard or to conceal a patent defect, there is no fraudulent concealment on the part of the vendor (*s*). The purchaser has an opportunity of inspecting and judging for himself; and the principle of *caveat emptor* applies (*t*). Where a meadow is sold without any notice being given to the purchaser of a public footway around the meadow and another across it, there is no fraudulent conceal-

(*k*) *Partridge* v. *Strange*, Plowd. 88; *Jenkins* v. *Jones*, *infra*.

(*l*) *Doe* v. *Evans*, 1 C.B. 717; 14 L.J. C.P. 237; 32 Hen. 8, c. 9, contains prohibitions against maintenance, champerty, and embracery.

(*m*) *Jenkins* v. *Jones*, 9 Q.B.D. 128; 51 L.J. Q.B. 438.

(*n*) *Kennedy* v. *Lyell*, 15 Q.B.D. 491.

(*o*) *Edwards* v. *M'Leay*, 2 Swanst. 287; Coop. Ch.C. 308; *Peto* v. *Blades*, 5 Taunt. 657; *Fuller* v. *Wilson*, 3 Q.B. 58; 11 L.J. Q.B. 251; *Shirley* v. *Stratton*, 1 Br. C.C. 440.

(*p*) *Jackson* v. *Whitehead*, 28 Beav. 154; *Hume* v. *Pocock*, L.R. 1 Ch. 379; 35 L.J. Ch. 731.

(*q*) *Stevens* v. *Adamson*, 2 Stark. 422.

(*r*) *Turner* v. *Harvey*, 1 Jac. 169.

(*s*) *Jones* v. *Bright*, 3 Moo. & P. 155, 175; 7 L.J. (O.S.) C.P. 213; Fitzh. N.B. 94, C.

(*t*) *Turner* v. *Harvey*, 1 Jac. 178.

ment on the part of the vendor (*u*). So, where property was sold which was represented as standing on a fine vein of anthracite coal, it was held that it was the business of the purchaser to inquire as to the extent to which the coal had already been worked (*x*); or where an estate was described as being within a ring-fence, but did not answer the description, and it appeared that the purchaser had gone over the estate before he entered into the contract, that he had lived in the neighbourhood all his life, and must have known at the time he made the bargain whether the property did or did not lie within a ring-fence, it was held that there was no warranty and no deceit (*y*). On the other hand, the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of the property; as, if an estate is offered for sale, and a person treats for it, knowing that there is a mine under it, and the vendor makes no inquiry, that person is not bound to give him any information of it (*z*).

Sale with all faults, or without allowance for any defect or error.—If it be made a term of the contract that the subject-matter of the sale is to be taken with all faults, the term or stipulation will release the vendor from the obligation of disclosing all such defects as are susceptible of discovery by a rigid examination of the subject-matter of sale (*a*). Where the vendor of a house, being conscious of a defect in the main wall, plastered it up and papered it over for the purpose of concealing it from the purchaser, it was held that this was a direct fraud, which avoided the contract of sale and enabled the purchaser to recover back the purchase-money (*b*).

SECTION II.

ORDINARY CONTRACTS FOR SALE OF GOODS.

Preliminary.—The subject of buying and selling goods and chattels is now dealt with in the Sale of Goods Act, 1893 (*c*), but it is still necessary for the proper understanding of the subject-matter that reference should be made to the cases decided prior to that Act,

(*u*) *Bowles* v. *Round*, 5 Ves. 509.
(*x*) *Colby* v. *Gadsden*, 34 Beav. 416.
(*y*) *Dyer* v. *Hargrave*, 10 Ves. 505; *Cowen* v. *Simpson*, 1 Esp. 290.
(*z*) *Turner* v. *Harvey*, 1 Jac. 178.
(*a*) *Pickering* v. *Dowson*, 4 Taunt. 779.
(*b*) *Anon.*, cited by Gibbs, J., *Pickering* v. *Dowson*, 4 Taunt. 785.
(*c*) 56 & 57 Vict. c. 71.

and therefore many of the authorities are retained as illustrations. It must be borne in mind that although the Act of 1893 is mainly a codification of the law, it is also in part an amending Act (*d*).

It should further be noticed in dealing with contracts of sale that the Act also provides generally that "where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract" (*e*).

Sale and agreement to sell (*f*).—"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another (*g*). A contract of sale may be absolute or conditional (*h*). Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell (*i*). An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred" (*k*).

Capacity to buy and sell.—"Capacity to buy and sell is regulated

(*d*) The following are the principal saving clauses to the Act:—

By sect. 60 "the enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title or interest."

By sect. 61, "(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

"(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.

"(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

"(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

(*e*) 56 & 57 Vict. c. 71, s. 55.

(*f*) The following terms, which are used in sect. 1, are defined by sect. 62 of the Act:—

"Buyer" means a person who buys or agrees to buy goods.

"Goods" include all chattels personal other than things in action or money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Property" means the general property in goods, and not merely a specific property.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods.

(*g*) 56 & 57 Vict. c. 71, s. 1 (1).

(*h*) *Ib.*, s. 1 (2).

(*i*) *Ib.*, s. 1 (3).

(*k*) *Ib.*, s. 1 (4).

by the general law concerning capacity to contract, and to transfer and acquire property. Provided that where necessaries are sold and delivered to an infant (*l*), or to a person who by reason of mental incapacity (*m*) or drunkenness (*n*) is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of the sale and delivery" (*o*).

Contract of sale, how made.—Subject to the provisions of the Act and of any statute in that behalf, "a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. Provided that nothing in this section shall affect the law relating to corporations" (*p*). A person takes a chattel as a general rule subject to what may turn out to be flaws in the title (*q*).

Contract of sale for 10*l. and upwards.*—"A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf (*r*). The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery (*s*), or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery (*t*). There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not" (*u*).

The provisions of sect. 4, sub-sect. 1, are substituted for the repealed sect. 17 of the Statute of Frauds, while sub-sect. 2 is practically a re-enactment of the repealed sect. 7 of 9 Geo. 4, c. 14 (see also, *ante*, p. 26).

Memorandum.—Requisites.—The absence of a memorandum in

(*l*) As to infants' necessaries, see *ante*, pp. 377—380.
(*m*) As to contracts with persons of mental incapacity, see *ante*, p. 402.
(*n*) As to contracts with drunken persons, see *ante*, p. 402.
(*o*) 56 & 57 Vict. c. 71, s. 2.
(*p*) *Ib.*, s. 3.
(*q*) *Cundy* v. *Lindsay*, 3 App.Cas. 459; 47 L.J. Q.B. 481.
(*r*) 56 & 57 Vict. c. 71, s. 4 (1).
(*s*) "Delivery" means voluntary transfer of possession from one person to another: sect. 62.
(*t*) 56 & 57 Vict. c. 71, s. 4 (2).
(*u*) *Ib.*, s. 4 (3).

writing and of the other conditions mentioned in sect. 4, sub-sect. 1, does not make the contract void or voidable; the only effect is that it is not enforceable. It would seem that the contract being good, all the legal consequences of a contract follow, so that if the contract is for the sale of specific goods the property in them passes to the buyer; and if the buyer after making the purchase refuses to fulfil any of the statutory conditions, the seller may call on the buyer to pay for the goods, and if he fails to comply may treat the contract as rescinded (*x*). The note or memorandum of the bargain should disclose the names of the vendor and purchaser, or their agents (*y*), the thing sold, and the price to be paid, if the price was agreed upon at the time of the making of the contract (*z*); but if no price was definitely agreed upon, the note or memorandum will be sufficient without any statement of price, and the law will infer that a reasonable price was to be paid (*a*) whether the goods were in existence at the date of the contract (*b*) or not (*c*). Any entry in a book, or any letter acknowledging the fact of the sale, mentioning the name of the vendor and the thing sold, and signed by the party to be charged or his agent, will take the case out of the statute (*d*), although it subsequently contains a repudiation of the bargain on bad and insufficient grounds (*e*). The contract may also be authenticated through the medium of bills of parcels, entries in books, letters, and separate writings, provided they refer to each other and to the same persons and things, and manifestly relate to the same contract (*f*). Where divers articles ordered by the defendant were entered in the plaintiff's order-book, and the defendant wrote his name at the foot of the entry, it was held that the entry and signature of the defendant might be taken in connection with an entry of the plaintiff's name in the book showing the book to be his book, so as to establish the requisite written memorandum of the contract (*g*). Where goods were sold by auction to an agent acting on behalf of an undisclosed principal, and the auctioneer wrote the initials of the agent's name, together with

(*x*) *Taylor* v. *G. E. Ry.*, (1901) 1 K.B. 774; 70 L.J. K.B. 499; *Nicholson* v. *Bower*, 1 E. & B. 172; 28 L.J. Q.B. 97.

(*y*) *Ante*, p. 34.

(*z*) *Elmore* v. *Kingscote*, 5 B. & C. 583; 8 D. & R. 343; *Goodman* v. *Griffiths*, 1 H. & N. 574; 26 L.J. Ex. 145, *ante*, p. 35.

(*a*) *Hoadly* v. *McLaine*, 4 M. & Sc. 340; 3 L.J. C.P. 162; *Ashcroft* v. *Morrin*, 4 M. & Gr. 450.

(*b*) *Acebal* v. *Levy*, 4 Moo. & Sc. 217; 3 L.J. C.P. 98; *Joyce* v. *Swann*, 17 C.B. N.S. 84, 103; *Valpy* v. *Gibson*, 4 C.B. 837; 16 L.J. C.P. 248.

(*c*) *Hoadly* v. *Maclaine*, *supra*.

(*d*) *Newell* v. *Radford*, L.R. 3 C.P. 52; 37 L.J. C.P. 1; *ante*, p. 35.

(*e*) *Bailey* v. *Sweeting*, 9 C.B. N.S. 843; 30 L.J. C.P. 150; *M'Clean* v. *Nicolle*, 9 W.R. 811.

(*f*) *Saunderson* v. *Jackson*, 2 Bos. & P. 238; *Allen* v. *Bennett*, 3 Taunt. 169; *Boydell* v. *Drummond*, 11 East, 142; *Long* v. *Millar*, 4 C.P.D. 450; 48 L.J. C.P. 596; *Ridgway* v. *Wharton*, 8 H.L.C. 238; 27 L.J. Ch. 46.

(*g*) *Sarl* v. *Bourdillon*, 1 C.B N.S. 195; 26 L.J. C.P. 78.

the prices, opposite the lots purchased by him, in the printed catalogue, it was held that the entry in the catalogue and a letter afterwards written by the principal to the agent, recognising the purchase, might be coupled together to constitute the requisite written memorandum of the contract (*h*). And, where a buyer wrote to the seller: "I give you notice that the corn you delivered to me, in part performance of my contract with you for one hundred sacks of good English seconds flour, at 45*s*. per sack, is so bad that I cannot make it into saleable bread, dated this 24th of September," and the seller replied: "I have your letter or notice of the 24th September, in reply to which I have to state that I consider I have performed my contract as far as it has gone," it was held that the first letter and the answer might be coupled together, and were sufficient evidence in writing to satisfy the terms of the Statute of Frauds, and enable the buyer to sue the seller for the non-delivery of an article corresponding with that mentioned in the buyer's letter (*i*).

But if there is any material discrepancy between the letters and entries—if they describe the quality or quantity of the thing sold differently, or otherwise vary in the statement of the terms of the contract—they will fail in establishing the bargain (*k*). Where an entry in the plaintiff's book, unsigned by the defendant, referred to an unconditional contract of sale, and a letter written by the defendant referred to certain conditions as to the time of delivery, which were never assented to by the plaintiff, it was held that the plaintiff could not avail himself of the letter for one purpose—to bind the defendant within the statute—and renounce it for another purpose, but that he must take it altogether; and then it was no recognition, but a repudiation, of the contract sought to be established by the entry (*l*). But, if the letter acknowledges the essential particulars of the contract, and then repudiates it on insufficient grounds, there will, as we have seen, be a good memorandum of the bargain (*m*).

Memorandum.—Brokers' bought and sold notes.—When sales are effected through the medium of brokers acting between the parties buying and selling, the broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of

(*h*) *Phillimore* v. *Barry*, 1 Campb. 513; *Gibson* v. *Holland*, L.R. 1 C.P. 1; 35 L.J. C.P. 5.

(*i*) *Jackson* v. *Lowe*, 7 Moore, 219, 228; 1 Bing. 9. As to insufficient connection between advice note and invoice of goods to constitute a memorandum in writing, see *Taylor* v. *Smith*, (1893) 2 Q.B. 65; 61 L.J. Q.B. 331.

(*k*) *Smith* v. *Surman*, 9 B. & C. 561, 569; 7 L.J. (O.S.) K.B. 296.

(*l*) *Cooper* v. *Smith*, 15 East, 103, 108; *Richards* v. *Porter*, 6 B. & C. 437; 5 L.J. (O.S.) K.B. 175; *Jordan* v. *Norton*, 4 M. & W. 155; 7 L.J. Ex. 281; *Archer* v. *Baynes*, 5 Exch. 625; 20 L.J. Ex. 55.

(*m*) *Ante*, p. 36.

buyer and seller (*n*); but, where the broker delivers notes of the contract materially differing in their terms, and there is no signed entry in the broker's books to cure the discrepancy, there is no proof of the assent of the parties to the same terms, and no valid bargain between them (*o*). It is the duty, but not always the practice, of brokers to make a memorandum of the contract in their books, to sign such memorandum, and to transcribe therefrom the bought and sold notes. If these notes are signed by the broker and agree, but differ from an unsigned entry in the book, the notes constitute the contract. If they agree, but differ from a signed entry, and the signed notes so agreeing have been adopted by the vendor and purchaser, they will, it seems, constitute a new contract in substitution of the contract evidenced by the signed entry (*p*). If they differ from each other, and one of them agrees with the signed entry, the entry and note agreeing with it may, it seems, be taken together as constituting the contract, to the exclusion of the other note. A broker in his book signed both the bought and sold note, but he did not sign the note he sent to the purchaser, who declined to accept on that ground; it was held that the purchaser by his conduct admitted that the broker had his authority, and consequently he was bound by the sold note signed and sent to the seller, and also that the entry in the broker's book was a sufficient memorandum to satisfy the Statute of Frauds (*q*). "A broker has only a special authority, not a general one; and, if you employ a broker to buy one kind of goods, and he buys another, you are not bound by his act" (*r*). In an action by the purchaser against the vendor on a contract made through a broker, it is sufficient for the purchaser to produce the bought note handed to him by the broker, and to show the employment of the latter by the vendor; if the sold note varies from the bought note, it lies on the vendor to prove that variance by producing the sold note (*s*). So, if the action be brought against the purchaser for not accepting goods sold, the sold note bearing the signature of the broker acting for both buyer and seller is a sufficient memorandum of the bargain (*t*). An apparent variance

(*n*) *Heyman* v. *Neale*, 2 Campb. 337.

(*o*) *Grant* v. *Fletcher*, 5 B. & C. 436; *Gregson* v. *Ruck*, 4 Q.B. 737; *Thornton* v. *Kempster*, 5 Taunt. 786, 788. But an unimportant or immaterial variation will not avoid the bargain: *Maclean* v. *Dunn*, 1 Moo. & P. 778; 6 L.J. (O.S.) C.P. 184.

(*p*) *Thornton* v. *Charles*, 9 M. & W. 807; 11 L.J. Ex. 302; *Sievewright* v. *Archibald*, 17 Q.B. 103; 20 L.J. Q.B. 535; *Goom* v. *Afalo*, 6 B. & C. 117; 5 L.J. (O.S.) K.B. 31; *Thornton* v. *Meux*, 1 Moo. & M. 43.

(*q*) *Thompson* v. *Gardiner*, 1 C.P.D. 777.

(*r*) *Pitts* v. *Beckett*, 13 M. & W. 743, 747; 14 L.J. Ex. 358; *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L.J. Ex. 142.

(*s*) *Hawes* v. *Forster*, 1 Moo. & R. 368.

(*t*) *Parton* v. *Crofts*, 16 C.B. N.S. 11; 33 L.J. C.P. 189; *Thompson* v. *Gardiner*, 1 C.P.D. 777.

between bought and sold notes may be explained by mercantile usage (*u*). Letters constituting a sufficient contract to satisfy the Statute of Frauds are not annulled by bought and sold notes differing from them, unless it plainly appears that the notes were to constitute the contract to the exclusion of the letters (*x*). A custom of trade to the effect that, whenever a broker purchases or sells for his principal without disclosing the name of such principal, the broker himself is liable to be looked to as purchaser or seller, may be given in evidence to fix the broker on the contract (*y*), unless such custom is inconsistent with the particular contract in question (*z*).

Memorandum.—Signature.—The question has already been considered (*ante*, pp. 37—41) as to what is and what is not a signing of a contract so as to meet the requirements of the Statute of Frauds, and now also of sect. 4 of the Sale of Goods Act, 1893.

Acceptance and actual receipt of goods.—The acceptance of the goods may be either before or at the time of the receipt of them (*a*). Thus, if the purchaser selects the goods himself, and writes his name upon them (*b*), or sends his own packer and packs the goods (*c*), or orders them to be sent to his residence or place of business, and the selected goods are delivered to him or his servant, at the place indicated by him, there is evidence of an acceptance and an actual receipt of the goods within the meaning of the statute (*d*). The acceptance need not be an absolute acceptance; all that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfil that contract (*e*). So, where there was a sale of wheat by sample, and the purchaser, having received a number of sacks of wheat delivered under the contract into his premises, opened them to see if they were equal to sample, and immediately afterwards gave the seller notice that he refused the wheat, it was held that there had been an acceptance and actual receipt by him (*f*). Again, where the purchaser selected some sheep from the plaintiff's flock, and had them sent down to his

(*u*) *Bold* v. *Rayner*, 1 M. & W. 343; 5 L.J. Ex. 172; *Kempson* v. *Boyle*, 3 H. & C. 763; 34 L.J. Ex. 191.

(*x*) *Heyworth* v. *Knight*, 17 C.B. N.S. 298; 33 L.J. C.P. 298.

(*y*) *Humfrey* v. *Dale*, E. B. & E. 1004; 27 L.J. Q.B. 390; *Hutcheson* v. *Eaton*, 13 Q.B.D. 861; *Fleet* v. *Murton*, L.R. 7 Q.B. 126; 41 L.J. Q.B. 49.

(*z*) *Barrow* v. *Dyster*, 13 Q.B.D. 635.

(*a*) *Morton* v. *Tibbett*, 15 Q.B. 428; 19 L.J. Q.B. 382.

(*b*) *Hodgson* v. *Le Bret*, 1 Campb. 233.

(*c*) *Kershaw* v. *Ogden*, 3 H. & C. 717; 34 L.J. Ex. 159.

(*d*) *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L.J. Q.B. 261.

(*e*) *Kibble* v. *Gough*, 38 L.T. 204; *Morton* v. *Tibbett*, 15 Q.B. 428; *Abbott* v. *Wolsey*, (1895) 2 Q.B. 67; 64 L.J. Q.B. 587; notwithstanding *Norman* v. *Phillips*, 14 M. & W. 277; 14 L.J. Ex. 306; and *Taylor* v. *Smith*, (1893) 2 Q.B. 65; 61 L.J. Q.B. 331.

(*f*) *Page* v. *Morgan*, 15 Q.B.D. 228; 54 L.J. Q.B. 434; *Taylor* v. *Smith*, *supra*.

own residence, and there counted them over, and said, "It is all right," and then sent them into his field, and the day after refused to keep them, saying they were not the sheep he bought, it was held that there was evidence for the jury of an acceptance of the sheep, and that, if the defendant had once really accepted them, his rejection of them afterwards would be of no avail unless they were not according to the contract (*g*). The acceptance must be made before the rescission of the contract; and if after goods are delivered to a carrier consigned to the vendee, and before any order has been given or act done constituting an acceptance of the goods, the contract is rescinded, no subsequent act by the vendee or by his trustee in bankruptcy will amount to an acceptance, so as to change the property in the goods, without the consent of the vendor (*h*).

To satisfy the section the purchaser must "accept" as well as "actually receive" the goods. The distinction between these two expressions is best shown where the purchaser separates the two acts by appointing an agent with authority to receive but not to accept. Thus, where a purchaser was alleged to have ordered goods to be separated from the bulk and sent to a wharfinger or carrier, and after this had been done refused to accept them, it was held that though there had been an actual receipt by the wharfinger or carrier there was no evidence of acceptance (*i*); for a carrier, though named by the purchaser, has *primâ facie* no authority to accept on his behalf (*k*).

To constitute an actual receipt as well as an acceptance of the goods, it must appear that the vendor has parted with the possession of the goods, and placed them under the control of the purchaser, so as to put a complete end to all the rights of the unpaid vendor as such (*l*). Although, therefore, goods are selected by a purchaser, and ordered to be sent to the residence of the latter, yet, if the purchaser refuses to take them in when they arrive, there is no acceptance or actual receipt of them by the purchaser (*m*).

Receipt for inspection and approval.—When the specific articles have not been selected by the purchaser, there is no acceptance until he has had an opportunity of exercising his judgment with

(*g*) *Saunders* v. *Topp*, 4 Exch. 390; 18 L.J. Ex. 374.

(*h*) *Smith* v. *Hudson*, 6 B. & S. 431; 34 L.J. Q.B. 145.

(*i*) *Hunt* v. *Hecht*, 8 Exch. 814; 22 L.J. Ex. 293; *Hart* v. *Bush*, E. B. & E. 494; 27 L.J. Q.B. 271; see also *Smith* v. *Hudson*, 6 B. & S. 431; 34 L.J. Q.B. 145.

(*k*) *Hanson* v. *Armitage*, 5 B. & Ald. 557; *Meredith* v. *Meigh*, 2 E. & B. 364; 22 L.J. Q.B. 401; *Norman* v. *Phillips*, 14 M. & W. 277; 14 L.J. Ex. 306; *Vigers* v. *Sanderson*, (1901) 1 K.B. 608; 70 L.J. K.B. 383.

(*l*) *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L.J. Q.B. 261.

(*m*) *Baldey* v. *Parker*, 2 B. & C. 37; 1 L.J. (O.S.) K.B. 229.

respect to the things sent; for he cannot be made the acceptor of whatever the vendor chooses to send him (*n*). If a purchaser sends his servant for goods, and, after they have been brought to him, sends them back, there is no acceptance and receipt. And the delivery of the goods into the hands of the intended purchaser, and the unpacking of them by the latter, are not sufficient if it appears that he has had them in his possession for no greater time than would reasonably suffice for him to examine the quantity and nature of the goods (*o*). Where a pair of earrings at a sale by auction were knocked down to the defendant, a foreigner, and delivered into his hands, but in a few minutes he handed them back and declined the purchase, on the ground that he had been mistaken as to the price at which they had been knocked down, it was held that, as by the conditions of sale the defendant had no right to remove the earrings until the deposit was paid, the mere delivery of them into his hands the moment he was declared the purchaser was not of itself evidence of an intention to part entirely with the possession of them, and that consequently there was not a complete delivery nor an acceptance and actual receipt (*p*). But acceptance may be inferred from the goods having been kept an unreasonable time (*q*).

Acceptance and receipt where goods purchased by bailee.—Whenever goods are in the hands of a hirer or bailee of them, and an oral bargain is made by him for the purchase of the goods, and the bailee then takes to the goods as purchaser, and so changes the character in which he holds them, it is an acceptance as against him, and there will be a binding contract for the purchase of the goods (*r*); but if the parol authority to take to the goods as owner, resulting from the oral bargain with the vendor, has been revoked, and the vendor has withdrawn from the bargain, a subsequent taking to the goods by the buyer is unauthorised and tortious, and cannot be an acceptance, which to bind the bargain must be with the assent of the vendor (*s*).

Constructive acceptance.—There may be a constructive acceptance within the meaning of the statute, although the goods remain in the possession of the vendor (*t*).

The question whether there has been such an acceptance is a

(*n*) *Hunt* v. *Hecht*, 8 Exch. 814; 22 L.J. Ex. 293.

(*o*) *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J.Q.B. 199; *Jordan* v. *Norton*, 4 M. & W. 155; 7 L.J.Ex. 281; *Lucy* v. *Mouflet*, 5 H. & N. 233; 29 L.J. Ex. 110.

(*p*) *Phillips* v. *Bistolli*, 2 B. & C. 511; 2 L.J. (O.S.) K.B. 116; see also *Hunt* v. *Hecht*, *supra*; *Coombs* v. *Bristol and Exeter Ry.*, 3 H. & N. 510; 27 L.J. Ex. 401; *Smith* v. *Hudson*, 6 B. & S. 431; 34 L.J. Q.B. 145.

(*q*) *Coleman* v. *Gibson*, 1 Moo. & R. 168; *Lucy* v. *Mouflet*, *supra*.

(*r*) *Edan* v. *Dudfield*, 1 Q.B. 302.

(*s*) *Taylor* v. *Wakefield*, 6 E. & B. 765, 769.

(*t*) *Elmore* v. *Stone*, 1 Taunt. 458; *Beaumont* v. *Brengeri*, 5 C.B. 301.

question of fact depending on the inference to be drawn from the acts of the alleged purchaser in reference to the goods (*u*). Thus, an acceptance may be evidenced by acts of domination and ownership over things incapable of manual occupation and transfer from hand to hand (*x*). If the purchaser sells (*y*) or offers to sell (*z*) the chattel, or deals with it in a manner which is inconsistent with the right of property and possession being in anyone else but himself, his conduct affords evidence of an acceptance and actual receipt of the thing (*a*). But it has been held that, so long as the vendor retains his right of lien for the price over the *whole* commodity sold, there can be no such acceptance and receipt as the statute requires (*b*).

Constructive possession by purchaser and extinction of right of lien.—Possession of goods may be given up, and the right of lien extinguished, although the goods are never actually removed from the premises of the vendor (*c*); and it has been held that, if an oral bargain is made for the purchase of goods, and the purchaser desires the vendor to keep them in his possession for an especial purpose, and the vendor assents thereto, there may be a constructive acceptance and constructive actual receipt, so as to satisfy the words of the statute. In cases of this sort the question will be whether the vendor had the subject-matter of the sale in his own possession, retaining his right of lien for the price, or whether he had the bare custody of the chattel as the servant of the purchaser, having no possession and no right of lien (*d*). Where a couple of horses had been sold by a livery-stable keeper at a fixed price, and the purchaser told the vendor that, as he had neither servant nor stable, the vendor must keep the horses at livery for him, whereupon the latter removed them from his *sale*-stable to his *livery*-stable, and there kept them at livery; it was held that this amounted to an actual delivery of the horses, that the vendor had parted with the possession of them, lost his lien for the price, and held the horses only as any other livery-stable keeper might have held them, having the bare custody of the horses and not the

(*u*) *Edan* v. *Dudfield*, *supra*.

(*x*) Williams, J., *Bushel* v. *Wheeler*, 15 Q.B. 445; as to acceptance inferred from conduct, see *Parker* v. *Wallis*, 5 E. & B. 28; *Currie* v. *Anderson*, 2 E. & E. 592; 29 L.J. Q.B. 87.

(*y*) *Morton* v. *Tibbett*, 15 Q.B. 428; 19 L.J. Q.B. 382; *Castle* v. *Sworder*, 6 H. & N. 828; 30 L.J. Ex. 210.

(*z*) *Blenkinsop* v. *Clayton*, 1 Moore, 328; 7 Taunt. 597.

(*a*) *Taylor* v. *G. E. Ry.*, (1901) 1 K.B. 774; 70 L.J. K.B. 499; *Taylor* v. *Smith*, (1893) 2 Q.B. 65; 61 L.J. Q.B. 331; as to what amounts to evidence of acceptance, see *Abbott* v. *Wolsey*, (1895) 2 Q.B. 97; 64 L.J. Q.B. 587.

(*b*) *Tempest* v. *Fitzgerald*, 3 B. & Ald. 680; *Carter* v. *Toussaint*, 5 B. & Ald. 855; *Maberley* v. *Sheppard*, 10 Bing. 99; 2 L.J. C.P. 181; *Holmes* v. *Hoskins*, 9 Exch. 753; *Smith* v. *Surman*, 9 B. & C. 561, 577; 7 L.J. (O.S.) K.B. 296; *Acraman* v. *Morrice*, 8 C.B. 449; 19 L.J. C.P. 57; *Bill* v. *Bament*, 9 M. & W. 36; 11 L.J. Ex. 81.

(*c*) *Jacobs* v. *Latour*, 2 Moo. & P. 201; 6 L.J. (O.S.) C.P. 243; *Martin* v. *Reid*, 11 C.B. N.S. 730; 31 L.J. C.P. 126.

(*d*) *Castle* v. *Sworder*, 6 H. & N. 828; 30 L.J. Ex. 310; *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L.J. Q.B. 261.

right of possession (*e*). And where there was an oral bargain for the sale of a horse, and the vendor asked the purchaser to lend him the horse for a few days till he got another, and the purchaser agreed to this, and the vendor kept the horse for a week and then sent it to the purchaser, who refused to receive it or pay for it: it was held that the purchaser by lending the horse to the seller had taken it as owner, and that the possession of the vendor under the loan was the possession of the purchaser (*f*).

Acceptance of bills of lading, delivery orders, and dock warrants.—The mere acceptance of a bill of lading of goods on board ship *in transitu* to the purchaser is not an acceptance and receipt of the goods; but if the purchaser retains possession of or exercises dominion and ownership over the bill of lading, this will be evidence of an acceptance and actual receipt (*g*). So the mere acceptance and receipt by a purchaser of a delivery order or dock-warrant is not an acceptance and actual receipt of the goods mentioned or comprised in such order or warrant, until it has been presented to the warehouse-keeper or dock-keeper, and the latter has attorned to the purchaser, and consented to hold the goods on his account (*h*); but as soon as he has attorned, whether orally or by writing, and whether the documents are or are not filed in the warehouse, the warehouse-keeper becomes the agent or trustee of the purchaser, and is bound to hold the goods at the disposal of the latter, and there is then an executed delivery as much as if the goods had been delivered into the purchaser's own hands, or had been removed to his warehouse, and there put under lock and key (*i*). A wharfinger who, receiving a delivery order for goods which at the time are not in his actual possession, promises to deliver them to the purchaser, is bound, if they afterwards come to hand, to hold them at the disposal of the party in whose favour the order has been made (*k*).

Acceptance and receipt of goods by carriers, forwarding agents, and agents for custody.—The acceptance and receipt of a carrier or wharfinger, or mere forwarding agent, appointed by the purchaser to be the vehicle of transmission to him, are not the acceptance and receipt of the purchaser (*l*), unless the latter so deals with the carrier or forwarding agent as to convert him into an *agent for*

(*e*) *Elmore* v. *Stone*, 2 Taunt. 458.

(*f*) *Marvin* v. *Wallis*, 6 E. & B. 735; 25 L.J. Q.B. 369.

(*g*) *Meredith* v. *Meigh*, 2 E. & B. 368; 22 L.J. Q.B. 403; *Currie* v. *Anderson*, 2 E. & E. 592; 29 L.J. Q.B. 87.

(*h*) *Bentall* v. *Burn*, 3 B. & C. 423; 3 L.J. (O.S.) K.B. 42; *Farina* v. *Home*, 16 M. & W. 119; 16 L.J. Ex. 75; *Lackington* v. *Atherton*, 7 M. & Gr. 360; 13 L.J. C.P. 140.

(*i*) *Pearson* v. *Dawson*, E. B. & E. 456; 27 L.J. Q.B. 248; *Harman* v. *Anderson*, 2 Campb. 243; *Dickinson* v. *Marrow*, 14 M. & W. 713.

(*k*) *Holl* v. *Griffin*, 10 Bing. 246; 3 L.J. C.P. 17.

(*l*) *Smith* v. *Hudson*, 6 B. & S. 431; 34 L.J. Q.B. 145; *ante*, p. 495.

custody holding the goods as the purchaser's servant or agent (*post*, p. 574). When the purchaser refuses to receive the goods from the carrier, the latter holds them as the agent of the consignor from whom he received them, and there is no acceptance and actual receipt by the purchaser within the meaning of the statute, although the latter has directed the mode of conveyance, and pointed out the particular carrier to be employed (*m*). But a purchaser may, by his conduct and course of dealing with the carrier, convert the latter into an agent for custody holding the goods on his, the purchaser's, behalf (*n*). Thus, where a purchaser directs goods to be taken to a place of deposit indicated by him, and they are accordingly sent there, and dealt with under his directions, it is the same as if they are sent to his own warehouse (*o*).

Part acceptance and actual receipt binding the contract.—Where the acceptance of a part of goods sold is relied upon to take the case out of the statute, it must be an acceptance of a part of goods bought under the contract sought to be enforced. If two separate contracts are made, acceptance of goods under one of these contracts will not take the other out of the statute (*p*). Generally speaking, when a person goes into a shop and buys various different articles at the same time, he does not make as many different contracts as there are articles purchased (*q*); but there is one contract for the whole, and the acceptance and receipt of any one of the articles so purchased will take the contract as to all of them out of the operation of the statute. Where the traveller of a steel manufacturer at Sheffield took an oral order from an edge-tool maker at Birmingham for thirty-five bundles of common steel at 34*s*., and five bundles of cast steel at 48*s*., it was held that this was one entire contract, and that the acceptance of the common steel took the cast steel out of the operation of the statute (*r*). But, where growing crops were put up to auction in several lots, and separately knocked down to a bidder at separate prices, it was held that there was a distinct contract of sale as to each lot (*s*). Where a party under one contract purchases goods ready made, and orders others to be made, an acceptance of the former goods will be a sufficient com-

(*m*) *Astey* v. *Emery*, 4 M. & S. 262; *Norman* v. *Phillips*, 14 M. & W. 277; 14 L.J. Ex. 306; *Hanson* v. *Armitage*, 5 B. & Ald. 557; 1 D. & R. 128; *Meredith* v. *Meigh*, 22 L.J. Q.B. 401; 2 E. & B. 364; *Hart* v. *Bush*, E. B. & E. 494; 27 L.J. Q.B. 271.

(*n*) *Post*, p. 574; *Bushel* v. *Wheeler*, 15 Q.B. 442.

(*o*) *Dodsley* v. *Varley*, 12 Ad. & E. 632.

(*p*) *Price* v. *Lea*, 1 B. & C. 156; *Hart* v. *Mills*, 15 M. & W. 85; 15 L.J. Ex. 200.

(*q*) Alderson, B., *Scott* v. *Eastern Counties Ry.*, 12 M. & W. 38; 13 L.J. Ex. 14. See also *Champion* v. *Short*, 1 Campb. 53; *Baldey* v. *Parker*, 2 B. & C. 37; 1 L.J. (O.S.) K.B. 229.

(*r*) *Elliott* v. *Thomas*, 3 M. & W. 170; 7 L.J. Ex. 129; *Rohde* v. *Thwaites*, 6 B. & C. 388; 5 L.J. (O.S.) K.B. 163; *Bigg* v. *Whisking*, 14 C.B. 195, 198.

(*s*) *Roots* v. *Dormer* (*Lord*), 4 B. & Ad. 77; 1 N. & M. 667.

pliance with sect. 4 of the Sale of Goods Act, 1893 (*t*). If after a purchase the purchaser draws samples from the bulk of the commodity, this amounts to an acceptance of it (*u*). Certain sugars in a warehouse were advertised for sale by auction, and samples of half a pound weight from each hogshead, drawn after the sugars had been weighed, were produced to the assembled bidders, and after the biddings were closed, the samples were delivered to and accepted by each purchaser, as part of his purchase, to make up the quantity and weight of each lot, as specified in the catalogue, and it was held that the delivery and acceptance of the sample were an acceptance and receipt of part of the things sold, so as to remove the contract from the operation of the Act of 1893 (*x*).

The acceptance takes the whole contract out of the statute, leaving it open to the parties to supply the terms of the bargain by oral evidence (*y*). If, therefore, the contract is made defeasible on certain conditions, the conditions will stand good as part of the contract. Where a mare was sold on the terms that, in case she should prove in foal, she should be returned together with part of the price; and the mare was delivered and accepted, and afterwards proved to be in foal, but the purchaser refused to return her; it was held that the acceptance took the whole agreement out of the statute, and that the plaintiff might sue the defendant for the refusal to return the mare (*z*).

Earnest and part payment within second exception of statute.—The mere offer of earnest or part payment which is not accepted is not sufficient to bind the bargain (*a*). But the giving of any quantity of money, however small, by way of earnest or part payment, has the effect of taking the whole contract out of the operation of the statute. It binds the bargain as between the parties, provided the other requisites necessary to the completion of a contract of sale have been duly complied with, and operates as a transfer of the right of property to the purchaser (*b*). The vendor cannot sell to another until he has requested the vendee to remove the goods and pay the price, and the latter has repudiated his obligation to perform his part of the contract of sale (*c*). If there is a bargain for the sale of goods at a certain price, and subsequently an agreement that a debt due from the purchaser shall be wiped off from the

(*t*) 56 & 57 Vict. c. 71, s. 4; also Lord Abinger, C.B., *Scott* v. *Eastern Counties Ry.*, 12 M. & W. 38; 13 L.J. Ex. 14.

(*u*) *Gardner* v. *Grout*, 2 C.B. N.S. 340; *Talver* v. *West*, Holt, N.P. 178.

(*x*) *Hinde* v. *Whitehouse*, 7 East, 558, 570.

(*y*) *Tomkinson* v. *Staight*, 17 C.B. 697, 707; 25 L.J. C.P. 85.

(*z*) *Williams* v. *Burgess*, 10 Ad. & E. 499; 8 L.J. Q.B. 286.

(*a*) *Blenkinsop* v. *Clayton*, 1 Moo. 328; 7 Taunt. 597.

(*b*) *Bach* v. *Owen*, 5 T.R. 409; *Blakey* v. *Dinsdale*, Cowp. 664.

(*c*) *Langfort* v. *Tiler* (*Administratrix*), 1 Salk. 113; *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155.

amount of the price, and the debt is accordingly released and discharged, this may be equivalent to earnest and part payment (*d*).

Subject-matter of contract.—Existing or future goods.—"The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called 'future goods'" (*e*).

"There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen (*f*).

"Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods" (*g*).

As a general rule a person may sell or offer for sale at any price whatsoever, remunerative or not, goods of which he is not the owner, but which he hopes or expects to acquire, provided that he is acting honestly (*h*).

"Where there is a contract for the sale of specific goods (*i*), and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void (*k*). Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided" (*l*).

Every contract for the sale of specific goods is made on the assumption that they are, or at the time of the sale shall be, in existence, and capable of being transferred; and if they have ceased to exist, and the vendor has not the power of making the transfer, there is no consideration for the payment of the purchase-money (*m*). Where a contract was made between two merchants, for the sale and purchase, at a fixed price, of an ascertained cargo of corn then on board a vessel at sea on its way from Turkey to Great Britain, and at the time of the making of the contract the vessel had been driven by stress of weather into an African port, and the cargo had become heated, and had been sold by the ship-master to prevent its total destruction, it was held that the contract

(*d*) *Walker* v. *Nussey*, 16 M. & W. 305; 16 L.J. Ex. 120; *Norton* v. *Davison*, (1899) 1 Q.B. 401; 68 L.J. Q.B. 265.

(*e*) 56 & 57 Vict. c. 71, s. 5 (1). "Future goods" are defined by sect. 62 as "goods to be manufactured or acquired by the seller after the making of the contract of sale."

(*f*) 56 & 57 Vict. c. 71, s. 5 (2).

(*g*) Sect. 5 (3).

(*h*) *Ajello* v. *Worsley*, (1898) 1 Ch. 274; 67 L.J. Ch. 172.

(*i*) "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made (sect. 62).

(*k*) 56 & 57 Vict. c. 71, s. 6.

(*l*) Sect. 7. "Fault" means wrongful act or default (sect. 62).

(*m*) *Howell* v. *Coupland*, 1 Q.B.D. 258; 46 L.J. Q.B. 147; *Nickoll* v. *Ashton*, (1901) 2 K. B. 126; 70 L.J. K.B. 600.

of sale made between the two merchants was a void sale, as the vendor had nothing to sell at the time of making the bargain; but it would have been otherwise if the cargo had been in existence on board the ship at the time of making the contract, and had been subsequently damaged and sold (*n*). A vendor may bind himself absolutely to deliver certain goods on a certain day, in which case he will be liable in damages if they have ceased to exist (*o*).

The price.—"The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties (*p*). Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case (*q*). Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor (*r*). Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault" (*s*).

Increased customs duty upon goods warehoused added to price.—By the Customs Laws Consolidation Act, 1876 (*t*), when any increase, decrease, or repeal takes place after the making of a contract of sale, or delivery of goods duty paid, the seller in case of increase may add so much money to the contract price, and the purchaser in case of decrease or repeal may deduct it. And by the Finance Act, 1900, sect. 9, the duty to be paid on goods or commodities deposited in a customs or excise office is declared to be the duty chargeable at the date of the actual removal of those goods or commodities from the warehouse, and if before that date any sums shall have been paid in respect of duty, the difference (if any) between the sums so paid and the actual duty chargeable shall be paid or repaid as the case may be (*u*).

Conditions and warranties as to time.—"Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of

(*n*) *Hastie* v. *Couturier*, 9 Exch. 102; 22 L.J. Ex. 299; 5 H.L.C. 673; 25 L.J. Ex. 253; *Barr* v. *Gibson*, 3 M. & W. 390; 7 L.J. Ex. 124.

(*o*) *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180; 38 L.J. Q.B. 98.

(*p*) 56 & 57 Vict. c. 71, s. 8 (1). As to selling at any price whatsoever, see *Ajello* v. *Worsley*, (1898) 1 Ch. 274; 68 L.J. Ch. 172.

(*q*) Sect. 8 (2).

(*r*) Sect. 9 (1).

(*s*) Sect. 9 (2). As to transfer of property, see sect. 16, *post*.

(*t*) 38 & 39 Vict. c. 35, s. 20.

(*u*) 63 Vict. c. 7, s. 9.

sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract (*x*). In a contract of sale 'month' means *primâ facie* calendar month" (*y*).

The question whether in a contract of sale the time for delivery of the goods, or payment of the price, or performance of any other term, is of the essence of the contract, so as to give the party insisting on performance a right to rescind the contract if the other party is in default, is, like all such questions, one of the intention of the parties. On the sale of a specific chattel where nothing is said as to the time for delivery or payment, it is usually the intention of the parties that the property in the chattel shall pass there and then, and that possession shall be given and taken and the price paid within a reasonable time after the date of the contract; the question of what is a reasonable time being one of fact depending on all the circumstances (*z*). But if delivery is unreasonably delayed, that of itself does not re-vest the property in the vendor, or excuse the purchaser from payment if the vendor afterwards tenders delivery. Similarly, if payment is unreasonably delayed that does not re-vest the property in the vendor, or excuse him from delivering if the price is subsequently tendered (*a*). If subsequently the purchaser absolutely refuses to take the chattel and pay the price, the vendor may rescind the sale (*b*); but mere default in payment not amounting to an absolute refusal does not entitle the vendor to rescind. Again, where goods are sold on credit and a time is specified for payment, it is clear that this time is not of the essence of the contract, because the property and right of possession have both passed to the purchaser before the time for payment has arrived (*c*). Therefore, in cases of sale of specific ascertained chattels, delay in delivery or payment may give a right of action, but no right to rescind the contract, and it would require a clear expression of intention to make the time for delivery or payment of the essence of the contract, or in other words to make the contract conditional on payment or delivery at the time named.

The case of a contract for the sale of unascertained goods is somewhat different. There it is not intended that the property shall pass at the date of the contract, but at some future date,

(*x*) 56 & 57 Vict. c. 71, s. 10 (1). As to stipulations as to time or otherwise, see Jud. Act, 1873, s. 25 (7), and *per* Cotton, L.J., *Reuter* v. *Sala*, 4 C.P.D. 249; 48 L.J. C.P. 492.

(*y*) 56 & 57 Vict. c. 71, s. 10 (2).

(*z*) *Ellis* v. *Thompson*, 3 M. & W. 445; 7 L.J. Ex. 185.

(*a*) *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155; *Bloxam* v. *Sanders*, 4 B. & C. 941; *Chinery* v. *Viall*, 5 H. & N. 288; 29 L.J. Ex. 180; *Woolfe* v. *Horne*, 2 Q.B.D. 355; *Page* v. *Cowasjee*, L.R. 1 P.C. 127.

(*b*) *Maclean* v. *Dunn*, 4 Bing. 722; 6 L.J. (O.S.) C.P. 184.

(*c*) *Martindale* v. *Smith*, *supra*.

which may well be of the essence of the contract (*d*); if the day for delivery be of the essence of the contract and payment is to be made upon delivery, then it would follow that the time for payment would also be of the essence of the contract. If by the terms of a contract delivery is to be made by instalments over a considerable period of time, the various dates for acceptance or delivery are not, as a general rule, of the essence of the contract (*e*), unless the delay amounts to a repudiation of the obligation to accept or deliver (*f*). Payment for each instalment as it falls due is not a condition precedent to the right to claim delivery of future instalments (*g*), unless expressly made so by contract, or in case of the insolvency of the purchaser (*h*), or under other circumstances involving a repudiation of his obligation (*i*). Whether the party insisting on performance can by notice to the party in default specify a time within which the contract must be performed or rescinded, would seem to depend upon whether the property in the goods had passed or not at the time of the notice (*k*); if it has not passed, it would seem that such a notice would be effectual provided a reasonable time were specified (*l*).

When a particular day is appointed for the delivery of the goods, or the payment of the price, the party has the whole of the day, and if one of several days, the whole of those days, for the performance on his part of the contract; but he must do all he can to make the payment or perform the act at a convenient hour before midnight. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to receive it. If he is to deliver goods, he must deliver them in sufficient time for examination and receipt. If the payment or delivery is to be performed at a certain place on a specific day, the tender must be to the other party at that place; and, as the attendance of the other is necessary at that place to complete the act, the law, though it requires the other to be present, does not require him to be present through the whole day; and therefore it fixes a particular part of the day; and it is enough if he is at the place a convenient time before sunset, so that the act may be completed; and, if the party who is to perform tenders to the

(*d*) *Bowes* v. *Shand*, 2 App.Cas. at p. 467; 46 L.J. Q.B. 561; *Coddington* v. *Paleologo*, L.R. 2 Ex. 193; 36 L.J. Ex. 73.

(*e*) *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30; *Simpson* v. *Crippin*, L.R. 8 Q.B. 14; 42 L.J. Q.B. 28.

(*f*) *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L.J. Ex. 73; *Honck* v. *Muller*, 7 Q.B.D. 92; 50 L.J. Q.B. 529.

(*g*) *Mersey Steel and Iron Co.* v. *Naylor*, 9 App.Cas. 434; 53 L.J. Q.B. 497.

(*h*) *Chalmers, Ex parte*, L.R. 8 Ch. 289; 42 L.J. Bankr. 37; *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47.

(*i*) *Bloomer* v. *Bernstein*, L.R. 9 C.P. 588; 43 L.J. C.P. 375.

(*k*) *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155.

(*l*) *Parkin* v. *Thorold*, 16 Beav. 59; 22 L.J. Ch. 170; *Crawford* v. *Toogood*, 13 Ch.D. 153; 49 L.J. Ch. 108.

party present, or, if absent, if the tender is made, before sunset, that is sufficient (*m*). Demand or tender of delivery may be treated as ineffectual, unless made at a reasonable hour; and what is a reasonable hour is a question of fact (*n*). Orders for goods to be delivered as soon as possible do not oblige the vendor who accepts the order to put everything else aside and execute it without any delay at all. He is only bound to execute the order within a reasonable time (*o*).

Enlargement of time of performance.—In the case of contracts required by sect. 4 of the Sale of Goods Act, 1893, to be in writing, it often appears that the time specified for delivery or acceptance of the goods or payment of the price is enlarged by one party at the verbal request of the other. The promise to deliver or pay at the substituted time cannot be sued on, and it appears that the original agreement is no longer the agreement between the parties. The difficulty on this point, which has been the subject of consideration in many cases (*p*), has now been set at rest, and the plaintiff must rely on the original agreement or nothing (*q*). If he can aver and prove that he was ready and willing to perform his part of it, and that the defendant made default on his part, the plaintiff proves a cause of action. Thus, where the time for delivery is extended at the request of the defendant, the plaintiff can prove that he was ready and willing to deliver at the time mentioned in the written agreement (*r*). But if the time were extended at the plaintiff's own request, he cannot sue on the original contract, since he was not ready and willing to perform his part; nor can he sue on the substituted agreement, because the term on which he insists is not in writing (*s*).

Conditions and warranties.—*Express.*—A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it (*t*). These statements may obviously vary in importance. On the one hand they may be such

(*m*) *Startup* v. *Macdonald*, 6 M. & Gr. 593; 12 L.J. Ex. 483. See *ante*, pp. 130, 134.

(*n*) 56 & 57 Vict. c. 71, s. 29 (4).

(*o*) *Attwood* v. *Emery*, 1 C.B. N.S. 110; 26 L.J. C.P. 73; *Tennant* v. *Bell*, 9 Q.B. 684; 16 L.J. M.C. 31; *Staunton* v. *Wood*, 16 Q.B. 638; *Duncan* v. *Topham*, 8 C.B. 225; 18 L.J. C.P. 310.

(*p*) *Cuff* v. *Penn*, 1 M. & S. 21; *Goss* v. *Nugent* (*Lord*), 5 B. & Ad. 58; 2 L.J. K.B. 127; *Stead* v. *Dawber*, 10 Ad. & E. 57; 9 L.J. Q.B. 101; *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L.J. Ex. 126; *Moore* v. *Campbell*, 10 Exch. 323; 23 L.J. Ex. 310; *Noble* v. *Ward*, L.R. 2 Ex. 135; 36 L.J. Ex. 91; *Ogle* v. *Vane* (*Lord*), L.R. 3 Q.B. 272; 37 L.J. Q.B. 77; *Tyers* v. *Rosedale Iron Co.*, L.R. 10 Ex. 195; 44 L.J. Ex. 130; *Leather Cloth Co.* v. *Hieronimus*, L.R. 10 Q.B. 140; 44 L.J. Q.B. 54; *Hickman* v. *Haynes*, L.R. 10 C.P. 598; 44 L.J. C.P. 358; *Plevins* v. *Downing*, 1 C.P.D. 220; 45 L.J. C.P. 695.

(*q*) *Plevins* v. *Downing*, *supra*.

(*r*) *Hickman* v. *Haynes*, *supra*.

(*s*) *Plevins* v. *Downing*, *supra*.

(*t*) *Per* Ld. Abinger, C.B., *Chanter* v. *Hopkins*, 4 M. & W. 399, 404; 8 L.J. Ex. 14.

as, if untrue, to entitle a purchaser to rescind the contract of sale. On the other, they may be such as only to give rise to a claim for damages. It would be more convenient if the term "warranty" had been applied exclusively to statements of the latter kind, those of the former being termed "conditions"; this distinction has now been drawn in the Sale of Goods Act, 1893 (*u*); but for the present, until sect. 11 of the Act is dealt with, the term "warranty" will be used in the wider sense as including statements of both kinds.

Warranties made pending negotiation for sale of property.—The declaration in an action for breach of warranty always averred *warrantizando vendidit* (*x*), which meant that the defendant had sold by warranting. "As to *warrantizando vendidit*," observes Holt, C.J., "that will be so, though the warranty be before the sale; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand, and the seller set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is selling with a warranty. But it is otherwise if the warranty be after the sale; as if a man sells goods and afterwards warrants them, such warranty is not good. But in the other case the warranty is part of the contract" (*y*).

Private representations made prior to sale by auction forming no part of public contract of sale.—If what passes between a vendor and purchaser forms no part of the negotiation ending in the purchase, it cannot be treated as a warranty. Thus in the case of a sale by auction, you cannot "tack on a previous private communication to what is said by the auctioneer at the time of the actual public sale, in order to constitute a warranty. To permit such a practice," observed Maule, J., during the argument, "would be to encourage a fraud upon all others attending the sale." If, therefore, a horse is advertised to be sold by auction without a warranty, and the owner privately represents the horse to be sound and free from vice, to a person who attends the sale and bids for and purchases the horse in reliance on the representation, the representation cannot be treated as a warranty. Those who bid at

(*u*) 56 & 57 Vict. c. 71, ss. 11, 12—14, 53, *post*.

(*x*) *Margetson* v. *Wright*, 8 Bing. 454; 1 L.J. C.P. 128.

(*y*) *Lysney* v. *Selby*, 2 Ld. Raym. 1120; *Roscorla* v. *Thomas*, 3 Q.B. 234; 11 L.J. Q.B. 214.

a public auction, bid against each other on the supposition that they all stand upon an equal footing; and if the sale is announced and conducted as a sale without a warranty, and the biddings are made upon that understanding, any secret underhand bargain for a warranty would be a fraud (*z*).

Representations amounting to warranty.—Many representations of the subject-matter of a contract are of such a nature, and have been made under such circumstances, that the party making them may fairly be considered to warrant his knowledge of their truth, so as to be estopped from afterwards setting up his want of knowledge. This is the case when the means of information are peculiarly within his reach, or he pretends to have informed himself upon the subject, when in truth he knows nothing at all about it. Where the vendor of a ship published a written description of the vessel, which represented the hull to be nearly as good as when launched, whereas it was worm-eaten and unseaworthy, and the keel was broken, and it appeared that the vendor had caused the description to be circulated without having examined the bottom of the vessel, and without knowing whether the description was true or false, and the vessel was afloat and the hull covered with water, so that the purchaser had no means of examining the hull himself, it was held that the purchaser might rescind the contract and recover a deposit paid by him (*a*). If a jeweller represents a piece of crystal to be a diamond, or a common stone to be a bezoar stone, this would now be considered to amount to a warranty of the fact to a purchaser, and the jeweller would be responsible accordingly, whether he knew the representation to be true or false (*b*); for, wherever the means of obtaining correct information lie peculiarly with the seller, it is probable the purchaser relies on the assertion, and if the seller asserts a falsehood to be the truth, not knowing whether it is or is not, he probably would be liable as on a breach of warranty (*c*). Thus, if the vendor of a house and the goodwill of a business represents the business done on the premises to be greater than it really is, this amounts to a warranty of the facts stated, although the statement may have been the result of a mistake, because the annual profit of the trade lies peculiarly within the private knowledge of the vendor (*d*). It must be imputed to him that he knew the fact;

(*z*) *Hopkins* v. *Tanqueray*, 15 C.B. 130; 23 L.J. C.P. 162.

(*a*) *Schneider* v. *Heath*, 3 Campb. 508; *Pawson* v. *Watson*, Cowp. 785; *Adamson* v. *Jarvis*, 4 Bing. 73; 5 L.J. (O.S.) C.P. 68.

(*b*) *Chandelor* v. *Lopus*, Cro. Jac. 4; and the note, 2 Smith's L.C. 52 (10th ed.).

(*c*) *Rawlins* v. *Wickham*, *infra*.

(*d*) *Risney* v. *Selby*, 1 Salk. 211; *Taylor* v. *Green*, 8 C. & P. 319; *Rawlins* v. *Wickham*, 3 De G. & J. 304; 28 L.J. Ch. 192; but see *Joliffe* v. *Baker*, 11 Q.B.D. 255; 52 L.J. Q.B. 609.

and whether he did or did not is of no matter: "he undertook to know, by undertaking to give the description" (*e*). A purchaser of a house gave 7,350*l.* for the house upon the faith of letters from the vendor stating that "the house was in so good a state as not to require any repairs whatever," whereas the house was, at the time the letters were written, affected with the dry rot, and the floors gave way shortly after the purchaser took possession of it; and it was held that the vendor was responsible to the purchaser for such a sum as would put the house into the state he had represented it to be in (*f*). It is not sufficient to show that an article delivered is equally good with that which was bargained for, although it is of a different description. If the article sold is described, the description amounts to a warranty that it shall be an article of the kind described (*g*).

Warranty on sales of horses.—The owner of a horse who has used and driven it, or has had the means of doing so, has greater means of knowledge than a stranger who knows nothing about the animal. If, therefore, the owner offers the horse for sale, every representation that he makes to the buyer respecting the qualities of the animal amounts to a warranty, although the word "warrant" is never used by him. "If parties are dealing for a horse, and the seller says, 'You may depend upon it that the horse is perfectly free from vice,' that is a very sufficient warranty, though the word WARRANT was not used" (*h*). If the purchaser of a horse tells the vendor in a letter, "You represented the horse to me as a five-year-old," and the defendant answers, "The horse is as I represented," this is evidence from which a WARRANTY may be inferred (*i*). If a horse offered for sale has a cough and running at the nose, and the vendor says that it is a mere cold, and that he will deliver the horse sound and free from blemish in a week, that amounts to a warranty to a purchaser that the horse has nothing more than a cold upon him and will be sound at the end of the week (*k*). "If a purchaser," observes Best, C.J., "asks for a carriage horse, or a horse fit to carry a lady or a timid or infirm person, the seller who knows the qualities of the horse he supplies in answer to the demand, undertakes, on every principle of honesty, that it is fit for the purpose specified" (*l*). A warranty will not bind a man in a thing that is apparent (*post*, p. 509), as to warrant

(*e*) *Calverley* v. *Williams*, 1 Ves. jun. 212.

(*f*) *Grant* v. *Munt*, Coop. Ch.C. 173. See also *Redgrave* v. *Hurd*, 20 Ch.D. 1; 51 L.J. Ch. 113; *Smith* v. *Land Corporation*, 28 Ch.D. 7.

(*g*) *Bowes* v. *Shand*, 2 App.Cas. 455; 46 L.J. Q.B. 561.

(*h*) *Cave* v. *Coleman*, 7 L.J. (O.S.) K.B. 26; 3 M. & R. 2; *Hopkins* v. *Tanqueray*, 15 C.B. 130; 23 L.J. C.P. 162.

(*i*) *Salmon* v. *Ward*, 2 C. & P. 211.

(*k*) *Liddard* v. *Kain*, 9 Moore, 356; 3 L.J. (O.S.) C.P. 246.

(*l*) *Jones* v. *Bright*, 3 Moo. & P. 155, 175; 7 L.J. (O.S.) C.P. 213.

that a horse has both his eyes, when he has manifestly lost one of them (*m*). If, therefore, at the time of the sale of a horse the animal is warranted sound in wind and limb, that is understood to mean saving those manifest and visible defects which were obvious to all observers; and, if the horse was manifestly blind or obviously lame, and the purchaser examined the animal before he bought it, and must have been aware of these patent defects, the vendor's representation will give no cause of action. But a purchaser who relies upon a warranty is not bound to make a close or searching examination of a horse before he buys to ascertain whether a defect exists. If, relying upon a warranty, he omits to make such an examination of the animal, and consequently fails to discover a defect which might have been ascertained by examination, he is, nevertheless, entitled to maintain an action (*n*); and, if a manifest defect is not necessarily of a permanent nature—if a horse has a cough and running at the nose, and the vendor says that it is merely a cold, and that the horse will be sound and well in a given time, and the purchaser buys in reliance upon the truth of the representation—the vendor, as we have seen, will be responsible in damages if the horse continues unsound and permanently diseased (*o*).

Evidence of breach of warranty of horse.—What constitutes unsoundness.—The rule as to unsoundness is, that if at the time of the sale the horse has any disease, or has undergone any alteration of structure either from disease or accident, which actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress, or from its ordinary effects, will diminish the natural usefulness of the animal, such horse is unsound (*p*). The word "sound" means, that the animal is free from disease at the time he is warranted. Of course, if the disease be slight, the unsoundness is proportionably so, and so also ought to be the damages (*q*). Convexity of the cornea, rendering a horse short-sighted, and causing him to shy, is unsoundness (*r*). It is not enough for the plaintiff to give evidence inducing a suspicion that the horse was unsound at the time of the warranty. If he only throws the soundness into doubt he is not entitled to recover (*s*).

Proof of manifest defects not covered by warranty.—If the defendant can prove that the defect complained of by the plaintiff was a manifest defect obvious to all observers, and that the plaintiff

(*m*) *Ekins* v. *Tresham*, 1 Lev. 102.
(*n*) *Holyday* v. *Morgan*, 28 L.J. Q.B. 9; 1 E. & E. 1.
(*o*) *Liddard* v. *Kain*, *supra*.
(*p*) *Coates* v. *Stevens*, 2 Moo. & R. 157.
(*q*) *Kiddell* v. *Burnard*, 9 M. & W. 668; 11 L.J. Ex. 268.
(*r*) *Holyday* v. *Morgan*, 28 L.J. Q.B. 9; 1 E. & E. 1.
(*s*) *Eaves* v. *Dixon*, 2 Taunt. 343.

examined the horse, and knew of the defect at the time he bought the animal, the defect will be excluded from the warranty. If the horse was naturally ill-formed from turning out one of its fore-legs, so as to be incapable of doing much work without cutting the ankle with the shoes so as to produce lameness, this is not unsoundness, rendering the vendor liable in damages for a breach of warranty (*t*). The peculiar form of hock called "curby hock," which is a natural defect, is not an unsoundness, if it has not occasioned lameness up to the time of the sale, although such horses are very liable to throw out a curb, and become lame (*u*). But bone spavin in the hock is unsoundness, although it may not produce lameness for years (*x*). A natural malformation of the animal, constituting a patent defect visible to the eye of every observer, must be taken to be known to a purchaser who has examined the horse, and he will be deemed to have bargained for the warranty of soundness subject to the patent defect; but if the defect is not obvious, it must be proved that the purchaser was cognizant of it at the time he purchased, for the very fact of the warranty having been given would tend to throw him off his guard, and prevent him from making a close examination of the animal (*y*).

Proof of vice.—If a horse has been warranted free from vice, and the horse is proved to be a crib-biter, the warranty is broken. "The habit of crib-biting," observes Parke, B., "may not indeed show vice in the temper of the animal, but as it is a habit decidedly injurious to its health, and tending to impair its usefulness, it comes within the meaning of the term 'vice'" (*z*).

Representations not amounting to warranty.—There is no warranty of the party's knowledge, or of the fact being as it is stated to be, if the representation is made concerning some matter the knowledge of which lies as much within the power of the one party as the other, and the correctness of which may be ascertained by the party interested in knowing the truth by the exercise of ordinary diligence, provided the representation is not made for the purpose of preventing him from making those inquiries which every prudent person ought to make (*a*). Where the statement is ambiguous, the party complaining of it must prove that he interpreted the words in the false sense in order to succeed in rescinding the contract (*b*). When a general warranty is given on a sale, defects which were apparent at the time of the making of the

(*t*) Alderson, J., *Dickinson* v. *Follett*, 1 M. & Rob. 300.
(*u*) *Brown* v. *Elkington*, 8 M. & W. 132; 10 L.J. Ex. 336.
(*x*) *Watson* v. *Denton*, 7 C. & P. 85.
(*y*) *Holyday* v. *Morgan*, 28 L.J. Q.B. 9; 1 E. & E. 1.
(*z*) *Scholefield* v. *Robb*, 2 M. & Rob. 210.
(*a*) *Attwood* v. *Small*, 6 Cl. & Fin. 338; *Clapham* v. *Shillito*, 7 Beav. 146.
(*b*) *Smith* v. *Chadwick*, 9 App.Cas. 187; 51 L.J. Ch. 597.

bargain, and were known to the purchaser, cannot be relied on as a ground of action (*c*). "If one sells purple to another, and saith to him, 'This is *scarlet*,' the warranty is to no purpose, for that the other may perceive this; and this gives no cause of action to him. To warrant a thing that may be perceived at sight is not good" (*d*).

Representations of matters of opinion and belief.—A representation, moreover, frequently amounts to a mere statement of the party's own opinion and belief upon a matter concerning which the other contracting party is to exercise his own judgment, and does not amount to a positive statement of a fact. Thus, if the vendor of a picture, submitted to the inspection of the purchaser, states it to be the work of a particular artist, it is always a question for the jury to determine whether the statement amounted to a mere expression of the vendor's own opinion and belief upon a matter concerning which the buyer was to exercise his own judgment, or whether it was understood to be a positive warranty of the fact (*e*). Where a purchaser inquires for himself, and acts upon his own opinion, he cannot say that he has been misled by the false statement of another (*f*); and, if he examines the article for himself, and selects it after exercising his own judgment upon it, the vendor only warrants that the article is, so far as he knows, what it appeared to be, and what he believed it to be, at the time he sold it (*g*). Thus, where the plaintiff, having heard that the defendant had some barley to sell, went to the defendant's counting-house, where a person who managed the defendant's business produced a sample of barley which he said was seed barley, and the plaintiff then looked at the barley, and said it was a good sample of seed barley, and bought it; and it turned out that both parties were mistaken, and that the barley was not what was ordinarily known in the market as "seed barley," but what was called "barley bigg"; and it appeared that both parties had equal means of knowledge of the true character of the article, that both had believed it to be seed barley, and that it was bought and sold as such; it was held that what the defendant's servant said about the article amounted, under the circumstances, merely to an expression of his own opinion and belief about it, and did not amount to a warranty (*h*). But, where the purchaser has not examined for

(*c*) *Margetson* v. *Wright*, 8 Bing. 454; 1 L.J. C.P. 128; *Ekins* v. *Tresham*, 1 Lev. 102.

(*d*) *Baily* v. *Merrell*, 3 Bulstr. 95.

(*e*) *Jendwine* v. *Slade*, 2 Esp. 572; *Lomi* v. *Tucker*, 4 C. & P. 15; *De Sewhanberg* v. *Buchanan*, 5 C. & P. 343; *Power* v. *Barham*, 4 Ad. & E. 473; 5 L.J. K.B. 88.

(*f*) *Jennings* v. *Braughton*, 22 L.J. Ch. 584; 17 Beav. 234.

(*g*) *Ormrod* v. *Huth*, 14 M. & W. 664; 14 L.J. Ex. 366.

(*h*) *Carter* v. *Crick*, 4 H. & N. 412; 28 L.J. Ex. 238.

himself, and has not relied upon his own judgment in the matter, but has acted upon the faith of the representation made to him, then the representation amounts, as we have seen, to a warranty of the fact.

Proof of warranties.—It has been held that a warranty made orally, on the completion of a written contract of sale, cannot be introduced as part of the contract, if the contract itself is silent as to the fact of the warranty, as it is a rule of law that oral evidence shall not be given "to superadd any term to a written agreement, for it would be setting aside all written contracts, and rendering them of no effect" (*i*). But, although a warranty cannot be superadded to a written contract by oral testimony, yet, if it can be shown that the contract was induced by an oral warranty made by one of two contracting parties, which was false to the knowledge of the party making it, and was made for the purpose of throwing the other contracting party off his guard, and fraudulently obtaining his consent to the bargain, this is a circumstance altogether collateral to the contract, and proof of it by oral testimony does not in anywise infringe upon the preceding rule of law. The oral evidence cannot be received to show that the contract itself was different from that authenticated by the written instrument; but it is admissible to show that the assent of the party to the contract was obtained under false pretences, and that the contract is bottomed in fraud, and has therefore no legal existence. *Ex dolo non oritur contractus.* The oral evidence of the false and fraudulent representation in such a case has not the effect of altering or adding to a written contract; but, admitting the contract in all its terms, it seeks to show that the party guilty of the fraud ought not to have the assistance of a court of justice for the enforcement of it. "If duress be pleaded, or a false reading of the deed, you avoid the deed at law by parol evidence: but then these facts are collateral to the import of the instrument; they do not vary or alter it" (*k*). The oral evidence is offered, not to affect the terms of the contract itself, but to destroy the remedy by way of action upon it (*l*). The facts may be pleaded not only as a defence to an action on the contract (*m*), but also as ground for an action of deceit (*n*). Where representations which may amount to a warranty are contained in letters which constitute a contract of sale, evidence is admissible of the surrounding circumstances for

(*i*) *Powell* v. *Edmunds*, 12 East, 6, 11.

(*k*) *Davis* v. *Symonds*, 1 Cox, Eq.Cas. 405.

(*l*) *Collins* v. *Blantern*, 2 Wils. 347; *Wright* v. *Crookes*, 1 Sc. N.R. 698; *Hutchinson* v. *Morley*, 7 Sc. 341.

(*m*) *Canham* v. *Barry*, 15 C.B. 597; 24 L.J. C.P. 100.

(*n*) *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L.J. (O.S.) K.B. 89; *Meyer* v. *Everth*, 4 Campb. 22; *Canham* v. *Barry*, *supra*.

the purpose of showing that no warranty was contemplated by the parties (*o*).

Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment.—"Cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied upon by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is a matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other" (*p*).

Construction of express warranties.—Where there was an agreement for the sale and purchase of all the naphtha the defendant might make during two years, "say from 1,000 to 1,200 gallons a month," it was held that these words did not amount to a warranty that that quantity of naphtha should be manufactured and sold per month (*q*). But where the agreement was to prepare and sell "say not less than 100," &c., it was held that the words

(*o*) *Stucley* v. *Baily*, 1 H. & C. 405; 35 L.J. Ex. 483.

(*p*) Lord Langdale, *Clapham* v. *Shillito*, 7 Beav. 149; *Shrewsbury* v. *Blount*, 2 Sc. N.R. 594.

(*q*) *Gwillim* v. *Daniell*, 2 Cr. M. & R. 61; 4 L.J. Ex. 174.

did amount to a warranty or undertaking that at least the quantity specified should be prepared and sold (*r*). Warranties of quantity and quality made on sales of goods will be regulated by the apparent intention of the parties at the time the contract was entered into. There is no necessity that the word "warrant" or "promise" should occur in the bargain; but the representation must form part of the contract of sale (*s*). Where a sale-note made on the purchase of a horse described the animal as "a black gelding, about five years old, constantly driven in the plough—warranted," it was held that, if the word "warranted" had been placed at the commencement of the sentence, it would have extended to the sex and age of the horse, and his fitness for the plough; but, as it concluded the sentence, it extended only to the soundness of the animal, the preceding sentences being merely descriptive of the horse, and of the work to which it had been accustomed (*t*). And, where the seller gave the purchaser a written receipt for the purchase-money, describing the horse as a bay gelding got by Cheshire Cheese, warranted sound, it was held that the warranty was confined to the soundness of the animal, and did not extend to the description of his parentage (*u*). So, where a written receipt described the horse sold as "a gray four years old colt, warranted sound in every respect," it was held that the warranty did not extend to the description of the age of the animal, and that if the parties had meant to warrant the age as well as the soundness of the colt, the words should have been "warranted a four years old colt, and sound in every respect" (*x*). Where, on the sale of a horse, the seller signed the following warranty,—"Mr. C. bought of Mr. G. G. a bay horse for ninety pounds, warranted sound. 90*l*. Warranted sound for one month"—it was held that the latter words limited the duration of the warranty, and meant that it was to continue in force for one month only, and that complaint of unsoundness must, therefore, be made by the purchaser within one month of the sale (*y*). But the construction to be put upon contracts of this description will be regulated by the surrounding circumstances of each particular case, which must be regarded, in order that the true meaning of the parties may be discovered.

(*r*) *Leeming* v. *Snaith*, 16 Q.B. 275; 20 L.J. Q.B. 164; as to the effect of the words "about" or "more or less," see *post*, s. 30; *Bourne* v. *Seymour*, 16 C.B. 337; 24 L.J. C.P. 202; *McConnel* v. *Murphy*, L.R. 5 P.C. 203.

(*s*) *Hopkins* v. *Tangueray*, 15 C.B. 130; 23 L.J. C.P. 162.

(*t*) *Richardson* v. *Brown*, 8 Moore, 338.

(*u*) *Dickenson* v. *Gapp*, cited 1 Moo. & Sc. 78.

(*x*) *Budd* v. *Fairmaner*, 1 M. & Sc. 74; 1 L.J. C.P. 16; as to unsoundness, see *Kiddell* v. *Burnard*, 9 M. & W. 668; 11 L.J. Ex. 268.

(*y*) *Chapman* v. *Gwyther*, L.R. 1 Q.B. 463; 35 L.J. Q.B. 142.

Warranties by agents.—The general presumption is that, where a principal intrusts property to an agent to sell, he authorises him to make all such warranties as are usual in the ordinary course of that particular business of selling, and that, if it is usual to sell with a warranty, he has an implied authority to warrant (*z*). The agent or servant of a horse-dealer has an implied authority to bind his principal or master by a warranty, even although (unknown to the buyer) he has express orders not to warrant; and evidence of an alleged custom among horse-dealers not to give a warranty where the purchaser obtains a veterinary surgeon's certificate of soundness, is not admissible to contradict such implied authority (*a*). But a servant intrusted on one particular occasion to sell has no implied authority to warrant so as to bind the owner (*b*).

Distinction between condition and warranty.—The foregoing statements with reference to warranties generally apply equally to warranties strictly so called and to warranties which amount to conditions. A warranty strictly so called is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated (*c*).

When condition to be treated as warranty.—"(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated. (b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. (c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect" (*d*).

Nothing in sect. 11 is to affect the case of any condition or

(*z*) *Dingle* v. *Hare*, 7 C.B. N.S. 145; 29 L.J. C.P. 148.

(*a*) *Howard* v. *Sheward*, L.R. 2 C.P. 148; 36 L.J. C.P. 42.

(*b*) *Brady* v. *Tod*, 9 C.B. N.S. 592; 30 L.J. C.P. 223; but as to this, see *ante*, p. 311.

(*c*) 56 & 57 Vict. c. 71, s. 62.

(*d*) *Ib.*, s. 11.

warranty, fulfilment of which is excused by law by reason of impossibility or otherwise (*e*).

Conditional and defeasible sales.—If on the sale of a horse it is part of the bargain that the animal shall be taken back if it is unsound, the purchaser will be entitled to return the animal, and recover back the purchase-money, on proof of the unsoundness of the horse. Where an agent intrusted to sell a mare, but not being authorised to warrant her, refused to do so, but at the time of the sale told the purchaser that, if the mare was not all right, she was not his, and the purchaser then paid the price and took away the mare, and, the animal proving to be unsound, he returned her and sued for the price, it was held that the proper question for the jury was whether it was part of the contract that the mare should be returned if she proved to be unsound (*f*); so, where, pending a negotiation for a sale of hops, the growth of 300 acres, the purchaser declared that he would not have the hops if the bine had been sulphured, and required and received a written undertaking from the vendor that no sulphur had been used, and the hops were then delivered to and received by the purchaser, and it was then ascertained that sulphur had been used on five acres by way of experiment without the knowledge of the vendor, and that these sulphured hops were so mixed with the unsulphured as to be undistinguishable, it was held that the purchaser had a right to avail himself of the breach of the condition and annul the bargain (*g*). If goods are sold on the terms that the buyer is to have them a certain time on trial, the sale is conditional on the purchaser's approval after trial, so that, if he returns them after trial, there is no sale. In these cases no property passes until the purchaser has received and adopted the goods (*h*). In other cases the right of property in the specific thing sold passes subject to a condition. If the condition is fulfilled or waived, the sale becomes an absolute sale (*i*); if it is not fulfilled or waived, the party in whose favour and for whose protection the condition was imposed is entitled to repudiate the contract and return the subject-matter of the sale and recover the price (*k*). Where a mare was sold on the terms that, if she proved in foal, she was to be returned, and the mare proved in foal, it was held that the vendor had a right to have the animal returned to him (*l*). Where the sale is defeasible within a certain

(*e*) 56 & 57 Vict. c. 71, s. 11 (3); *Behn* v. *Burness*, 3 B. & S. 756; 32 L.J. Q.B. 204.

(*f*) *Foster* v. *Smith*, 18 C.B. 156.

(*g*) *Bannerman* v. *White*, 10 C.B. N.S. 844; 31 L.J. C.P. 28.

(*h*) *Swain* v. *Shepherd*, 1 Moo. & R. 223.

(*i*) *Moss* v. *Sweet*, 16 Q.B. 493; 20 L.J. Q.B. 167.

(*k*) *Head* v. *Tattersall*, L.R. 7 Ex. 7; 41 L.J. Ex. 4.

(*l*) *Williams* v. *Burgess*, 10 Ad. & E. 499; 8 L.J. Q.B. 286.

time, the fact that the thing sold has within that time and without any negligence on the part of the purchaser ceased to exist, does not disable the purchaser from avoiding the contract. Where a horse was sold with a condition that he might be returned within a specified time if he did not answer the description given of him, and within the time the horse injured itself without any negligence on the part of the purchaser, it was held that the latter was entitled to rescind the contract and recover the price of the horse which did not answer the description (*m*); and the same has been held where the horse died (*n*). Where a horse was sold with the condition that if it did not correspond with the warranty it must be returned on the second day after the sale, and while being ridden it fell and was so injured that it could not be returned on that day, it was held that the purchaser could, nevertheless, sue for breach of warranty (*o*).

A contract for the sale of goods "on arrival" (*p*), or to arrive (*q*), or that may be loaded (*r*), or expected to arrive (*s*), is conditional on the arrival or loading of the goods, so that, if no goods arrive or are shipped, there is no sale and no liability to deliver on the part of the vendor; but, it may be that if a man takes upon himself to sell goods expected to arrive by a certain ship, and the goods afterwards arrive consigned to some third party, so that the intended vendor has no power of disposing of them, he is precluded from setting up that, in addition to the contingency of their arrival, there was implied the further contingency of their coming consigned to him. Having dealt with them as his own, he cannot be allowed to import into the contract a new condition, viz., that the goods on their arrival shall prove to be his (*t*); for, whenever the agreement is conditioned upon an event which happens, the vendor will be liable for non-performance, although he is prevented from fulfilling his contract by reason of some mistake or accident over which he had no control; for he ought to have provided against the possible contingency by his contract. If, therefore, he agrees to sell certain cases of East Indian tallow to be delivered to the purchaser on the safe arrival of a certain ship, and the ship arrives, but without the tallow, the vendor is responsible for the non-performance of his

(*m*) *Head* v. *Tattersall*, *supra*.

(*n*) *Elphick* v. *Barnes*, 5 C.P.D. 321; 49 L.J. C.P. 698.

(*o*) *Chapman* v. *Withers*, 20 Q.B.D. 824; 57 L.J. Q.B. 457.

(*p*) *Boyd* v. *Siffkin*, 2 Campb. 326.

(*q*) *Lovatt* v. *Hamilton*, 5 M. & W. 639; *Johnson* v. *Macdonald*, 9 M. & W. 600; 12 L.J. Ex. 99.

(*r*) *Hayward* v. *Scougall*, 2 Campb. 56.

(*s*) *Smith* v. *Myers*, L.R. 7 Q.B. 139; 41 L.J. Q.B. 91.

(*t*) *Fischel* v. *Scott*, 15 C.B. 69; *Gorrissen* v. *Perrin*, 2 C.B. N.S. 681; 27 L.J. C.P. 29.

contract (*t*), for a vendor may bind himself to deliver goods in any event (*u*).

Effect of a breach of warranty by the vendor.—If it appears to have been the intention of the parties that a sale of chattels should be an absolute sale with a warranty superadded, the purchaser cannot annul the sale and return the thing sold, unless there has been actual fraud, and the vendor knew, at the time of the sale, that the thing sold did not answer the warranty; but, if the sale is conditional on the thing sold being in accordance with the warranty, the purchaser will be entitled to annul the sale, and return the article and recover the price, if the condition is not fulfilled. Where the plaintiff exchanged a watch with the defendant for a pair of candlesticks warranted to be silver, which turned out to be base metal, it was held that the defendant could not rescind the contract and return the candlesticks, and claim back his watch, without proving that the plaintiff knew that the candlesticks were not silver at the time he gave the warranty (*v*). Lord Eldon is reported to have said that, if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might return the horse and bring an action to recover the full money paid, but that the seller had a right to expect that the horse should be returned in the same state he was in when sold, and not by any means diminished in value (*w*). "It is, however, extremely difficult, indeed impossible," justly observes Lord Tenterden, "to reconcile this doctrine with those cases in which it has been held that, where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and re-vest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorising the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether." "If these cases," observes his lordship, "are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, re-vest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration" (*x*).

(*t*) *Hale* v. *Rawson*, 4 C.B. N.S. 85: 27 L.J. C.P. 189.
(*u*) *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L.J. Q.B. 164; *Nickoll* v. *Ashton*, (1901) 2 K.B. 126; 70 L.J. K.B. 600.
(*v*) *Emanuel* v. *Dane*, 3 Camp. 299.
(*w*) *Curtis* v. *Hannay*, 3 Esp. 82.
(*x*) *Street* v. *Blay*, 2 B. & Ad. 456;

Rejection and non-acceptance of goods sold.—In cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed (*y*). In cases of executory contracts when there is a warranty of quality, the purchaser is not only not bound to receive the goods unless they correspond with the warranty; but, even after they have been delivered by the vendor, he may reject them after discovering the defect, and, if he has paid for them, he may recover back the price. It is, however, generally necessary to enable a purchaser to reject goods after delivery, that he should not have done more than was necessary for a fair trial of them, or for the purpose of examination and comparison, that he should reject the goods within a reasonable time (*z*), and that he should not have done any act to alter the position of the vendor or to delay the return of the goods (*a*). If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them (*b*). In determining what is a reasonable time for rejecting goods the conduct of the seller may be taken into consideration, as, for instance, a subsequent misrepresentation whereby he has induced the purchaser to prolong the trial (*c*).

Conditions and warranties—Implied undertaking as to title, &c.—"In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass: (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods: (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made" (*d*).

In Noy's Maxims it is affirmed to be a principle of law that

Dawson v. *Collis*, 10 C.B. 523; 20 L.J. C.P. 116; *Parsons* v. *Sexton*, 4 C.B. 899; 16 L.J. C.P. 184; *Toulmin* v. *Hedley*, 2 Car. & K. 157; *Foster* v. *Smith*, 18 C.B. 156; *Heyworth* v. *Hutchinson*, L.R. 2 Q.B. 447; 36 L.J. Q.B. 270.

(*y*) *Behn* v. *Burness*, 3 B. & S. 756; 32 L.J. Q.B. 204.

(*z*) See 56 & 57 Vict. c. 71, ss. 35, 56.

(*a*) *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199; *Street* v. *Blay*, 2 B. & Ad. 456; *Chapman* v. *Morton*, 11 M. & W. 534; 12 L.J. Ex. 292.

(*b*) Bovill, C.J., *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438; 41 L.J. C.P. 228.

(*c*) *Adam* v. *Richards*, 2 H.Bl. 573.

(*d*) 56 & 57 Vict. c. 71, s. 12.

"If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, *et caveat emptor*" (*e*). However true this may have been when Noy wrote, it is certainly not true as a general proposition at the present day. Wherever a man sells goods *as owner*, he impliedly undertakes that the goods are his own goods, and that he has a right to make the sale he professes to make; and, if he was not the owner at the time of the sale, and was not selling his own goods but the goods of a third party, who subsequently claims them and deprives the purchaser of them, he is responsible in damages for the breach of such implied undertaking (*f*). "By the civil law," observes Blackstone, "an implied warranty was annexed to every sale in respect of the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose" (*g*). If goods are sold by a person who is not the owner, and the owner is found out and paid for the goods, the vendor who sold them cannot then call upon the purchaser for payment (*h*). "If a man takes the goods of S. tortiously and sells them to me for money as his own goods, and afterwards S. takes them away from me, I may have an action on the case against my vendor." "If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B. buy them, when in truth they are the goods of another, yet, if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of a stranger, yet B. shall have an action for this deceit" (*i*).

"Where one, having the possession of any personal chattel, sells it, the bare affirming it to be his amounts to a warranty of the fact: and an action lies on the affirmation; for his having possession is a colour of title, and perhaps no other title can be made out. *Aliter*, where the seller is out of possession; for then there may be room to question the seller's title; and *caveat emptor* in such a case to have either an express warranty or a good title" (*k*). This

(*e*) Noy's Maxims, ch. 42, p. 89.

(*f*) *Eichholz* v. *Bannister*, 17 C.B. N.S. 708; 34 L.J. C.P. 105.

(*g*) 2 Bl. Com. 451; 2 Kent's Com. s. 478; 2 Stephen's Com. 84 (ed. 11); see also Lee, C.J., in *Ryall* v. *Rowles*, 1 Ves. senr. 351, commenting on the unreported case of *L'Apostre* v. *L'Plaistrier*; *Simms* v. *Marryatt*, 17 Q.B. 281; 20 L.J. Q.B. 458.

(*h*) *Dickenson* v. *Naul*, 4 B. & Ad. 638; *Allen* v. *Hopkins*, 13 M. & W. 94; 13 L.J. Ex. 316.

(*i*) 1 Rolle Abr. 90, pl. 5; 91, pl. 7; see *Pasley* v. *Freeman*, 3 T.R. 59.

(*k*) *Medina* v. *Stoughton*, 1 Salk. 210; *Crosse* v. *Gardner*, Carth. 90; *Adamson* v. *Jarvis*, 4 Bing. 66; 5 L.J. (O.S.) C.P.

dictum of Lord Holt's would appear not to be warranted by later authorities. "This distinction by Holt," observes Buller, J., "is not mentioned by Lord Raymond, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot perceive a distinction between the vendor's being in or out of possession. The thing is bought of him in consequence of his assertion; and, if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on" (*l*).

The circumstances of the case may, however, rebut the warranty of title; or, in the words of sect. 12, the circumstances of the contract may be such as to show a different intention. Whenever a man does not sell goods as owner, but in some special character or capacity, and the purchaser has notice thereof, he is bound to look into the title of his vendor; for there is not, under such circumstances, any implied warranty of title on the part of the vendor (*m*). The latter merely undertakes and promises that he does not, at the time he sells, know of any defect in his authority or title to sell; and he cannot be made responsible for the repayment of the purchase-money, unless it can be proved that he knew he had no right or title to sell, and that consequently his conduct was fraudulent. Thus, in the case of sales by sheriffs of goods and chattels taken in execution, the sheriff does not impliedly warrant his title to sell, or warrant the purchaser against eviction; he merely promises that he does not, at the time he sells, know of any defect in his authority, or that he has no right or title to sell (*n*). So, in the case of sales by pawnbrokers of unredeemed pledges, the pawnbroker only warrants the subject-matter of the sale to be a pledge the time for the redemption of which has expired. He does not warrant or promise that the pledgor had a title to pledge the article; nor does he impliedly warrant the purchaser against eviction. As he has sold in a special character or capacity, he impliedly sells and agrees to transfer his own title and interest in the subject-matter of the sale, and no more; and, that being so, it is the duty of the purchaser to inquire into the title; and, if he neglects so to do, and it subsequently appears that the pledgor had no title to pledge nor the pawnbroker to sell, and the purchaser is evicted, he cannot recover

68; *Harding* v. *Freeman*, Sty. 310; *Roswell* v. *Vaughan*, Cro. Jac. 196.

(*l*) *Pasley* v. *Freeman*, 3 T.R. 51, 58; see also *Morley* v. *Attenborough*, 3 Exch. 500; 18 L.J. Ex. 148; *Eichholz* v. *Bannister*, 17 C.B. N.S. 708; 24 L.J. C.P. 105. The distinction taken by Lord Holt is, however, well recognised in America: see 2 Kent's Com. s. 478; Story on Sale, s. 367, n. 5, p. 436 (ed. 4).

(*m*) *Bagueley* v. *Hawley*, L.R. 2 C.P. 625; 36 L.J. C.P. 328.

(*n*) *Chapman* v. *Speller*, 14 Q.B. 621; 19 L.J. Q.B. 239.

compensation for his loss, unless he can establish a case of fraud (*o*). There may be no implied warranty of title on the part of a vendor, and yet the purchaser may be entitled to recover back the purchase-money, on the ground of a total failure of consideration. Thus, in the case of a sale of stock, scrip, or shares in joint stock companies, the law does not imply any undertaking or warranty from the vendor that the scrip, stock, or shares he sells are genuine; but, if the vendor has innocently sold forged or counterfeit stock, scrip, or shares, the purchaser is entitled, as we have seen, to a return of the purchase-money, on the ground that there has been a total failure of consideration (*p*). Where the plaintiff succeeded the defendant as the tenant of a dwelling-house, and agreed with him for the purchase of the tenant's fixtures in the house, and paid him the purchase-money, and it subsequently appeared that the fixtures belonged to the landlord, and that the tenant had no right to sell them, and the plaintiff was obliged to pay the value of them to the landlord, it was held that he was entitled to recover back the money he had paid to the defendant, on the ground that there had been a total failure of the consideration, and that the money had been paid under a mistake, although it appeared that the defendant had himself bought the fixtures *bonâ fide* of a preceding tenant in ignorance of the title of the landlord (*q*).

But, if the vendor does not pretend himself to be the owner of the goods he sells, but sells only such a title and interest as the law gives him in the subject-matter of the sale, the purchase-money cannot be recovered back on the ground of a failure of the consideration, if it turns out that the vendor had not the title or interest which he was supposed to have, unless the vendor knew of his want of title at the time of the sale, and there has been a fraudulent concealment (*r*). Where the plaintiff and defendant both attended a sheriff's sale where goods seized under a writ of execution were being sold by auction, and the defendant purchased a lot for 18*l.*, and the plaintiff offered the defendant 5*l.* "to let him stand in his shoes," which offer the defendant accepted, and with the assent of the sheriff made over his bargain to the plaintiff, and the plaintiff paid down 23*l.*, 18*l.* of which were handed to the sheriff as the price of the lot, and the remaining 5*l.* were retained by the defendant as his share of the purchase-

(*o*) *Morley* v. *Attenborough*, 3 Exch. 500; 18 L.J. Ex. 148.

(*p*) *Westropp* v. *Solomon*, 8 C.B. 345, 371; 19 L.J. C.P. 1.

(*q*) *Robinson* v. *Anderton*, 1 Peake, 129; *Wilkinson* v. *Lloyd*, 7 Q.B. 27, 43; sub nom. *Leeman* v. *Lloyd*, 14 L.J. Q.B. 165.

(*r*) As to effect of fraud, see sect. 61, *post*.

money, and it was subsequently discovered that the goods had been seized by mistake, and were not the property of the debtor against whom execution had been issued, and the plaintiff was obliged to return the goods, and then brought an action against the defendant for the recovery of the 5*l.* on the ground that there had been a total failure of consideration, it was held that the true consideration was the transfer to the plaintiff of the defendant's right, such as it was, to the 18*l.* lot; and, having got that, the plaintiff had got all that he had bargained for, and agreed to buy, and the defendant to sell, and that there was no ground for claiming a return of the purchase-money. In deciding for the defendant, observes the court, "under the circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid" (*s*). On a sale of letters patent there is no warranty that the patent is indefeasible, and the purchaser having the same means of knowledge as to the value of the patent as the seller, the maxim *caveat emptor* applies (*t*).

Conditions and warranties—Sale by description.—"Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description" (*u*). If the thing delivered does not answer the description of that which was sold—if, that is, it differs in kind and not in quality only, so as to amount in effect to a different article—the buyer is not bound to take it; and, if he has paid for it, he may recover back the money (*x*).

When the sale is a sale of particular classes and descriptions of goods to be selected by the vendor, such as a sale of so many measures of corn, wine, oil, or fruit, and not of any specific ascertained parcel of goods, the vendor will fulfil his contract by furnishing any goods fairly answering the description given by him. When, on the other hand, the precise article intended to be bought and sold was ascertained at the time of the making of the bargain, the vendor must deliver the identical thing so ascertained, and cannot fulfil his contract by delivering anything else of a corresponding nature. If the purchaser, instead of going in person

(*s*) *Chapman* v. *Speller*, 14 Q.B. 621; 19 L.J. Q.B. 239.

(*t*) *Hall* v. *Conder*, 2 C.B. N.S. 53; 26 L.J. C.P. 138.

(*u*) 56 & 57 Vict. c. 71, s. 13; *Nichol* v. *Godts*, 10 Exch. 191; 23 L.J. Ex. 314. As to sale by sample, see sect. 15, *post*.

(*x*) *Azémar* v. *Castella*, L.R. 2 C.P. 677; 36 L.J. C.P. 263; *Vigers* v. *Sanderson*, (1901) 1 K.B. 608; 70 L.J. K.B. 383.

to a shop, and selecting the goods himself, sends an order describing what he wants, the vendor, if he accepts the order, must select and send an article which fairly corresponds with the description. And this is so whether the purchaser has an opportunity of inspecting the goods and judging for himself or not (*y*). Thus, where a purchaser forwarded a written order to the vendor for "scarlet cuttings," to be shipped on his account for the Chinese market, and the vendor sent on board a different article, it was held that the plaintiff was entitled to recover from the vendor all the loss he had sustained in consequence of his not having had in China the goods which he had ordered (*z*). If, therefore, a shipowner supplies a ship ordered to be copper-fastened which is not copper-fastened, or a silversmith sells plated goods for silver (*a*), or if a merchant sells wine or beer described as "fit," or ordered by the purchaser to be "fit, for the Mediterranean," or "India market," and sends out a liquid which turns sour on the voyage, and is not saleable on its arrival as wine or beer (*b*), he is liable to an action for the breach of an implied undertaking to furnish the article described and ordered (*c*). Where a contract was entered into for the supply of a certain quantity of "best palm oil, usual tare and draft, wet, dirty, and inferior, if any, at a fair allowance," it was held that evidence was admissible to show that there was an established usage in the trade regulating the proportions of good and bad oil, and that the vendor under such a contract was bound to supply a certain proportion of the best oil (*d*).

The vendee may refuse to receive the thing proffered to him in performance of the contract on the ground that it does not correspond with the descriptive statement (*e*). A purchaser is not bound to accept goods partly of the quality bargained for and partly of an inferior quality, if they are mixed together so that the whole bulk becomes of an inferior quality to that bargained for (*f*). Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination though he may have bought after inspection of the bulk (*g*).

(*y*) *Tye* v. *Fynmore*, 3 Campb. 462; *Josling* v. *Kingsford*, 3 C.B. N.S. 447; 32 L.J. C.P. 94.

(*z*) *Bridge* v. *Wain*, 1 Stark. 504.

(*a*) *Shepherd* v. *Kain*, 5 B. & Ald. 240.

(*b*) *Fisher* v. *Samuda*, 1 Campb. 190.

(*c*) *Gardiner* v. *Gray*, 4 Campb. 144; *Powell* v. *Horton*, 2 Bing. N.C. 668; 5 L.J. C.P. 204; *Allan* v. *Lake*, 18 Q.B. 560; *Simond* v. *Braddon*, 2 C.B. N.S. 324; 26 L.J. C.P. 198; *Wieler* v. *Schilizzi*, 17 C.B. 619; 25 L.J. C.P. 89.

(*d*) *Lucas* v. *Bristow*, E. B. & E. 907; 27 L.J. Q.B. 364.

(*e*) *Behn* v. *Burness*, 3 B. & S. 751; 32 L.J. Q.B. 204; *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438; 41 L.J. C.P. 228.

(*f*) *Nicholson* v. *Bradfield Union*, L.R. 1 Q.B. 620; 35 L.J. Q.B. 176.

(*g*) *Jones* v. *Just*, L.R. 3 Q.B. 197; 37 L.J. Q.B. 89; *Mody* v. *Gregson*, L.R. 4 Ex. 49; 38 L.J. Ex. 12; *Randall* v. *Newson*, 2 Q.B.D. 102; 46 L.J. Q.B. 259; *Bowes* v. *Shand*, 2 App.Cas. 455, 480; 46 L.J. Q.B. 561.

Where there is a contract for the sale of specific or ascertained goods which the buyer has not seen, and he relies on the description given to him of them by the seller, the contract is for the sale of goods by description, and there is an implied condition that the goods shall correspond with the description (*h*).

Conditions and warranties—Implied conditions as to quality or fitness.—Subject to the provisions of the Act of 1893 and of any statute in that behalf, "there is no implied warranty or condition as to the quality (*i*) or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose: (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed: (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade: (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith" (*k*).

Implied warranty where nothing is said respecting quantity or quality—Caveat emptor.—The law does not imply from the mere seller of an article in its natural state, who has no better means of information than the purchaser, as, for instance, where the goods are in existence and can be inspected by the buyer (*l*), and who does not affirm that the article is fit for any particular purpose, any warranty or undertaking beyond the ordinary promise that he makes no false representation calculated to deceive the purchaser, and practises no deceit or fraudulent concealment, and that he is not cognizant of any latent defect materially affecting the marketable value of the goods (*m*). "In the general sale of a horse, the

(*h*) *Varley* v. *Whipp*, (1900) 1 Q.B. 513; 69 L.J. Q.B. 333.

(*i*) "Quality of goods" includes their state or condition: 56 & 57 Vict. c. 71, s. 62.

(*k*) 56 & 57 Vict. c. 71, s. 14.

(*l*) *Jones* v. *Just*, L.R. 3 Q.B. 197; 37 L.J. Q.B. 89.

(*m*) *Barr* v. *Gibson*, 3 M. & W. 390; 7 L.J. Ex. 124.

seller only warrants it to be an animal of the description it appears to be, and nothing more; and, if the purchaser makes no inquiries as to its soundness or qualities, and it turns out to be unsound and restive, or unfit for use, he cannot recover as against the seller, as it must be assumed that he purchased the animal at a cheaper rate" (*n*). So, on the sale and transfer of wares and merchandise, if nothing is said as to the character or quality of thing sold, the buyer takes the risk of all latent defects unknown to the seller at the time of entering into the contract of sale; all that the seller answers for being that the article is, as far as he knows, what it appears to be.

Implied warranty where article sold to be used for specific purpose.—If the vendor is informed that an article of a certain quality, or description, suited for some specified purpose, is required, the law implies a promise from him that he will supply to the purchaser an article of the quality or description ordered, and reasonably fit for the purpose for which it is required. Where the plaintiff sent to the shop of the defendant, who was a rope-dealer, for a crane rope, and the defendant's foreman went to the plaintiff's premises and took the necessary admeasurement, saw the crane, and was told that the rope was wanted for the purpose of raising pipes of wine, and the rope was brought and fixed, but it broke, and a cask of wine was precipitated into the street, and wholly lost; it was held that the defendant, by accepting the employment under the circumstances, had impliedly undertaken to furnish a rope reasonably fit for the purpose for which it was ordered, and was liable for the damage occasioned by its breaking, although he was not in fact the maker of it, he having employed a ropemaker to execute the order, and the latter having, in his turn, employed a third manufacturer of ropes for the purpose (*o*). This warranty is of a general character and includes latent defects (*p*).

Where the plaintiff bought a quantity of hops of the defendant, who was not the grower, by sample taken from the pockets, and at the time of the sale the bulk fairly answered to the sample, and no inherent defect was perceptible or known to the defendant, the vendor; but the grower, in order to increase the weight of the hops, had fraudulently watered them after they were dried, and the effect of a proceeding of this kind did not usually become perceptible for several months, and was not known to the defendant at the time he sold the hops, but became manifest in a few months

(*n*) *Per* Best, C.J., *Jones* v. *Bright*, 3 Moo. & P. at p. 175; 7 L.J. (O.S.) C.P. 213.

(*o*) *Brown* v. *Edgington*, 2 M. & Gr. 279; 10 L.J. C.P. 66; and see *Bigge* v. *Parkinson*, 7 H. & N. 955; 31 L.J. Ex. 301.

(*p*) *Randall* v. *Newson*, 2 Q.B.D. 102; 46 L.J. Q.B. 259; the doctrine of *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169, does not apply.

after the sale, whilst the hops remained in the plaintiff's possession, and rendered them unsaleable; it was held that there was no implied warranty on the part of the defendant that the hops were good, sound, and merchantable, at the time he sold them, and that, as the defendant had acted *bonâ fide*, he was not answerable for the loss (*q*). But this case cannot now be considered good law (*r*). The law generally implies a promise from a manufacturer that all goods manufactured and sold by him for a specific purpose, and to be used in a particular way, are reasonably fit for the purpose for which he professes to make them, and for which they are known to be required. Thus, where the plaintiff bought a pole for his carriage from the defendant, who supplied a pole which broke short off and which the jury found was not reasonably fit for a carriage pole, it was held that the defendant was liable in an action for damages, though he did not know of any defect in the pole (*s*); again, where a tradesman manufactured and sold copper sheathing for vessels, it was held that he impliedly warranted that the copper he manufactured was reasonably fit for the purpose of sheathing vessels (*t*); and it would seem, indeed, that the mere seller of copper described as fit for sheathing vessels would be presumed to have a reasonable knowledge of the article so described, and that the law would imply a warranty that the article was reasonably fit for the purpose specified (*u*). Where a contract for the sale of goods is silent as to the purpose for which they are required, the antecedent course of conduct of the buyer and seller, and the fact that a document stating the purpose for which the goods are required was brought to the knowledge of the seller, are admissible in evidence in an action for breach of warranty brought upon the contract to show that the buyer relied on the seller's skill and judgment, and that there is an implied condition that the goods shall be reasonably fit for such purpose (*x*). But, when a known and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, yet, if the known and defined thing is actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. Thus, where a manufacturer invented and sold a "smoke-consuming furnace," and the defendant ordered it for his brewery, it was held that the law would imply no warranty that

(*q*) *Parkinson* v. *Lee*, 2 East, 314.

(*r*) See now 56 & 57 Vict. c. 71, s. 14 (1); also the remarks of Brett, L.J., in *Randall* v. *Newson*, 2 Q.B.D. at p. 106; 46 L.J. Q.B. 259, with reference to *Parkinson* v. *Lee*, *supra*.

(*s*) *Randall* v. *Newson*, *supra*.

(*t*) *Jones* v. *Bright*, 3 Moo. & P. 155; 7 L.J. (O.S.) C.P. 213.

(*u*) *Gray* v. *Cox*, 6 D. & R. 200; 4 B. & C. 108.

(*x*) *Gillespie* v. *Cheney*, (1896) 2 Q.B. 59; 65 L.J. Q.B. 552.

the machine was fit for the defendant's brewing-copper, and that the utmost that the vendor could be considered to undertake under such circumstances was that the machine would consume smoke, which it appeared to have done in other instances when applied to a different purpose. If the vendor had said, "I will send you one of my smoke-consuming furnaces which will suit your brewery," in such a case that would be a warranty that it should suit a brewery (*y*). In an action for the price of a printing-machine, it appeared that the plaintiff had obtained a patent for a machine of which he was the inventor, which he called "Ollivant's patent printing machine," the object of which was to print calico in two colours; that the defendant, hearing of the invention, wrote to the plaintiff to know the price; when the latter in reply said, "I undertake to make you a two colour printing machine on my patent principle;" whereupon the defendant ordered the machine, but could not make it print two colours, and therefore refused to pay the price; but it was held that, as the defendant had got a machine made on the plaintiff's "patent principle," he had got all he had bargained for, and that there was no implied undertaking that it would, in the defendant's hands and under his management, answer the purpose for which he wanted it (*z*). But a contract for the sale of goods by description is not "a contract for the sale of a specified article under its patent or other trade name" within the proviso in section 14, sub-sect. 1, of Sale of Goods Act, 1893 (*a*); and on a sale of unascertained goods, an express warranty that they shall conform to a certain standard does not exclude the implied warranty that they shall be reasonably fit for the purpose for which the vendor knows they are wanted. Thus, where the defendant undertook to supply the plaintiff, who had entered into an agreement with the East India Company for the conveyance of troops to Bombay, with troop stores guaranteed to pass survey of the East India Company's officers, it was held that this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended (*b*). If a manufacturer sells an article which he knows is bought for a particular purpose he impliedly warrants that it is fit for that purpose (*c*), but it is unreasonable to require that he should be cognizant of all the purposes to which the article sold might be applied (*d*).

(*y*) *Chanter* v. *Hopkins*, 4 M. & W. 399; 8 L.J. Ex. 14; *Camac* v. *Warriner*, 1 C.B. 367; *Prideaux* v. *Bunnett*, 1 C.B. N.S. 613; *Shepherd* v. *Pybus*, 4 Sc. N.R. 434; 11 L.J. C.P. 101.

(*z*) *Ollivant* v. *Bailey*, 5 Q.B. 288; 13 L.J. Q.B. 34.

(*a*) *Gillespie* v. *Cheney*, (1896) 2 Q.B. 59; 65 L.J. Q.B. 552.

(*b*) *Bigge* v. *Parkinson*, 7 H. & N. 955; 31 L.J. Ex. 301.

(*c*) *Jones* v. *Bright*, 5 Bing. 533; 7 L.J. (O.S.) C.P. 213.

(*d*) *Drummond* v. *Van Ingen*, 12 App.

Warranty of merchantable quality.—Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be merchantable under that description. The maxim *caveat emptor* does not apply to a sale of goods when the buyer has no opportunity of inspection (*e*).

When goods are sold by sample under circumstances in which, in the absence of a sample, there would have been an implied warranty that they were merchantable, such warranty is excluded only with respect to such matters as can be judged of by the sample. Where manufacturers contracted to supply to the plaintiffs a quantity of material to be in quality and weight according to sample, and goods according to sample and of the agreed weight were delivered and accepted, but it was afterwards discovered that owing to a certain defect the goods were unmerchantable, it was held that, although the defect existed in the sample, yet since it could not have been discovered by an ordinary examination, the implied warranty of merchantable quality was not excluded (*f*).

Implied warranties on sales of provisions.—Every victualler and dealer in provisions, who sells provisions impliedly warrants them to be wholesome and fit for food. "If I come to a tavern to eat, and the taverner gives and sells me meat and drink corrupted, whereby I am made sick, an action lies against him without any express warranty, because it is a warranty in law" (*g*). If a man contracts to supply victuals to a ship's crew, he impliedly warrants them to be good and wholesome, and fit for the sustenance of man (*h*). This is clearly so if he contracts as a purveyor of victuals. Before the Sale of Goods Act, 1893, there was a difference according to the character in which the vendor sold. Thus where one farmer sold the carcass of a pig to another, it was held that there was no warranty that the carcass was fit for human consumption (*i*); and even on a sale by a meat-salesman to a butcher it was held that there was no such warranty (*k*). It is at least doubtful how far these decisions can now be supported.

Implied warranty by seller that goods are his own manufacture.—It was formerly held that there was an implied contract on the part of a manufacturer that the goods delivered should be those of his

Cas. 284; 56 L.J. Q.B. 563; *Jones* v. *Padgett*, 24 Q.B.D. 650; 59 L.J. Q.B. 261.

(*e*) *Jones* v. *Just*, L.R. 3 Q.B. 197; 37 L.J. Q.B. 89.

(*f*) *Mody* v. *Gregson*, L.R. 4 Ex. 49; 38 L.J. Ex. 12; *Drummond* v. *Van Ingen*, 12 App.Cas. 284; 56 L.J. Q.B. 563.

(*g*) Year Book, 9 Hen. 6, 53; 1 Rolle, Abr. 90, P. pl. 1, 2.

(*h*) *Bigge* v. *Parkinson*, 7 H. & N. 955; 31 L.J. Ex. 301.

(*i*) *Burnby* v. *Bollett*, 16 M. & W. 644; 17 L.J. Ex. 190.

(*k*) *Emmerton* v. *Matthews*, 7 H. & N. 586; 31 L.J. Ex. 139.

own make (*l*). This, however, is no longer the law; one manufacturer may sell goods manufactured by another provided he complies with the directions of the Merchandise Marks Act, 1887 (*m*).

Warranty as to genuineness of articles with trade-marks.—By sect. 17 of the Merchandise Marks Act, 1887, on the sale or in the contract for the sale of any goods to which a trade-mark or mark or trade description has been applied (*n*), the vendor shall be deemed to warrant that the mark is a genuine trade-mark, and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor, and delivered at the time of the sale or contract to and accepted by the vendee (*o*).

Warranty of description as to quantity or country.—By sect. 18, where, at the passing of the Act of 1887, "a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied; provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there."

Conditions and warranties—Sale by sample.—"A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect" (*p*).

"In the case of a contract for sale by sample—(a) there is an implied condition that the bulk shall correspond with the sample in quality: (b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk by the sample: (c) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample" (*q*).

If goods are sold by description merely, without a sample,

(*l*) *Johnson* v. *Raylton*, 7 Q.B.D. 438; 50 L.J. Q.B. 753.

(*m*) 50 & 51 Vict. c. 28.

(*n*) As to what amounts to "applying," see s. 5.

(*o*) As to implied warranty on the sale of agricultural fertilisers and feeding stuffs, see 56 & 57 Vict. c. 56.

(*p*) 56 & 57 Vict. c. 71, s. 15 (1).

(*q*) *Ib.* s. 15 (2).

there is an implied condition that they are merchantable under that description (*r*). If a sample is exhibited at the time of the contract, a question may arise whether the description or the sample was intended to be essential. The latter case is not strictly speaking a sale by sample within the Act of 1893, and it is sufficient if the goods correspond with the sample; in the former case they must answer the description as well (*s*). The question which of the two was to be "the touchstone of the contract" depends on the intention and object of the parties using the sample (*t*). Generally the description is the more important, as it goes to the nature of the goods, whilst the sample deals more with the quality (*u*). In any case the implied condition that the goods shall answer the description and be merchantable under it is excluded only in so far as the quality of the goods might have been ascertained by inspection of the sample, and the vendor remains liable for any defect which was not discoverable by reasonable inspection of the sample (*x*). On a sale by sample, if the goods are not equal to sample the purchaser may reject them (*y*). Moreover, he is entitled to inspect the bulk before accepting the goods, and if an opportunity of inspecting them is not given he may reject them (*z*). The place of delivery is usually the place for inspection (*a*).

Before the passing of the Act it was held that on a sale by sample the only warranty was that the sample was fairly taken from the bulk (*b*). The purchaser suing for damages on the ground that the bulk did not correspond with the sample had then to establish either a warranty or a false and fraudulent representation that the bulk was equal to the sample. If he relied on an implied warranty, the implication had to be based on facts other than the mere exhibition of the sample. If he relied on a misrepresentation, he had to prove that it was false to the knowledge of the vendor (*c*). It was formerly a question in each case whether the term that the goods should correspond with the sample was a condition entitling the purchaser in breach of it to rescind the contract, or merely a warranty giving him a right of action for damages; and on the sale of specific chattels the latter construction prevailed (*d*). The

(*r*) See sect. 13, *ante*, p. 523.

(*s*) See sect. 13, *ante*, p. 523.

(*t*) *Mody* v. *Gregson*, L.R. 4 Ex. 49; 38 L.J. Ex. 12; *Hill* v. *Smith*, 4 Taunt. 520; *Meyer* v. *Everth*, 4 Campb. 22; *Gardiner* v. *Gray*, 4 Campb. 144.

(*u*) *Nichol* v. *Godts*, 10 Exch. 191; 23 L.J. Ex. 314.

(*x*) 56 & 57 Vict. c. 71, s. 15 (2) (c); *Drummond* v. *Van Ingen*, 12 App. Cas. 284; 56 L.J. Q.B. 563.

(*y*) *Hibbert* v. *Shee*, 1 Campb. 113.

(*z*) 56 & 57 Vict. c. 71, s. 15 (2) (b); *Lorymer* v. *Smith*, 1 B. & C. 1.

(*a*) *Perkins* v. *Bell*, (1893) 1 Q.B. 193; 62 L.J. Q.B. 91.

(*b*) *Sayers* v. *London and Birmingham Flint Glass Co.*, 27 L.J. Ex. 294.

(*c*) *Ormrod* v. *Huth*, 14 M. & W. 651; 14 L.J. Ex. 306; *Freeman* v. *Baker*, 5 B. & Ad. 797; 3 L.J. K.B. 17; *Moens* v. *Heyworth*, 10 M. & W. 147; 10 L.J. Ex. 177.

(*d*) *Heyworth* v. *Hutchinson*, L.R. 2 Q.B. 447; 36 L.J. Q.B. 270.

same result is now arrived at through the combined operation of sects. 15 (2) (a) and 11 (1) (c) of the Act of 1893. The term is a condition, the breach of which gives, in case of unascertained goods, a right to rescind, but in case of specific goods a right to damages only. Where there is a written contract of sale, or any note or memorandum of the bargain in writing, the circumstance of the sale being by sample cannot be imported into the contract and made use of by the purchaser, if the note or memorandum is silent as to the sample (*e*), unless by custom of the trade the goods in question are sold by sample (*f*). Where both parties intended the written contract to contain a stipulation that the article purchased was to be according to sample, and that stipulation is omitted by mistake, the purchaser may decline to accept the article if it does not agree with the sample (*g*). Where goods have been sold by sample, evidence of a custom of trade, as to returning or making an allowance for such of the goods as do not answer the sample, is receivable (*h*).

Sales voidable on ground of fraudulent misrepresentation.—The position of a person who enters into a contract for the sale of goods relying upon the misrepresentation of the other party varies according as the misrepresentation is fraudulent or innocent. In the former case the person deceived may rescind the contract, or he may keep the goods and sue for damages. In the latter case, if the representation made amounts to a condition, the party misled may rescind the contract or retain the goods and sue for damages (*i*); if it amounts to a warranty strictly so called, he may sue for damages but cannot rescind the contract; if it does not amount either to a condition or to a warranty, he has no remedy. A contract induced by the fraudulent deceit of one of the parties is not void, but only voidable. But the person deceived can only rescind the contract and demand restitution, where he does not elect to sue for damages, on the terms that he himself makes restitution; and if, either from his own act or from misfortune, it is impossible to make such restitution, he is too late to rescind (*k*).

It is not every wilful false statement, made with full knowledge of its falsehood, that will amount in judgment of law to a fraud, so as to enable a purchaser to avoid a contract of sale. The ordinary praise or commendation, for example, bestowed by a vendor on the wares he sells, though embodying statements of fact known by the party making them to be not strictly true, does not vitiate the contract of sale. A misrepresentation, moreover, to enable a

(*e*) *Meyer* v. *Everth*, 4 Campb. 22; *Gardiner* v. *Gray*, *ib.* 144.
(*f*) *Syers* v. *Jonas*, 2 Exch. 111.
(*g*) *Borrowman* v. *Rossell*, 16 C.B. N.S. 68; 33 L.J. C.P. 11.
(*h*) *Cooke* v. *Riddelien*, 1 Car. & K. 561.
(*i*) See *ante*, pp. 507, 508.
(*k*) *Houldsworth* v. *City of Glasgow Bank*, 5 App.Cas. 317, 338.

purchaser to avoid a sale on the ground of deceit and fraud, must be made concerning some matter material to the value of the contract, so that there may be fair ground for thinking that the contract would never have been entered into if the false statement had not been made. *De minimis non curat lex;* and, therefore, if a man represents his house to be in good repair, and a few tiles are off the roof, or two or three of the joists under the floor near the ground are rotted with the damp, or a pane of glass is broken in a garret window, such trifling defects, to use the language of Lord Kenyon, "are mere bagatelles," and afford no evidence of *mala fides* (*l*). To all trifling representations, not really inducing the contract (*m*), and to all affirmations of matters of opinion, not amounting to positive assertions of fact with knowledge of their falsehood, the maxim of *caveat emptor* must apply (*n*).

False representation through third party.—Where the defendant, in the course of a negotiation for the sale of a public-house, made a false and fraudulent representation to one Bourner as to the receipts of the house, and thereby induced Bourner to agree to buy it, and Bourner being unable to complete the purchase, got the plaintiff to take his contract off his hands by repeating to him the false representation made by the defendant, and the defendant then carried out the bargain with the plaintiff, and took the plaintiff's money, knowing that the false and fraudulent representation had been communicated to the plaintiff, and that he was acting under the influence of it, it was held that the plaintiff was entitled to sue the defendant for the deceit, although the false representation had not been made to him directly by the defendant, but through the medium of a third party. A defendant, knowing that the fraudulent representation he had made to a third person had been communicated to the plaintiff, with whom he was about to contract, and withholding an explanation or denial of that third person's authority for the communication, and suffering the plaintiff on the faith of that communication to enter into the contract, is as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself (*o*).

Fraudulent breach of warranty.—Whenever the representation amounts to a warranty of the fact stated, and is untrue, it is immaterial whether there was knowledge or want of knowledge of

(*l*) *Bowles* v. *Atkinson*, cited Sugden's V. & P. 334 (ed. 14); *Geddes* v. *Pennington*, 5 Dow, 164.

(*m*) *Attwood* v. *Small*, 6 Cl. & F. 444; *Smith* v. *Kay*, 7 H.L.C. 775; *Lowndes* v. *Lane*, 2 Cox, 363.

(*n*) *Benham* v. *United Guar. Assur. Co.*, 7 Exch. 744; 21 L.J. Ex. 317; as to the avoidance of contracts on the ground of fraudulent misrepresentation, see *ante*, pp. 113—118.

(*o*) *Pilmore* v. *Hood*, 5 Bing. N.C. 97, 109; 8 L.J. C.P. 11.

the untruth on the part of the person making it. "If one man," observes Lord Ellenborough, "lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit" (*p*). If, therefore, a watchmaker warrants a watch to go well, or a horsedealer warrants his horse to be sound, or quiet and free from vice, or a wine-merchant warrants his claret to be in a fit state for exportation, or a copper manufacturer warrants his copper to be fit for sheathing vessels, and a purchaser buys on the faith of the warranty, and then finds that the watch will not go, or that the horse is unsound or vicious, or that the claret is sour, or that the copper is unfit for sheathing, this is sufficient, though in each of the cases mentioned the vendor was not aware of the fact at the time he gave the warranty (*q*). The purchaser of a warranted but worthless article is entitled to maintain an action, although he has stipulated that if he dislikes the article it shall be exchanged for another of the same value (*r*).

Counterfeiting trade-marks—Fraudulent use by one person of the trade-mark of another with intent to deceive.—If a manufacturer has adopted a particular mark (*s*) or name (*t*) to denote that the goods so marked were made by him, and the mark has become known and understood in the trade, he who uses the mark for the purpose of deceiving purchasers and making them believe the goods to be the goods of the manufacturer who has introduced the mark, is guilty of a false and fraudulent representation, and if this produces damage to another, the person injured is entitled to an action for the deceit (*u*). Where "a clothier of Gloucestershire sold very good cloth, so that in London, if they saw any cloth of his mark, they would buy it without searching thereof; and another, who made ill cloth put his mark upon it without his privity; and an action upon the case was brought by him who bought the cloth for this deceit," it was adjudged maintainable (*x*).

Fraudulent concealment.—If a vendor has resorted to any contrivance for the purpose of concealing any defect in the subject-matter of a contract of sale, the purchaser may avoid the contract

(*p*) *Williamson* v. *Allison*, 2 East, 446, 451.
(*q*) *Wallace* v. *Jarman*, 2 Stark. 162; *Anon.*, Lofft, 146; *Gresham* v. *Postan*, 2 C. & P. 540; *Williamson* v. *Allison*, *supra*.
(*r*) *Wallace* v. *Jarman*, *supra*.
(*s*) See 50 & 51 Vict. c. 28.
(*t*) *Reddaway* v. *Banham*, (1896) A. C. 199; 65 L.J. Q.B. 381.
(*u*) *Crawshay* v. *Thompson*, 4 M. & Gr. 386, n.; 11 L.J. C.P. 301.
(*x*) 33 Eliz. cited by Doderidge, J., *Southern* v. *How*, Cro. Jac. 471, n.

on the ground of fraud; but the vendor is not bound to point out defects which may be seen on examination (*y*). It has been held that there was a fraudulent concealment vitiating a contract of sale in the following cases:—where a partner who had the exclusive management and control of the partnership business agreed to purchase the share of his co-partner, but kept back from the knowledge of the latter the true state of the accounts and of the amount of profit realized, and by that means effected the purchase for a less sum than would have been taken if the state of the partnership had been fully disclosed and fairly stated (*z*);—where an intending purchaser of a policy of insurance, having secret information of the alarming illness and imminent danger of death of the party on whose life the policy had been effected, treated with an assignee of the policy for the purchase of it without disclosing the condition and state of health of the assured (*a*);—where the vendor of a mare stated, at the time of sale, that he believed the mare to be sound but would not warrant, and the mare was at the time unsound to his knowledge (*b*);—where the vendor of pimento, knowing it to be sea-damaged, sold it without disclosing the fact to the purchaser, there being a custom of the trade to disclose such defects at the time of the sale (*c*);—where the agent of the vendor of a picture, knowing that he had induced the purchaser to labour under a delusion with respect to the picture, which materially influenced his judgment as to the value of it, permitted him to purchase without removing the delusion (*d*). But the vendor is not bound to inform the purchaser that the latter is under a mistake, where such mistake is not induced by the act of the vendor. Thus where the plaintiff offered to sell some oats to the defendant, and the defendant agreed to buy them supposing them to be old oats, but the plaintiff did nothing to induce the defendant to suppose so, it was held that the sale was valid (*e*). If the defect is patent, and can readily be discovered by proper examination, and the purchaser has the means of examination at hand, there is no fraudulent concealment, and the maxim of *caveat emptor* will apply. But the vendor must in no case resort to any art or contrivance to conceal a defect, for if he does he will be answerable, as we have just seen, for wilful deceit. "If I sell a horse that has lost an eye, no action lies against me for so doing;

(*y*) *Horsfall* v. *Thomas*, 1 H. & C. 90; 31 L.J. Ex. 322.

(*z*) *Maddeford* v. *Austwick*, 1 Sim. 89.

(*a*) *Jones* v. *Keene*, 2 Moo. & R. 348.

(*b*) *Wood* v. *Smith*, 5 Man. & R. 124; 8 L.J. (O.S.) K.B. 50.

(*c*) *Jones* v. *Bowden*, 4 Taunt. 847.

(*d*) *Hill* v. *Gray*, 1 Stark. 434; see the observations on this case by Jervis, C.J., *Keates* v. *Cadogan* (*Earl*), 20 L.J. C.P. 78; 10 C.B. 591.

(*e*) *Smith* v. *Hughes*, L.R. 6 Q.B. 597; 40 L.J. Q.B. 221.

but if I sell him with a false and counterfeit eye, there an action lieth" (*f*). It would seem to follow that if the vendor of a glandered horse has resorted to any doctoring or contrivance for the purpose of suppressing the marks of the disease, and has thereby deceived the purchaser, the latter will be entitled to recover all the damages he has sustained by the deception (*g*).

In sales of manufactured articles and provisions, if the vendor is cognizant, at the time he sells the articles, of latent defects materially lowering their value, and rendering them totally unfit for the purpose for which they are known to be required, and neglects to disclose such defects to the purchaser, he is guilty of a fraudulent concealment (*h*). But, in a general sale of a horse, the vendor is not bound to disclose any unsoundness in the animal, although he may be aware of its existence; and, if the purchaser makes no enquiries as to its soundness or qualities, and the vendor has said or done nothing to throw the purchaser off his guard or to conceal a defect, there is no fraudulent concealment on the part of the vendor (*i*). The purchaser has an opportunity of inspecting and judging of the animal himself; and the principle of *caveat emptor* applies. The damage, however, resulting from the spread of infectious and contagious disorders amongst sheep and cattle is so serious, that every vendor who sells an animal knowing it to be labouring under a highly contagious or infectious disorder, ought to be held responsible for fraudulent concealment, if he fails to disclose the fact at the time he makes the bargain (*k*). Where a statute prohibited persons from sending animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor and purchaser, any right on the part of the latter to claim damages arising from loss of his own animals by the spreading of the disease (*l*).

Sale "with all faults."—If it be a term of the contract that the subject-matter of the sale is to be taken with all faults, the stipulation relieves the vendor, where he does nothing to conceal the

(*f*) *Southerne* v. *Howe*, 2 Roll. 5.

(*g*) See *Mullett* v. *Mason*, L.R. 1 C.P. 559; 35 L.J. C.P. 299.

(*h*) Compare p. 487, *ante*.

(*i*) *Jones* v. *Bright*, 3 Moo. & P. 175; Fitz. N. B. 94, C.; *Hill* v. *Balls*, 2 H. & N. 299; 27 L.J. Ex. 48.

(*k*) *Blakemore* v. *Brist. & Ex. Ry.*, 8 E. & B. 1049; 27 L.J. Q.B. 167; *Anderson* v. *Buckton*, 1 Str. 192; by the Contagious Diseases (Animals) Act, 1894 (57 & 58 Vict. c. 57), extensive powers are given to the Board of Agriculture and the local authority to enable them to deal with animals suffering from contagious diseases. See *Cullen* v. *Trimble*, L.R. 7 Q.B. 416.

(*l*) *Ward* v. *Hobbs*, 4 App.Cas. 13; 48 L.J. Q.B. 281.

defects from all liability in respect of any defect in the article sold (*m*). In such a sale the purchaser must use his own eyes and understanding to discover what faults there are (*n*). Where the sale is by description "with all faults," that expression means with all faults which an article may have consistently with its being the thing described (*o*). If the vendor is not to be responsible for any defect or "error," the stipulation will protect him from all unintentional misstatement. Therefore, where a shipowner advertised for sale "the fine teak-built barque, *Intrepid*, A 1, as she now lies in dock, well adapted for a passenger ship," but stipulated that the vessel was to be taken with all faults, without any allowance for any defect or error whatever, and it turned out that the barque was not teak-built, nor of class A 1, nor adapted for a passenger ship, it was held that, as the defendant distinctly stated that he would warrant nothing, the advertisement must be taken as a mere description of the vessel, and that the real meaning of the contract was this—There is the vessel in dock, I describe her as A 1, and call her a teak-built barque; I do not mean to warrant anything. Go and look at her, and examine and judge for yourself; and, if you take her, you take her with all her faults, without any allowance for any error or misdescription on my part (*p*).

But an agreement "to take a thing with all faults does not mean that it is to be taken with all frauds" (*q*); and the stipulation will be of no avail to the vendor, if he has wilfully misled the purchaser, or thrown him off his guard by a wilful false representation, or has resorted to any contrivance to conceal a defect. Thus, where the owners of an unseaworthy vessel, whose hull was worm-eaten and keel broken, removed the vessel from the ways where she lay dry, and where the state of her bottom and keel might easily have been discovered, and kept her afloat in deep water where her defects were completely concealed, and then issued a printed advertisement of the sale of the vessel, which described the hull as being nearly as good as when launched, but stated that it was "to be taken with all faults," it was held that as the vendors had knowingly given a false representation of the state of the vessel, and attempted to conceal the defects in the hull and to throw the purchaser off his guard, they could not shelter themselves under the stipulation that the vessel was to be taken with all faults (*r*). Where the vendor of a vessel, "to be taken with all faults," knowingly represented the vessel in his handbills and advertise-

(*m*) *Ward* v. *Hobbs*, 4 App.Cas. 13; 48 L.J. Q.B. 281.

(*n*) *Pickering* v. *Dowson*, 4 Taunt. 779.

(*o*) *Shepherd* v. *Kain*, 5 B. & Ald. 240.

(*p*) *Taylor* v. *Bullen*, 5 Exch. 779; 20 L.J. Exch. 21.; see *Ward* v. *Hobbs*, *supra*.

(*q*) Marshall, Serj. arg. *Pickering* v. *Dowson*, *supra*.

(*r*) *Schneider* v. *Heath*, 3 Campb. 506.

ments as having been built in 1816, in order to get an increased price, whereas she had been launched in 1815, it was held that this was a fraud. "A person," observes Abbott, C. J., "ought either to be silent or to speak the truth, and in case he spoke at all, he was bound to disclose the real fact" (*s*). If the defect, moreover, is of such a nature that a purchaser cannot, by the most diligent examination, discover it, and the defect is known to the vendor at the time of the sale, the latter ought not, according to the opinion of Lord Kenyon, to be permitted to shelter himself from the consequences of a fraudulent concealment under a stipulation that the thing is to be taken with all faults (*t*). According to Lord Ellenborough, however, "where an article is sold with all faults it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent" (*u*). An examination, however, is useless if the defect is of such a nature that it cannot be detected by any examination, however careful; and a vendor who, knowing this, sells with all faults for the purpose of exonerating himself from liability to disclose the secret defect, seems to make use of the stipulation, "to be taken with all faults," in order to cover the perpetration of a fraud (*x*). In a case (*y*), which has been disapproved of by Lord Ellenborough (*z*), the twenty-two broken futtocks of the vessel were concealed only by the ballast. The defect was disclosed as soon as the ballast was taken out after the sale, and might have been easily discovered before the sale by a careful examination of the vessel. It was, therefore, wrongly described as "a defect which the purchaser could not, by any attention, possibly discover." The question whether the ballast had been put there for the purpose of concealing the defect does not appear to have been raised.

Purchaser electing to avoid contract.—If the purchaser is entitled to treat the contract of sale as a void contract, by reason of the fraud or deceit of the vendor, he may return the article and bring an action for the recovery of the money paid under the void contract, or, treating the contract as a subsisting contract, he may retain the thing sold in his own hands, or resell it, and sue to recover the damages he has sustained (*a*). He must make his

(*s*) *Fletcher* v. *Bowsher*, 2 Stark. 561.
(*t*) *Mellish* v. *Motteux*, 1 Peake, 115.
(*u*) *Baglehole* v. *Walters*, 3 Campb. 155, 156.
(*x*) Sugd. V. & P. 333, 334 (ed. 14).
(*y*) *Mellish* v. *Motteux*, 1 Peake, 115.
(*z*) *Baglehole* v. *Walters*, *supra*.
(*a*) *Ante*, pp. 118, 532; *Clough* v. *L. & N. W. R.*, L.R. 7 Ex. 26; 41 L.J. Ex. 22.

election within a reasonable time, and when once made it is final (*b*). He must forthwith return or tender the subject-matter of the sale, or give notice to the vendor to take it back; for if he keeps it an unreasonable time (*c*), or exercises the dominion of an owner over it, he cannot afterwards treat the sale as a void sale, and recover the purchase-money on the ground of a failure of consideration (*d*). He must also be in a situation to restore the subject-matter of the sale to the vendor (*e*). If he has changed the nature of it, so that he cannot restore it in the same state in which it was when bought, he cannot avoid the contract, but must resort to his cross action (*f*). Thus, where a log of mahogany was sold on the faith of a representation that the log was sound throughout, and the representation was fraudulently made, but the fraud was not discovered until the log had been cut through by the purchaser, it was said that the latter, by cutting the log, had made it his own property, and could not afterwards return it to the vendor (*g*).

Transfer of property—Intention of parties.—"Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained" (*h*). "Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred (*i*). For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case" (*k*).

Rules for ascertaining intention.—"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state (*l*), the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the

(*b*) *Ante*, p. 118.

(*c*) *Clough* v. *L. & N. W. R.*, *supra*.

(*d*) *Fisher* v. *Samuda*, 1 Campb. 190.

(*e*) *Sheffield Nickel Co.* v. *Unwin*, 2 Q.B.D. 214; 46 L.J. Q.B. 299; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

(*f*) *Clarke* v. *Dickson*, E. B. & E. 148; 27 L.J. Q.B. 222; *Urquhart* v. *Macpherson*, 3 App.Cas. 831; *Tennent* v. *City of Glasgow Bank*, 4 App.Cas. 615.

(*g*) See *Udell* v. *Atherton*, 7 H. & N. 172; 30 L.J. Ex. 337.

(*h*) 56 & 57 Vict. c. 71, s. 16. As to passing of property in unascertained goods, see sect. 18, rule 5 (1), *post*.

(*i*) 56 & 57 Vict. c. 71, s. 17 (1).

(*k*) Sect. 17 (2).

(*l*) Goods are in a "deliverable state" within the meaning of the Act when they are in such a state that the buyer would under the contract be bound to take delivery of them (sect. 62 (4)).

purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer:—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction: (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact (*m*).

Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made: (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract" (*n*).

A contract for the sale of goods may operate as a direct transfer of the ownership and right of property in the thing sold to the purchaser, or may amount only to an agreement for a future transfer giving the purchaser a right of action against the vendor for a breach of contract, but not effecting any alteration of ownership. When the bargain operates as a transfer of ownership, the sale is complete; when it amounts only to an agreement to procure

(*m*) See also 56 & 57 Vict. c. 71, s. 56, and *Beverley* v. *Lincoln Gas Co.*, 6 Ad. & E. 829; 7 L.J. Q.B. 113; *Moss* v. *Sweet*, 16 Q.B. 493; 20 L.J. Q.B. 167; *Elphick* v. *Barnes*, 5 C.P.D. 321; 49 L.J. C.P. 698.

(*n*) 56 & 57 Vict. c. 71, s. 18. As to delivery to carriers, see sect. 32, *post*.

or manufacture an article of a given description, and then transfer it to the purchaser, and does not effect any immediate alteration of ownership, the sale is incomplete. A transfer to the purchaser of the right of property in the thing sold is naturally accompanied by a transfer of the risk of loss, so that, if, between the time of the making of the bargain and the delivery, the thing sold is destroyed, without any neglect on the part of the vendor, the loss is the loss of the purchaser, and he may be compelled to pay the price, although he can never have the thing for which he agreed to pay it. To constitute a complete sale, the precise thing sold as well as the price must be ascertained (*o*). Personal engagements may subsist between the parties; but there can be no transfer of ownership until such ascertainment has been accomplished (*p*).

Where ascertained existing goods are the subject of a contract of immediate sale, and whether there is a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done, such as, for instance, in most cases, delivery—in some cases actual payment of the price—and in other cases weighing or measuring in order to ascertain the price, or marking, packing, coopering, filling up casks, or the like. Where there is a warranty of the quality of such specific goods, that circumstance will not prevent the property in them passing to the purchaser, and, if it is simply a warranty, will not entitle the purchaser to refuse to accept the goods, or to return them, merely because the warranty is not fulfilled; and, in order to entitle the purchaser so to refuse or to return them, it must, in the case of specific goods, be a term of the contract that he shall be at liberty to do so. In the case of executory contracts where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but, where certain goods have been selected by the seller, and have been approved of by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts something more will generally remain to be done, as, for instance, selection or

(*o*) As to ascertainment of price, see sects. 8, 9, and 18, rule 3.

(*p*) As to loss of goods by distress for rent after property in them has passed to purchaser, see *Greaves* v. *Hepke*, 2 B. & Ald. 131.

appropriation, approval, and delivery of some kind, before the property would be considered as intended to pass, and upon that taking place the property will pass, if it was intended to do so, equally as in the case of a contract for ascertained goods (*q*).

It may be the intention of the parties that no property shall pass until the price is paid. Thus, where the plaintiff sold to the defendant a certain unascertained quantity of oil, part of a large quantity lying at the plaintiff's wharf, and sent an order to the wharfinger to transfer the oil to the defendant, and the wharfinger made the transfer in his books to the defendant, and gave the plaintiff's clerk a paper acknowledging the transfer, and the clerk went with this paper to the defendant's counting-house and demanded a cheque in payment, and was refused, but the defendant took and retained the paper and sent to the wharfinger and obtained possession of the oil, it was held that, as there was no intention to part with the paper or the property in the goods without payment, there was no change of property in the goods in the hands of the wharfinger, and that the plaintiff was entitled to recover the oil or the value of it from the defendant (*r*).

When the subject-matter of the sale is ascertained at the time the bargain is struck, and the price is likewise agreed upon, the sale is a complete sale from the time of the making of the bargain, and the right of property in the thing sold and the risk of loss are transferred to the purchaser, although the right of possession may continue in the vendor until the purchase-money has been paid or tendered (*s*). The right of property and the attendant risk may be transferred by the buyer to a third party by another contract of sale, although the price may not have been paid and the right of possession divested out of the original vendor (*t*). Where the vendor agreed to sell, and the purchaser to buy, "a stack of hay standing in Canonbury Field, Islington, at the sum of 145*l*., the hay to be allowed to stand on the premises until the first of May next, and not to be cut till paid for," it was held that there was an immediate transfer of the right of property to the purchaser, and, the hay having been accidentally destroyed by fire whilst it remained in the possession of the vendor, that the purchaser must bear the loss (*u*). A sale otherwise complete may, however, be made subject to the condition that if at the time for delivery the subject-matter is not in existence the contract shall be rescinded.

(*q*) *Per* Bovill, C.J., in *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438; 41 L.J. C.P. 228.

(*r*) *Godts* v. *Rose*, 17 C.B. 229; 25 L.J. C.P. 61.

(*s*) *Bloxam* v. *Sanders*, 4 B. & C. 941; *Knight* v. *Hopper*, Skin. 647; Noy's Maxims, ch. 42, p. 88; Bro. Abr. Contr. pl. 26.

(*t*) *Scott* v. *England*, 14 L.J. Q.B. 43.

(*u*) *Tarling* v. *Baxter*, 6 B. & C. 360; 5 L.J. (O.S.) K.B. 164.

Thus, where a crop of potatoes off a specified field was sold (although the crop was not then sown) and the crop failed, it was held that the seller was not liable for damages (*x*).

Although the vendor has given a delivery order, or a dock-warrant, to a warehouse-keeper, wharfinger, or bailee, having the custody of the goods, commanding him to deliver them to the purchaser, yet, so long as the precise quantity of goods to be delivered under the order has not been ascertained, and separated from the mass of the commodity in bulk, the sale is not complete, and the right of property is not altered. Thus, where a vendor, having eighteen tons of Riga flax in mats lying at a wharf, sold ten tons thereof to a purchaser and gave him a delivery order on the wharfinger for ten tons, which order was accepted by the latter and entered in his books, it was held that the ownership was not altered, nor the right of property transferred from the vendor to the purchaser, until the flax had been weighed and the precise quantity to be delivered under the order had been separated from the bulk and put into a deliverable state, and placed at the disposal of the purchaser (*y*). If the bulk of the commodity has been identified, and the sale is a sale of an undivided quantity thereof, expressly sold as such at an ascertained price, whether the ownership of the share passes or not (*z*), it would seem that the risk of the loss of the subject-matter thereof will pass to the purchaser where the shares remain unseparated through his default (*a*).

Imperfect sales—Unascertained price.—Generally speaking, to constitute a sale which shall immediately pass the property it is necessary not only that the thing sold should be ascertained, but that there should be a price ascertained or ascertainable. But the parties may buy or sell a given thing, nothing remaining to be done for ascertaining it, but the price to be afterwards ascertained in the manner fixed by the contract of sale or on a *quantum valebat;* or they may agree that the sale shall be complete and the property pass although the delivery of possession is postponed, and although something shall remain to be done by the seller before the delivery; or they may agree that, nothing remaining to be done for ascertaining the thing sold, yet the sale shall not be complete and the property shall not pass before something is done to ascertain the amount of the price. The question must always

(*x*) *Howell* v. *Coupland*, 1 Q.B.D. 258; 46 L.J. Q.B. 147, *ante*, p. 137; *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L.J. Q.B. 164.

(*y*) *Busk* v. *Davis*, 4 M. & S. 395; *Shepley* v. *Davis*, 5 Taunt. 617; *Moakes* v. *Nicholson*, 19 C.B. N.S. 290; 34 L.J. C.P. 273; *Gabarron* v. *Kreeft*, L.R. 10 Ex. 274; 44 L.J. Ex. 238.

(*z*) *Martineau* v. *Kitching*, L.R. 7 Q.B. 454, 456; 41 L.J. Q.B. 227.

(*a*) See 56 & 57 Vict. c. 71, s. 37, *post*.

be, what was the intention of the parties in that respect, and that has to be collected from the terms of the contract. If those terms do not show an intention of immediately passing the property until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected and the property does not pass until that thing is done (*b*). Thus it has been said, "If I sell you all my corn for 12*d.* a bushel, you may not take it before it is measured, whereby the number of the bushels may be known and also the certainty of the sum which is to be paid for it, so that before the certainty is known, it cannot be adjudged any good contract or agreement" (*c*). Where a vendor sold the bark stacked at Redbrook at 9*l.* 5*s.* per ton of 21 cwt., to be weighed before delivery, and 8 tons 14 cwt. of the bark were weighed and delivered, but before the residue was weighed and the quantity thereof ascertained, a high flood arose and destroyed it, it was held that the right of property in the unweighed residue had not been altered, neither, consequently, had the risk of loss (*d*). But the distinction must be observed between a sale by measure or weight requiring the measuring or weighing to be accomplished for the purpose of determining and fixing the price, and a sale of specific goods in the lump at an ascertained price, accompanied with a representation or warranty of the weight or quantity, where the weighing or measuring is necessary only for the purpose of satisfying the purchaser that he has got the quantity bargained for (*e*). Moreover, if it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass, although the goods have still to be weighed, measured, or tested, provided the subject-matter of the sale is ascertained (*f*); and there may be a complete contract so as to pass the property in the goods, although the price has not been definitely agreed on (*g*), or although the goods are still unfinished (*h*), or unweighed (*i*). When the quantity is ascertained, the mere omission to add up the total contents according to weight or measure will not prevent the right of property and the risk from passing to the purchaser (*k*). If certain specific cases, bales, or packages of goods are sold in the

(*b*) *Logan* v. *Le Mesurier*, 11 Jur. 1091; 6 Moo. P.C. 116; 2 Wms. Saund. 122, note (*m*) (ed. 1871).

(*c*) See *Reniger* v. *Fogossa*, Plowd. at p. 7, Bradshaw, *arguendo*.

(*d*) *Simmons* v. *Swift*, 5 B. & C. 857; 5 L.J. (O.S.) K.B. 10; *Hanson* v. *Meyer*, 6 East, 614; *Zagury* v. *Furnell*, 2 Campb. 240.

(*e*) *Swanwick* v. *Sothern*, 9 Ad. & E. 895, 900; *Gilmour* v. *Supple*, 11 Moore, P.C. 571; *Furley* v. *Bates*, 33 L.J. Ex. 43; *S. C. nom. Turley* v. *Bates*, 2 H. & C. 200.

(*f*) *Furley* v. *Bates*, *supra*; *Martineau* v. *Kitching*, L.R. 7 Q.B. 436; 41 L.J. Q.B. 227.

(*g*) *Joyce* v. *Swann*, 17 C.B. N.S. 84.

(*h*) *Young* v. *Matthews*, L.R. 2 C.P. 127; 36 L.J. C.P. 61.

(*i*) *Martineau* v. *Kitching*, *supra*.

(*k*) *Tansley* v. *Turner*, 2 Bing. N.C. 151; 4 L.J. C.P. 272.

lump, at the customary and reasonable price paid for such articles, the price is sufficiently ascertained, and the right of property will pass, although no definite sum has been agreed upon, and the time or mode of payment has not been specified (*l*).

Sale or return.—When goods are sold under a contract of "sale or return," the sale is a conditional sale. The property in the goods does not pass to the purchaser until he has done some act adopting the transaction (*m*). If the goods are returned or tendered back to the vendor within a reasonable time, the sale is annulled, and the latter cannot recover the price of them; but, if the purchaser, having got possession of the goods, fails to exercise his option of returning them within a reasonable time, the contract is discharged of the condition, the sale stands as an absolute sale, and the price of the goods may be recovered in an action for goods sold and delivered (*n*). Where goods delivered "on sale or return" are pledged by the buyer, the pledging of the goods by him is "an act adopting the transaction" within sect. 18, rule 4 (a) so as to pass the property in the goods to him (*o*).

Imperfect sales of unascertained chattels (*p*).—Until the parties are agreed on the specific goods, the contract can be no more than a contract to supply goods answering a particular description; and, since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold (*q*). Hence a bargain and sale of 20 tons of oil, the vendor having more than 20 tons in divers cisterns, passes no property (*r*).

Contracts for sale and manufacture of goods.—A man may purchase a chattel whilst in process of making; or he may agree to purchase it when made (*s*); whether he does the one thing or the other depends on the intention of the parties. In the latter case, *i.e.*, where a specific chattel is ordered to be made, the right of property is not vested in the party who gives the order, nor the right to the price in the vendor, until the thing ordered is com-

(*l*) *Valpy* v. *Gibson*, 4 C.B. 837; 16 L.J. C.P. 248; *Joyce* v. *Swann*, *supra*; *Hoadly* v. *McLaine*, 10 Bing. 482; 3 L.J. C.P. 162.

(*m*) 56 & 57 Vict. c. 71, s. 18, r. 4 (a).

(*n*) *Moss* v. *Sweet*, 16 Q.B. 493; 20 L.J. Q.B. 167 (overruling *Iley* v. *Frankenstein*, as reported 8 Sc. N.R. 841); *Wingfield*, *Ex parte*, 10 Ch.D. 591, 593. See also *Ray* v. *Barker*, 4 Ex. D. 279; 48 L.J. Ex. 569.

(*o*) *Kirkham* v. *Attenborough*, (1897) 1 Q.B. 201, 66 L.J. Q.B. 149.

(*p*) See 56 & 57 Vict. c. 71, ss. 16 and 18, r. 5, *ante*, pp. 539, 540.

(*q*) Blackburn on Sale, p. 125 (ed. 2); *Logan* v. *Le Mesurier*, 6 Moo. P.C. 116; 11 Jur. 1091; *Heseltine* v. *Siggers*, 1 Exch. 856; 18 L.J. Ex. 166.

(*r*) *White* v. *Wilks*, 5 Taunt. 176.

(*s*) *Laidler* v. *Burlinson*, 2 M. & W. 602; 6 L.J. Ex. 160.

pleted and made ready for delivery, and has been approved of by the purchaser, or some person appointed on his behalf to inspect the materials and workmanship. The builder or maker is not bound to deliver to the purchaser the identical chattel which is in progress, although the purchase-money may have been paid in advance (*t*), but may, if he pleases, dispose of it to some other person, and deliver to the purchaser another chattel, provided it answers to the description contained in the contract (*u*). On the other hand, it may be that the property was intended to pass before the chattel is completed; thus, where the contract provides that the article shall be manufactured under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments regulated by particular stages in the progress of the work, this shows an intention that the general property in the materials used is to vest in the purchaser at the time when they are put together under the approval of the superintendent, or at all events when the first instalment is paid, subject to the right of the builder to retain the fabric, in order to complete it and earn the rest of the price; and the rights of the parties are then in the same state as if so much of the article as is then contructed had originally belonged to the purchaser, and had been delivered by him to the builder to be finished (*x*). Or the true inference may be that the component parts of the chattel as they are added to the fabric are appropriated to the purchaser by way of contract, so that neither could he refuse them when the chattel is completed, nor the vendor compel him to accept any other; and yet that no property in the chattel is to pass until completion (*y*). When the article is completed and made ready for delivery, and has been approved of by the purchaser, the general property therein is transferred to the latter, although the chattel may remain in the hands of the builder for the purpose of receiving some subsequent additions (*z*).

There is a great analogy, it has been observed by the civilians, between this description of contract of sale and the contract of letting and hiring of work and labour; and we are told in the Digest and in the Institutes how to discriminate between the one and the other. If, it is said, the materials for work, as well as the work itself, have been furnished by the workman, then the contract is a contract of sale. If, on the other hand, the employer has fur-

(*t*) *Mucklow* v. *Mangles*, 1 Taunt. 318.

(*u*) *Atkinson* v. *Bell*, 8 B. & C. 277; 6 L.J. (O.S.) K.B. 258; *Laidler* v. *Burlinson*, *ante*, p. 545; *Elliott* v. *Pybus*, 4 Moo. & Sc. 389, 397; 3 L.J. C.P. 182.

(*x*) *Clarke* v. *Spence*, 4 Ad. & E. 448; 5 L.J. K.B. 161; *Woods* v. *Russell*, 5 B. & Ald. 942; *Read* v. *Fairbanks*, 13 C.B. 692; 22 L.J. C.P. 206; *Wood* v. *Bell*, 6 E. & B. 361; 25 L.J. Q.B. 321; *Bellamy* v. *Davey*, (1891) 3 Ch. 540; 60 L.J. Ch. 778.

(*y*) *Clarke* v. *Spence*, *supra*.

(*z*) *Carruthers* v. *Payne*, 2 Moo. & P. 429; 7 L.J. (O.S.) C.P. 84; *Wilkins* v. *Bromhead*, 7 Sc. N.R. 921; 13 L.J. C.P. 74.

nished the materials, and the undertaker of the work contributes his labour merely, the contract is a contract of letting and hiring of labour. Thus, to quote an example from the Roman law, "If Titius should agree with a goldsmith for the making of a certain number of golden rings, of a specified size and weight, for ten *aurei*, the goldsmith to furnish both the gold and workmanship, the contract would be a contract of buying and selling. But, if Titius should give his own gold, and agree to pay only for the workmanship, then the contract would be a contract of letting and hiring simply" (*a*).

Selection and appropriation of goods to use of purchaser.—If the commodity was selected in the bulk by the purchaser, the ownership and risk pass as soon as the quantity sold has been separated from the mass and tendered to the purchaser or placed at his disposal. Thus, where a quantity of turpentine was sold by auction at a fixed price per hundred-weight, to be delivered in casks, and taken at the net weight printed in the catalogue, the casks to be filled up by the vendor and removed by the purchaser, and all the casks were filled up except ten, and were placed in the vendor's warehouse at the disposal of the purchaser, and before they were removed, the whole quantity was consumed by fire, it was held that the right of property in the casks that had been filled up and placed at the disposal of the purchaser had passed to the latter, and that he must stand to the loss; but, as to the remaining quantity, which had not been selected and weighed and made ready for delivery, that the right continued in the vendor and the property remained at his risk (*b*).

If the bulk of the commodity bought and sold has not been selected by the purchaser in the first instance, the sale may be rendered complete, so as to operate as a transfer of the property and risk, by a subsequent selection by the vendor and approval by the purchaser, such subsequent selection and approval being the same as if the article had been fixed upon in the first instance (*c*); but a selection by the vendor only without the approval of the purchaser will not transfer the property in the goods so selected (*d*). If the article is to be selected by the vendor, but the purchaser makes its acceptance dependent upon his approval of it as regards work-

(*a*) Dig. lib. 19, tit. 2, lex. 2; Instit. lib. 3, tit. 24, § 4; Cod. lib. 4, tit. 65; *Lee* v. *Griffin*, 1 B. & S. 272; 30 L.J. Q.B. 252; *Atkinson* v. *Bell*, 8 B. & C. 277; 6 L.J. (O.S.) K.B. 258; *Grafton* v. *Armitage*, 2 C.B. 336; 15 L.J. C.P. 20.

(*b*) *Rugg* v. *Minett*, 11 East, 210; *Simmons* v. *Swift*, 5 B. & C. 857; 5 L.J. (O.S.) K.B. 10; *Aldridge* v. *Johnson*, 7 E. & B. 885; 26 L.J. Q.B. 296; *Langton* v. *Higgins*, 4 H. & N. 402; 28 L.J. Q.B. 252; *Langton* v. *Waring*, 18 C.B. N.S. 315; Blackburn on Sale, p. 128 (ed. 2).

(*c*) *Rohde* v. *Thwaites*, 6 B. & C. 388; 5 L.J. (O.S.) K.B. 163; *Sparkes* v. *Marshall*, 2 Bing. N.C. 761; 5 L.J. C.P. 286.

(*d*) *Jenner* v. *Smith*, L.R. 4 C.P. 270; *Campbell* v. *Mersey Docks*, 14 C.B. N.S. 412.

manship, convenience, or taste, the latter will be entitled to reject it, if it does not meet his approval upon some one or more of the grounds stated (*e*).

When everything that the seller is to do to complete the sale has been performed, the property and the attendant risk pass to the purchaser, although the latter may not have got the right of possession of the subject-matter of the sale, or perfect control over it, by reason of the non-performance of some act to be done exclusively by him, such as procuring wines and spirits to be gauged by a custom-house officer, in order to ascertain their strength preparatory to the calculation of the duty, payment of the duty when ascertained, or the non-performance of any other act which it is incumbent on the buyer alone to perform (*f*). But it is not competent to the buyer to perfect the contract and vest the property in himself by the performance of acts which it is the duty of the vendor to perform, unless the acts are done by the authority of the vendor (*g*).

Reservation of right of disposal.—"Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled (*h*). Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal (*i*). Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him" (*k*).

Delivery under bill of lading—Transfer by bill of lading.—A bill

(*e*) *Andrews* v. *Belfield*, 2 C.B. N.S. 779.

(*f*) *Rugg* v. *Minett*, 11 East, 210; *Studdy* v. *Sanders*, 5 B. & C. 628; 4 L.J. (O.S.) K.B. 290; *Hinde* v. *Whitehouse*, 7 East, 558; *Turley* or *Furley* v. *Bates*, 2 H. & C. 200; 33 L.J. Ex. 43: *Sweeting* v. *Turner*, L.R. 7 Q.B. 310; 41 L.J. Q.B. 58.

(*g*) *Acraman* v. *Morrice*, 8 C.B. 449; 19 L.J. C.P. 57.

(*h*) 56 & 57 Vict. c. 71, s. 19 (1). As to the protection afforded to innocent purchasers, see sect. 25, *post*, pp. 554, 555; *Cahn* v. *Pockett's Bristol Channel Co.*, (1899) 1 Q.B. 643; 68 L.J. Q.B. 515; 52 & 53 Vict. c. 45, ss. 2 (1), 9, and 10.

(*i*) 56 & 57 Vict. c. 71, s. 19 (2).

(*k*) *Ib.* s. 19 (3).

of lading is a receipt for goods shipped on board a ship signed by the person who contracts to carry them or his agent authorised to sign it and stating the terms on which the goods were delivered to and received by the ship. When signed by the carrier or his agent, who is often the master of the ship, the bill of lading is handed to the shipper. If the shipper intends the property in the goods to pass to a purchaser as soon as, or before, they are put on board, the bill of lading will naturally state that the goods are deliverable to the purchaser or his assigns. If he does not intend this, the bill of lading will state that the goods are to be delivered to the shipper or his assigns. A vendor may annex terms to a bill of lading preserving his control over the cargo and the *jus disponendi* of the goods on arrival at their destination (*l*); although they may be shipped on board the purchaser's ship, and may be in the hands of the purchaser's ship-master (*m*). Where a bill of lading states that goods are consigned to a merchant abroad, and that the goods are shipped by order and on account of the consignee, this is strong evidence that the property was intended to vest in the consignee from the time they are put on board (*n*). But, if goods are delivered to a ship-master, to be carried under a bill of lading, whereby the latter undertakes to carry them for and on account of the vendor, and deliver them to the vendor at the port of destination, or to the assignee of the bill of lading, this is evidence of an intention not to transfer the property until the bill of lading has been endorsed to the purchaser (*o*). So where a shipper keeps in his own or his agent's hands a bill of lading making the goods deliverable to his order until certain conditions have been fulfilled by the consignee, the property in the goods will not pass until such conditions are fulfilled by the consignee, or at least until he offers to fulfil the conditions, and demands the bill of lading. The vendor retains not only a lien but a power to dispose of the goods so long as the vendee continues in default (*p*). But if the bill of lading is only dealt with to secure the contract price, then, on payment or tender, the goods vest in the purchaser (*q*). Where goods destined for a foreign port are put on board ship, and the bill of lading and policy of insurance are handed over in

(*l*) *Van Casteel* v. *Booker*, 2 Exch. 691; 18 L.J. Ex. 9; *Jenkyns* v. *Brown*, 14 Q.B. 496; 19 L.J. Q.B. 286; *Gabarron* v. *Kreeft*, L.R. 10 Ex. 274; 44 L.J. Ex. 238.

(*m*) *Turner* v. *Liverpool Dock Trustees*, 6 Exch. 543; 20 L.J. Ex. 393; *Rosevear Clay Co., Ex parte*, 11 Ch.D. 560; 48 L.J. Bankr. 100.

(*n*) *Brown* v. *Hodgson*, 2 Campb. 36.

(*o*) *Wait* v. *Baker*, 2 Exch. 1; 17 L.J. Ex. 307; *Jenkyns* v. *Brown*, 14 Q.B. 496; 19 L.J. Q.B. 286; *Joyce* v. *Swann*, 17 C.B. N.S. 84; *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. at p. 172; 47 L.J. Ex. 418.

(*p*) *Ogg* v. *Shuter*, 1 C.P.D. 47; 45 L.J. C.P. 47.

(*q*) *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. 164; 47 L.J. Ex. 418.

exchange for part payment, this is evidence that the property and risk in the goods are intended forthwith to vest in the purchaser (*r*).

It is a common practice for the shipper, or other person to whom or to whose assigns the goods are deliverable, to indorse the bill of lading to a third person. The effect of such indorsement in passing the property in the goods from the indorser to the indorsee is often a question of great difficulty. In the absence of evidence to the contrary the indorsement shows an intention to pass the property. But in truth it is only evidence of the intention of the parties which has usually to be gathered from the contract of sale and other facts besides the mere indorsement. In this sense it is true to say that the indorsement passes such property as the parties intend and no more (*s*). Thus it may pass the property conditionally (*t*) or not at all (*u*). At common law the indorsee of a bill of lading could not sue the carrier on the contract contained in the bill of lading; but by section 1 of the Bills of Lading Act, 1855 (*x*), every consignee (*y*) of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods mentioned therein passes, has transferred to him all such rights of suit, and is subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself; and every bill of lading representing goods to have been shipped on board is conclusive against the master or person signing the same, unless either the holder took the bill with actual notice that the goods were not on board, or the person signing shows that the mistake was made without his default, and wholly by the fraud of the shipper or of the holder or some person under whom the holder claims (*z*). The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass the property in the goods to an indorsee so as to transfer to him all liabilities in respect to the goods within the meaning of the Bills of Lading Act, 1855 (*a*), if the indorsee has neither taken possession nor dealt with the goods.

As between the charterer and the shipowner the charter-party

(*r*) *Tregelles* v. *Sewell*, 7 H. & N. 574.

(*s*) *Sewell* v. *Burdick*, 10 App.Cas. 74; 54 L.J. Q.B. 156.

(*t*) *Barrow* v. *Coles*, 3 Campb. 92; *Shepherd* v. *Harrison*, L.R. 5 H.L. 116; 40 L.J. Q.B. 148; *Sanders* v. *Maclean*, 11 Q.B.D. 327, 341; 52 L.J. Q.B. 481.

(*u*) *Coxe* v. *Harden*, 4 East, 211; per Bowen, L.J., in *Burdick* v. *Sewell*, 13 Q.B.D. 170; 53 L.J. Q.B. 399; *Sewell* v. *Burdick*, *supra*.

(*x*) 18 & 19 Vict. c. 111, ss. 1 and 3; *The Figlia Maggiore*, L.R. 2 Ad. & E. 106; 37 L.J. Adm. 52.

(*y*) A "consignee" does not cease to be such by merely parting with the beneficial interest in the goods: see *Fowler* v. *Knoop*, 4 Q.B.D. 299; 48 L.J. Q.B. 333.

(*z*) *Meyer* v. *Dresser*, 16 C.B. N.S. 646; 33 L.J. C.P. 289.

(*a*) 18 & 19 Vict. c. 111, s. 1; *Sewell* v. *Burdick*, 10 App.Cas. 74; 54 L.J. Q.B. 156.

governs the contract, the bill of lading being a mere receipt for the goods (*b*); but where the bill of lading is indorsed over, then, as between the shipowner and the indorsee, the bill of lading contains the contract (*c*). The person who first gets a bill of lading (though only one of a set of three) gets the property which it represents, and need not do any act to ascertain his title which the transfer of the bill of lading of itself renders complete, so that any subsequent dealings with the others of the set are subordinate to the rights passed by that one (*d*); and where goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee or his assigns, "the one of which bills being accomplished, the others to stand void," the warehouseman who has custody of the goods is justified in delivering them to the consignee on the production of one part, even although there has been a prior indorsement for value of another part, provided that the delivery be *bonâ fide*, and without notice or knowledge of the prior indorsement (*e*).

Risk primâ facie *passes with property.*—"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in default as regards any loss which might not have occurred but for such fault. Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party" (*f*).

Undivided shares.—In the large majority of cases the risk passes to the purchaser with the property, and the test as to whether the risk has passed is the same as that to be applied to the question whether the property has passed. But the risk and the property are not inseparable (*g*); they may be separated by the express terms of the contract (*h*). Where a vendor sells an undivided share to be separated by the purchaser from an ascertained bulk, it would seem that the risk would pass to the purchaser if the share remained unseparated through his default, though the property would not pass until the share had been separated from the bulk (*i*).

(*b*) *Per* Lord Bramwell, *Sewell* v. *Burdick*, *supra*, at p. 105; *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67; 56 L.J. Q.B. 202.

(*c*) *Leduc* v. *Ward*, 20 Q.B.D. 475; 57 L.J. Q.B. 379.

(*d*) *Barber* v. *Meyerstein*, L.R. 4 H.L. 317; 39 L.J. C.P. 187.

(*e*) *Glyn, Mills & Co.* v. *E. & W. India Dock Co.*, 7 App.Cas. 591; 52 L.J. Q.B. 146.

(*f*) 56 & 57 Vict. c. 71, s. 20.

(*g*) *Martineau* v. *Kitching*, L.R. 7 Q.B. 436; 41 L.J. Q.B. 227.

(*h*) *Castle* v. *Playford*, L.R. 7 Ex. 98; 41 L.J. Ex. 44; *Anderson* v. *Morice*, 1 App.Cas. 713; 46 L.J. C.P. 11.

(*i*) *Martineau* v. *Kitching*, *per* Black-

Sale by person not the owner.—Subject to the provisions of the Act, "where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell" (*k*). Provided also that nothing in the Act shall affect—"(*a*) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; (*b*) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction" (*l*).

It is well established that if one person by his words or conduct induces another to believe in the existence of a state of circumstances and to act on that belief so as to alter his position, he cannot afterwards aver a different state of things against the party whom he has misled (*m*). Thus, the lessee of a public house who allowed another to sell the fixtures and fittings as if they were his own, whereby a third person was induced to purchase them *bonâ fide*, cannot recover them from the purchaser (*n*). But, where a firm of timber merchants kept stocks of timber warehoused in their own name with a dock company, to whom they gave instructions to accept all delivery orders signed by their clerk; and the clerk, who had authority from the timber merchants to sign delivery orders in relation to sales to their customers, fraudulently gave delivery orders in favour of himself under an assumed name, and having procured timber from the dock company sold it to strangers; it was held that the clerk could give no better title than he had himself, and that no question arose of the timber merchants being estopped from denying his authority to dispose of the timber (*o*).

Market overt.—"Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller (*p*). Nothing in this section shall affect the law relating to the sale of horses" (*q*).

A sale in market overt forms another exception to the general

burn, J., L.R. 7 Q.B., p. 456; see also sect. 37, *post*.

(*k*) 56 & 57 Vict. c. 71, s. 21 (1).

(*l*) *Ib.*, s. 21 (2); as to the Factors Acts, see *post*, p. 758 *et seq.*; as to sale of pledges by pawnbrokers, see *post*, p. 765.

(*m*) *Pickard* v. *Sears*, 6 Ad. & E. 469; see *ante*, p. 68.

(*n*) *Gregg* v. *Wells*, 10 Ad. & E. 90; 8 L.J. Q.B. 193; *Freeman* v. *Cooke*, 2 Ex. 654; 18 L.J. Ex. 114; see further as to sales by ostensible agents, *Ramazotti* v. *Bowring*, 7 C.B. N.S. 851; 29 L.J. C.P. 30; *Pole* v. *Leask*, 9 Jur. N.S. 829; *Edmunds* v. *Bushell*, L.R. 1 Q.B. 97; 35 L.J. Q.B. 20.

(*o*) *Farquharson* v. *King*, (1902) A.C. 325; 71 L.J. K.B. 667.

(*p*) 56 & 57 Vict. c. 71, s. 22 (1).

(*q*) *Ib.*, s. 22 (2).

rule that a bargain and sale passes no better title than the vendor had. By such a sale the purchaser obtains an absolute title against all persons, including the true owner (*r*), except in the case provided for by section 24 (*post*), in which stolen property revests in the owner on conviction of the thief. Every shop in the city of London is a market overt, but for such things only as by the trade of the owner are put there for sale; thus, if the sale be openly in a goldsmith's shop in the city so that anyone standing or passing by the shop might see it there, the sale would change the property; but if the sale be in the shop, either behind a hanging or behind a cupboard upon which his plate stands so that one who stood or passed by the shop could not see it, the property would not be changed; so also if the sale be not in the shop, but in the warehouse or other place in the house, it would not change the property (*s*), as, for instance, in a showroom above a jeweller's shop in the city to which access could only be obtained by the jeweller's special permission (*t*). It would seem, however, that the doctrine as to sales in market overt in the city of London does not apply to a sale by a customer to a shopkeeper (*u*). A sale in a warehouse used as a shop, having windows in which goods are exposed for sale, is a sale in market overt (*x*). To constitute a sale in market overt, the goods must be present in the market during the whole of the transaction, from the making of the contract to the delivery (*y*). A sale by sample is not entitled to the privileges of a sale in market overt (*z*). The same considerations apply to other markets in England which by custom are markets overt (*a*). The sale of a horse even in market overt does not confer an absolute title unless certain statutory (*b*) formalities are complied with (*c*).

Sale under voidable title.—"When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith (*d*), and without notice of the seller's defect of title" (*e*). If a vendor has parted with the possession of goods in fulfilment of a contract of sale, obtained by fraud on the

(*r*) *Cundy* v. *Lindsay*, 3 App.Cas. 459; 47 L.J. Q.B. 481.

(*s*) *Case of Market Overt*, 5 Co. 84; 2 W. Bl. 449; *Wilkinson* v. *King*, 2 Campb. 335.

(*t*) *Hargreaves* v. *Spink*, (1892) 1 Q.B. 25; 61 L.J. Q.B. 318.

(*u*) *Hargreaves* v. *Spink*, *supra*.

(*x*) *Lyons* v. *De Pass*, 11 Ad. & E. 326; 9 L.J. Q.B. 51.

(*y*) *Crane* v. *London Docks Co.*, 5 B. & S. 313; 33 L.J. Q.B. 224.

(*z*) *Crane* v. *London Docks Co.*, *supra*.

(*a*) *Case of Market Overt*, *supra*.

(*b*) See 2 Ph. & M. c. 7; 31 Eliz. c. 12.

(*c*) *Moran* v. *Pitt*, 42 L.J. Q.B. 47.

(*d*) A thing is deemed to be done "in good faith" within the meaning of the Act when it is in fact done honestly, whether it be done negligently or not: sect. 62 (2).

(*e*) 56 & 57 Vict. c. 71, s. 23.

part of the purchaser, the contract is voidable, but he cannot, after the goods have been re-sold and passed into the hands of a *bonâ fide* sub-purchaser, disaffirm the contract, and annul the title of the latter to the property (*f*). But, if the relation of the vendor and vendee does not subsist between the original owner and the person who commits the fraud, and the goods have been obtained by false pretences, in such a way as not to transfer the property in them, and have been afterwards disposed of to a *bonâ fide* purchaser by sale not in market overt, the latter does not acquire a title to the goods as against the person who has been defrauded (*g*).

Revesting of property in stolen goods on conviction of offender.—"Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise (*h*). Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender" (*i*). Formerly if the owner of goods had been induced to part with them by fraud, and they were afterwards bought, whether in market overt or elsewhere, by an innocent purchaser, nevertheless upon the prosecution and conviction of the fraudulent person, the property in the goods reverted to the original owner (*k*); but since the enactment of sect. 24, sub-sect. 2, the property in the goods does not under such circumstances revert to the original owner, notwithstanding the provisions of sect. 100 of the Larceny Act, 1861 (*l*), and of sect. 27, sub-sect. 3, of the Summary Jurisdiction Act, 1879 (*m*).

Seller or buyer in possession after sale.—"Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title (*n*) under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith

(*f*) *White* v. *Garden*, 10 C.B. 919; 20 L.J. C.P. 166; *Sheppard* v. *Shoolbred*, Car. & M. 61; *Attenborough* v. *St. Katharine's Docks Co.*, 3 C.P.D. 450; 47 L.J. C.P. 763.

(*g*) *Higgons* v. *Burton*, 26 L.J. Ex. 342; *Kingsford* v. *Merry*, 1 H. & N. 503; 26 L.J. Ex. 83; *Cundy* v. *Lindsay*, 3 App. Cas. 459; 47 L.J. Q.B. 481.

(*h*) 56 & 57 Vict. c. 71, s. 24 (1).

(*i*) *Ib.* s. 24 (2).

(*k*) *Bentley* v. *Vilmont*, 12 App.Cas. 471; 57 L.J. Q.B. 18; overruling *Moyce* v. *Newington*, 4 Q.B.D. 32; 48 L.J. Q.B. 125, which is now reinstated by 56 & 57 Vict. c. 71, s. 24 (2).

(*l*) 24 & 25 Vict. c. 96, s. 100.

(*m*) 42 & 43 Vict. c. 49, s. 27 (3).

(*n*) See 52 & 52 Vict. c. 45, s. 1 (4), for definition of "document of title."

and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same (*o*). Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner (*p*). In this section the term 'mercantile agent' has the same meaning as in the Factors Acts" (*q*). These provisions are a re-enactment of ss. 8 and 9 of the Factors Act, 1889 (*r*), with this modification, that they do not apply to the delivery or transfer of goods or documents of title "under any agreement for sale, pledge, or other disposition thereof."

Where a vendor sells goods which are warehoused, and agrees to retain the goods until demanded, and after the sale writes letters to the warehouseman appropriating the goods as security for money advanced by the warehouseman, these letters do not amount to "a delivery of the goods" or "a transfer of the documents of title" within sect. 25 of the Act (*s*). Where a seller of goods sent to the buyer under cover of a letter a bill of lading accompanied by a draft to be accepted by the buyer for the price of the goods contained in the bill of lading, but the buyer never accepted the draft and retained the bill of lading, which he indorsed to a sub-purchaser, who received it in good faith for valuable consideration and without notice of any right of the original seller in respect of the goods, it was held, the buyer having become insolvent, that he was in possession of the bill of lading with the consent of the seller so that its transfer to the sub-purchaser gave the latter a good title to the goods and that the original seller had no right to stop the goods *in transitu* (*t*).

Purchaser having notice of writ of execution.—A writ of *fieri facias* or other writ of execution against goods binds the property in the goods of the execution debtor as from the time when the

(*o*) 56 & 57 Vict. c. 71, s. 25 (1). See, as to Factors Acts, *post*, p. 760.

(*p*) 56 & 57 Vict. c. 71, s. 25 (2).

(*q*) *Ib.* s. 25 (3); see 52 & 53 Vict. c. 45, s. 1 (1), for definition of "mercantile agent."

(*r*) 52 & 53 Vict. c. 45, ss. 8, 9.

(*s*) *Nicholson* v. *Harper*, (1895) 2 Ch. 415; 64 L.J. Ch. 672.

(*t*) *Cahn* v. *Pocketti's Bristol Channel Co.*, (1899) 1 Q.B. 643; 68 L.J. Q.B. 515.

writ is delivered to the sheriff to be executed; but no such writ is to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff (*u*).

Duties of seller and buyer.—"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale" (*x*). Although a bargain and sale may be so far imcomplete as not to operate as an immediate transfer of property, yet the engagements which naturally result from the contract are in existence as soon as it has been entered into. There is an implied promise or undertaking on the part of the vendor to put the vendee into possession of the thing sold without delay, if the contract makes no mention of the time of delivery, and an undertaking by the vendee to accept the goods and pay the price on the delivery of the subject-matter of the sale by the vendor. There is also an implied undertaking, on the part of the vendor of a specific chattel to be delivered at a future day, that he will not do anything inconsistent with the rights of the purchaser; and, if he wastes or re-sells the property, he is responsible in damages (*y*).

Actual and constructive delivery of goods.—The delivery of goods may be either real or symbolical, actual or constructive. When the subject-matter of the sale is capable of manual delivery, such as a watch, a book, or a gun, and is actually transferred from the hand of the vendor to that of the purchaser or his agent, there is an actual delivery. So, if, being a bulky commodity, it is removed from the warehouse of the vendor to that of the purchaser, and placed under the control of the latter, there is an actual delivery. But although there has been no manual transfer from hand to hand, and the goods have not been removed from the place where they were deposited at the time of the sale, if the vendor has handed to the purchaser the key of a box or warehouse where the goods were deposited (*z*) in order that he may remove them (*a*), or has given to the purchaser a delivery order or warrant for their removal (*b*), and placed them at the disposal of the latter,

(*u*) 56 & 57 Vict. c. 71, s. 26 (1).

(*x*) 56 & 57 Vict. c. 71, s. 27; see also sect. 37, *post*.

(*y*) *Chinery* v. *Viall*, 5 H. & N. 288; 29 L.J. Ex. 180; *Bowdell* v. *Parsons*, 10 East, 359.

(*z*) *Chaplin* v. *Rogers*, 1 East, 194.

(*a*) *Salter* v. *Woollams*, 2 M. & Gr. 650; 10 L.J. C.P. 145; *Bartlett* v. *Holmes*, 22 L.J. C.P. 182; 13 C.B. 630.

(*b*) *Greaves* v. *Hepke*, 2 B. & Ald. 131; *Marshall* v. *Green*, 1 C.P.D. 35; 45 L.J. C.P. 153; *Elmore* v. *Stone*, 1 Taunt. 458.

there is a constructive delivery, provided, at the time of the delivery of the key or warrant, the particular goods to be removed had been weighed out or measured, or separated from the bulk, and nothing but delivery remained to be performed by the vendor in order to complete his part of the contract of sale.

When goods are incapable of manual delivery, such as a hay-stack in a meadow, the same strict evidence of transfer cannot ordinarily be given, and it is enough for the vendor to show that the purchaser was himself to have fetched away the article, and that the vendor has given him the power and opportunity of removing it (*c*). But, if goods sold remain in the vendor's dwelling-house or warehouse, the mere circumstance that he has allowed the purchaser an opportunity of removing a trifling part is consistent with the intention of retaining the vendor's lien on the residue, and therefore would not be conclusive evidence of delivery (*d*). For it must be observed that the mere placing of goods at the disposal of the purchaser, or putting it in his power to remove them, will not in any case constitute a delivery, if the vendor retains his lien for the price or possesses any control over them (*e*).

Proof of delivery.—The question of delivery is a question of fact, and is to be determined by reference to all the surrounding circumstances, which must be looked at in order to see if there has been a virtual change of possession as well as a change of ownership. The taking of samples, coopering casks, and the general exercise of acts of ownership by the purchaser over the subject-matter of the sale, in those cases where nothing but delivery remains to be performed to execute the contract, are circumstances from which an actual transfer of the possession of the article to the purchaser may be fairly inferred; but they are equivocal acts, open to explanation, and afford no sufficient proof of delivery, if they have been done without the knowledge or sanction of the vendor (*f*). Where goods are sold for ready money and the price is not paid, the marking of the goods and packing them up in boxes or cloths belonging to the purchaser do not constitute a delivery so long as the goods remain in the possession of the vendor, inasmuch as the latter has not, until he has actually parted with the possession of them, lost his lien for the price (*g*); and the

(*c*) *Smith* v. *Chance*, 2 B. & Ald. 753; *Wood* v. *Tassell*, 6 Q.B. 236; *Tansley* v. *Turner*, 2 Bing. N.C. 151; 4 L.J. C.P. 272.

(*d*) *Thompson* v. *Maceroni*, 4 Dowl. & R. 619; 2 L.J. (O.S.) K.B. 208.

(*e*) *Goodall* v. *Skelton*, 2 H. Bl. 316; *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L.J. Q.B. 261; cf. *Holderness* v. *Shackels*, 8 B. & C. 621; 7 L.J. (O.S.) K.B. 80.

(*f*) *Dixon* v. *Yates*, 5 B. & Ad. 313; 2 L.J. K.B. 198; *Craven* v. *Ryder*, 6 Taunt. 433. See *post*, p. 571 *et seq.*

(*g*) *Boulter* v. *Arnott*, 1 Cr. & M. 333; 2 L.J. Ex. 97.

delivery of part of the goods does not, unless so intended by the parties, operate as a constructive delivery of the whole, so as to deprive the vendor of his right to possession of the residue until payment of the price (*h*). The unpacking or unloading of goods for the purpose of inspection by a purchaser who has not previously selected (*ante*, p. 495) is not necessarily an acceptance of the goods by the purchaser so as to authenticate the contract of sale, and *à fortiori* is not sufficient to render him liable to an action for the price (*i*). But, if he lands and stores the goods, and keeps them an unreasonable time, or does more than is necessary to be done for inspection, he makes the goods his own (*k*).

Payment and delivery, concurrent conditions.—"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods" (*l*). If a precise time has been appointed for the payment of the price, and another and different time is fixed for the delivery, the acts are not concurrent, and do not constitute mutual conditions (*m*) unless they are made so by custom and usage of trade. Thus if a bought note specifies that certain goods have been "bought to be paid for by cash in one month," the buyer is entitled to call for delivery at any reasonable time from the making of the contract; but the vendor has no right to the money until the month has expired, unless a usage of trade, authorising the vendor to keep possession of the goods until the day of payment arrives, can be established (*n*). If the goods are to be delivered "forthwith," and the price is to be paid in a "fortnight" or "month," the delivery must be made within the period named (*o*). Where, by the terms of the contract, the goods were to be taken away at the purchaser's expense in fourteen days from the day of the sale, and the purchase-money was to be paid on or before the delivery of the goods, it was held that the seller was bound to deliver when called upon at any time during

(*h*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; 2 L.J. K.B. 55; *Dixon* v. *Yates*, *supra*; *Hammond* v. *Anderson*, 1 Bos. & P. N.R. 69.

(*i*) *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199; *Toulmin* v. *Hedley*, 2 Car. & K. 157.

(*k*) *Chapman* v. *Morton*, 11 M. & W. 540; 12 L.J. Ex. 292; see also s. 35, *post*.

(*l*) 56 & 57 Vict. c. 71, s. 28; *Callonel* v. *Briggs*, 1 Salk. 112; *Morton* v. *Lamb*, 7 T.R. 125; *Rawson* v. *Johnson*, 1 East, 203; *Wilks* v. *Atkinson*, 1 Marsh. 412; *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30; *Bloxam* v. *Sanders*, 4 B. & C. 941.

(*m*) *Ante*, p. 503; *Thorpe* v. *Thorpe*, 1 Salk. 171; 1 Raym. 665; *Spartali* v. *Benecke*, 10 C.B. 212; 19 L.J. C.P. 293; *Chinery* v. *Viall*, 5 H. & N. 288; 29 L.J. Ex. 180.

(*n*) *Field* v. *Lelean*, 6 H. & N. 617; 30 L.J. Ex. 168.

(*o*) *Staunton* v. *Wood*, 16 Q.B. 638.

the fourteen days, and had not fourteen days to deliver the goods, although the purchaser had fourteen days to take them away (*p*).

Rules as to delivery.—"(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery (*q*). (2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time (*r*). (3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods (*s*). (4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact (*t*). (5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller" (*u*).

If the goods are in the hands of a warehouse-keeper, wharfinger, or other agent, for safe custody, and are to be fetched away by the purchaser, and the goods are weighed and set apart for the purchaser, and the agent consents to hold them at the disposal of the latter, there is a sufficient delivery on the part of the vendor; and, if the goods are improperly taken away by a third party, the vendor cannot then be sued for the non-delivery of them (*x*). Some auctioneers sold a rick of hay which had been distrained by a landlord for rent. By the conditions of sale the hay was to be removed by the purchaser, and, the time specified for its removal being considered too short, the tenant gave a written permission for the hay to remain on the land for a longer period. The price of the hay was paid at the time of the sale, and a few days afterwards the purchaser received from the auctioneers a written order, addressed to the tenant, requiring him to permit the purchaser to remove the hay; but the tenant then refused, and would not suffer him to

(*p*) *Hagedorn* v. *Laing*, 6 Taunt. 162.
(*q*) 56 & 57 Vict. c. 71, s. 29 (1).
(*r*) *Ib.*, s. 29 (2).
(*s*) *Ib.*, s. 29 (3).
(*t*) *Ib.*, s. 29 (4), see *ante*, p. 505.
(*u*) *Ib.*, s. 29 (5).
(*x*) *Wood* v. *Tassell*, 6 Q.B. 234.

come upon the land to take it. The purchaser then brought an action against the auctioneers for the non-delivery; and the defendants pleaded that they did deliver possession to the plaintiff: and it was held that this plea was supported by the facts; that the permission given by the tenant for the hay to remain on the land for the convenience of the purchaser amounted to an attornment from the tenant to the purchaser, and was equivalent to an express undertaking on the part of the tenant to hold the hay for the purchaser's use and at his disposal (*y*).

Delivery of wrong quantity.—"Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate (*z*). Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate (*a*). Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole (*b*). The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties" (*c*).

If more goods are sent than the purchaser agreed to buy, he may refuse to receive any portion of the goods so sent, and is not bound to incur risk or trouble in selecting some of the things and sending back others (*d*); still more is this the case where the superfluous goods are not of the quality ordered (*e*). A contract for a cargo of about sixty fathoms of lathwood is not performed by the tender of that quantity out of a cargo of eighty-three fathoms (*f*). Similarly a purchaser cannot be compelled to take less than he has ordered (*g*). If the subject of the contract is the sale of a specific quantity of a given article with a margin for a moderate excess in or diminution of that quantity under the words

(*y*) *Salter* v. *Woollams*, 2 M. & Gr. 650; 10 L.J. C.P. 105.

(*z*) 56 & 57 Vict. c. 71, s. 30 (1).

(*a*) *Ib.* s. 30 (2).

(*b*) *Ib.* s. 30 (3); *Levy* v. *Green*, 1 E. & E. 969; 28 L.J. Q.B. 319; *Nicholson* v. *Bradfield Union*, L.R. 1 Q.B. 620; 35 L.J. Q.B. 176.

(*c*) 56 & 57 Vict. c. 71, s. 30 (4).

(*d*) *Cunliffe* v. *Harrison*, 6 Exch. 903; 20 L.J. Ex. 325; *Dixon* v. *Fletcher*, 3 M. & W. 146; *Rylands* v. *Kreitman*, 19 C.B. N.S. 351; *Hart* v. *Mills*, 15 M. & W. 85; 15 L.J. Ex. 200.

(*e*) *Levy* v. *Green*, 1 E. & E. 969; 28 L.J. Q.B. 319.

(*f*) *Kreuger* v. *Blanck*, L.R. 5 Ex. 179; 39 L.J. Ex. 160; *Borrowman* v. *Drayton*, 2 Ex. D. 15; 46 L.J. Ex. 273; *Ireland* v. *Livingston*, L.R. 5 H.L. 395; 41 L.J. Q.B. 201.

(*g*) *Oxendale* v. *Wetherell*, 9 B. & C. 386; 7 L.J. (O.S.) K.B. 264; *Colonial Ins. Co. of New Zealand* v. *Adelaide Mar. Ins. Co.*, 12 App.Cas. 138; 56 L.J. P.C. 19.

"about" or "more or less" the seller cannot call upon the buyer to accept any greater or less quantity of the article bargained for than the quantity specified subject to a moderate margin (*h*). Thus, if a purchaser has agreed to buy "about 300 quarters (more or less) of foreign rye, &c.," he is not bound to accept 350 quarters (*i*). If the vendor has agreed to sell, and the purchaser to buy, a certain quantity, "say not less than 100, &c.," the words amount to a contract to deliver at least the quantity specified (*k*). If the quantity is to be between 1,800 and 2,200 quarters, the purchaser is not bound to accept more than 2,200 quarters, nor to accept less than 1,800 (*l*). But it is otherwise where the purpose of the parties is the delivery of the goods in any event, and the statement as to the quality is merely subsidiary. Thus, if the right of property in the subject-matter of the sale has passed by the bargain from the vendor to the purchaser, the latter is not justified in refusing to accept it and pay the price, by reason of some unintentional misrepresentation of the quantity. Where the vendor agreed to sell and the purchaser to buy "the cargo Prima Donna as it stands, consisting of about 1,300 quarters Ibralia corn, at 30*s.* per quarter, the quantity to be taken from the bill of lading," and the bill of lading described the cargo as being 1,667 quarters; and afterwards when the corn came to be measured it was found to consist of only 1,614 quarters, it was held that the purchaser must put up with the loss, as there had been no intentional misrepresentation, and no fraud on the part of the vendor (*m*). If the right of property has not passed by the bargain, the purchaser cannot be made responsible for the non-acceptance of the subject-matter of the sale and non-payment of the price, unless the vendor can show that the article or chattel tendered for acceptance fairly corresponded in quantity with the thing agreed to be bought; for no man can be compelled to take more than he agreed to buy (*n*). The natural deterioration of an article between the time of the sale and delivery does not entitle the purchaser to refuse acceptance (*o*). With regard to the vendor, if the contract is entire for the purchase of a certain quantity of goods, he cannot be compelled to deliver a part only of the goods; and, if the purchaser declines to take the whole

(*h*) *Reuter* v. *Sala*, 4 C.P.D. 239; 48 L.J. C.P. 492.

(*i*) *Cross* v. *Eglin*, 2 B. & Ad. 106; 9 L.J. (O.S.) K.B. 145.

(*k*) *Leeming* v. *Snaith*, 16 Q.B. 275; 20 L.J. Q.B. 165. See *Morris* v. *Levison*, 1 C.P.D. 155; 45 L.J. C.P. 409.

(*l*) *Tamvaco* v. *Lucas*, 1 E. & E. 581; 28 L.J. Q.B. 153; *Reuter* v. *Sala*, 4 C.P.D. 239; 48 L.J. C.P. 492. As to defective deliveries on contracts to deliver by instalments, see sect. 31 (2), *post*.

(*m*) *Covas* v. *Bingham*, 2 E. & B. 836; 23 L.J. Q.B. 27.

(*n*) *Hart* v. *Mills*, 15 M. & W. 85; 15 L.J. Ex. 200.

(*o*) *Bull* v. *Robison*, 10 Exch. 342; 24 L.J. Ex. 165; *Beer* v. *Walker*, 46 L.J. C.P. 677. See also sect. 33, *post*.

quantity he has ordered, the vendor may at once abandon the contract or sue for damages (*p*).

Delivery by instalments.—"Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments (*q*). Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated" (*r*).

The principle embodied in sect. 31 is the only one which can be deduced from the numerous conflicting authorities on the question as to when a single breach by one party to a contract to deliver or accept delivery by instalments entitles the other party to treat the whole contract as repudiated (*s*) or as merely giving rise to a claim for compensation (*t*). When a bargain has been made for the manufacture of a certain specified quantity of goods to be supplied from time to time, and paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for damages (*u*). For in an action on a contract of sale for the non-acceptance of goods sold, it is sufficient, though also necessary, for the vendor to show that he was ready and willing to deliver the goods to the purchaser according to the terms of the contract (*x*). The plaintiffs undertook to supply the defendants with 30,000 tons of ore at 25*s.* 6*d.* per ton, cost freight and insurance, payment to be made by cash on delivery of each shipment, "deliveries to be

(*p*) *Kingdom* v. *Cox*, 5 C.B. 522; 17 L.J. C.P. 155.

(*q*) 56 & 57 Vict. c. 71, s. 31 (1).

(*r*) *Ib.* s. 31 (2).

(*s*) See *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30; *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L.J. Ex. 73; *Roper* v. *Johnson*, L.R. 8 C.P. 167; 42 L.J. C.P. 65; *Bloomer* v. *Bernstein*, L.R. 9 C.P. 588; 43 L.J. C.P. 375; *Honck* v. *Muller*, 7 Q.B.D. 92; 50 L.J. Q.B. 529; *Rhymney Ry.* v. *Brecon, &c. Ry.*, 69 L.J. Ch. 813.

(*t*) See *Jonassohn* v. *Young*, 4 B. & S. 296; 32 L.J. Q.B. 385; *Simpson* v. *Crippin*, L.R. 8 Q.B. 14; 42 L.J. Q.B. 28; *Freeth* v. *Burr*, L.R. 9 C.P. 208; 43 L.J. C.P. 91; *Tyers* v. *Rosedale Iron Co.*, L.R. 10 Ex. 195; 44 L.J. Ex. 130; *Mersey Steel and Iron Co.* v. *Naylor*, 9 App.Cas. 434; 53 L.J. Q.B. 497.

(*u*) *Cort* v. *Ambergate Ry.*, 17 Q.B. 148; 20 L.J. Q.B. 466.

(*x*) *Boyd* v. *Lett*, 1 C.B. 222; 14 L.J. C.P. 111; *Hannuic* v. *Goldner*, 11 M. & W. 849, 856: *Granger* v. *Dacre*, 12 M. & W. 434; 13 L.J. Ex. 93.

made at the rate of from 800 to 1,300 tons per month, provided we are able to procure tonnage at or under 16*s.* 6*d.* per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore through any dangers of the mines, &c." The plaintiffs withheld ore while freights were above the limit, and then sought to deliver ore according to contract, and it was held that they might, but that they might not deliver ore which they had been prevented delivering by dangers of the mines, &c. (*y*).

Delivery to carrier.—"Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery (*z*) of the goods to the buyer (*a*).

"Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages (*b*).

"Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit" (*c*).

If the vendor is authorised to select the goods and forward them to the purchaser, the selection by the vendor, and the delivery of the goods to a carrier to be conveyed to the purchaser, will have the effect of transferring the ownership and risk to such purchaser provided the selection is made according to the orders or authority given (*d*). As soon as the goods are delivered into the hands of the carrier he becomes responsible to the purchaser to whom they are consigned (*e*), and there is an executed delivery as well as a transfer of the ownership and risk (*f*); but, if by the terms of the contract the delivery of the goods at their place of destination is

(*y*) *De Oleaga* v. *West Cumberland Iron Co.*, 4 Q.B.D. 472; 48 L.J. Q.B. 753.

(*z*) "Delivery" means voluntary transfer of possession from one person to another: sect. 62.

(*a*) 56 & 57 Vict. c. 71, s. 32 (1).

(*b*) *Ib.* s. 32 (2).

(*c*) *Ib.* s. 32 (3).

(*d*) *Fragano* v. *Long*, 4 B. & C. 221; 3 L.J. (O.S.) K.B. 177: *Browne* v. *Hare*, 4 H. & N. 822; 29 L.J. Ex. 6.

(*e*) *Dawes* v. *Peck*, 8 T.R. 330; *Dutton* v. *Solomonson*, 3 Bos. & P. 582; *Bryans* v. *Nix*, 4 M. & W. 791; 8 L.J. Ex. 137; *Swain* v. *Shepherd*, 1 Moo. & R. 223; *Fragano* v. *Long*, *supra*; *Gronin* v. *Mendham*, 5 M. & S. 189; Lord Cottenham, *Dunlop* v. *Lambert*, 6 Cl. & F. 621.

(*f*) *Fragano* v. *Long*, *supra*; *Wiltshire Iron Co.*, *In re*, L.R. 3 Ch. 443; 37 L.J. Ch. 554; *Calcutta Steam Navigation Co.* v. *De Mattos*, 32 L.J. Q.B. 214.

made a condition precedent to the payment of the price, and the goods perish in the hands of the carrier, the vendor is not entitled to the price (*g*). And, if the purchaser's right to possession of the goods is made conditional on the prior performance of some act on his part, such as an acceptance of a bill of exchange, or the giving of a promissory note for the price, the vendor may resume the possession of them, if the purchaser neglects to fulfil the condition at the time appointed (*h*). The vendor, after he has once parted with the goods in fulfilment of an unconditional contract of sale, and placed them in a course of transmission to the purchaser, cannot lawfully re-take them from the carrier, unless the purchaser becomes bankrupt whilst they are in the hands of the carrier (*i*), or unless the goods have been sent merely on approval, or upon some condition which the purchaser is bound and fails to perform (*k*).

Deterioration to goods in transit.—"Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit" (*l*).

Buyer's right to examine goods.—"Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract (*m*). Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract" (*n*).

A vendor tendering goods for acceptance must so tender them as to allow the purchaser an opportunity of inspecting them to see whether they are or are not the goods which he has bought; and the purchaser need not accept them if this opportunity is not given (*o*); and if on inspection they turn out to be different from those which were agreed to be sold, he may reject them (*p*). But, if the goods have been selected by the purchaser prior to the sale, or have been purchased with all faults, the purchaser has no right

(*g*) Ld. Cottenham, *Dunlop* v. *Lambert*, 6 Cl. & Fin. 621; *Calcutta Steam Navigation Co.* v. *De Mattos*, *supra*.

(*h*) Com. Dig. Condition (B. 13); *Brandt* v. *Bowlby*, 2 B. & Ad. 932; 1 L.J. K.B. 14; *Moakes* v. *Nicholson*, 19 C.B. N.S. 290; 34 L.J. C.P. 273.

(*i*) *Rosevear Clay Co., Ex parte*, 11 Ch. D. 560; 48 L.J. Bankr. 100.

(*k*) *Wilmshurst* v. *Bowker*, 7 M. & Gr. 882; 12 L.J. C.P. 475.

(*l*) 56 & 57 Vict. c. 71, s. 33; see also s. 30, *ante*, p. 560.

(*m*) 56 & 57 Vict. c. 71, s. 34 (1).

(*n*) *Ib.* s. 34 (2).

(*o*) *Isherwood* v. *Whitmore*, 11 M. & W. 347; 12 L.J. Ex. 93; *Lorymer* v. *Smith* 1 B. & C. 1.

(*p*) *Tye* v. *Fynmore*, 3 Campb. 462; *Toulmin* v. *Hedley*, 2 Car. & K. 157; *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199.

of inspection for the purpose of measuring or the like before payment (*q*). The place of delivery is usually the place for inspection (*r*).

Acceptance.—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them" (*s*). Where by the Act of 1893 any reference is made to a reasonable time, the question what is a reasonable time is a question of fact (*t*).

Generally speaking, a purchaser must be taken to have finally accepted goods when he has done more than is necessary for a mere trial of them or for the purpose of examination and comparison, and has done some act to alter the position of the vendor, or to delay the return of the goods (*u*). A purchaser who has exercised acts of dominion over the goods, as by parting with the property in them, or who has altered the position of the vendor in relation to the goods, will, generally speaking, be taken to have finally accepted them (*x*). "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them" (*y*). Thus, he is not bound to place the goods in neutral custody (*z*). It is sufficient if he does some unequivocal act showing an intention to reject, giving notice to the vendor that he does so. The vendor is then bound to take them away, and if he refuses to do so, they remain at his risk, and if they are destroyed by accident the loss will fall on the vendor (*a*).

Liability of buyer—Neglect or refusal to take delivery—Risk.—"When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this

(*q*) *Pettit* v. *Mitchell*, 4 M. & Gr. 836; 12 L.J. C.P. 9.
(*r*) *Perkins* v. *Bell*, (1893) 1 Q.B. 193; 62 L.J. Q.B. 91.
(*s*) 56 & 57 Vict. c. 71, s. 35.
(*t*) *Ib.* s. 56.
(*u*) *Curtis* v. *Pugh*, 10 Q.B. 111; 16 L.J. Q.B. 199; *Toulmin* v. *Hedley*, 2 Car. & K. 157; *Street* v. *Blay*, 2 B. & Ad. 456; *Chapman* v. *Morton*, 11 M. & W. 534; 12 L.J. Ex. 292.
(*x*) *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438; 41 L.J. C.P. 228.
(*y*) 56 & 57 Vict. c. 71, s. 36.
(*z*) *Grimoldby* v. *Wells*, L.R. 10 C.P. 391; 44 L.J. C.P. 203.
(*a*) *Okell* v. *Smith*, 1 Stark. 107; *Grimoldby* v. *Wells*, *supra*.

section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract" (*b*).

Unpaid seller's rights.—"Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller (*c*) of goods, as such, has by implication of law—(a.) A lien on the goods for the price while he is in possession of them (*d*); (b.) In case of the insolvency (*e*) of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them (*f*); (c.) A right of re-sale as limited by this Act" (*g*).

"Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer" (*h*).

The seller of goods is deemed to be an "unpaid seller" within the meaning of the Act of 1893—(a.) When the whole of the price has not been paid or tendered (*i*); (b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise (*k*). In Part IV. of the Act—which includes ss. 38-48 inclusive—the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price (*l*).

The following persons have been held to be in the position of unpaid sellers for this purpose—a consignor of goods to be sold on the joint account of himself and the consignee (*m*); a person who has an interest in or a right to receive goods and purports to sell them (*n*); but a mere surety for the payment of the price is not a

(*b*) 56 & 57 Vict. c. 71, s. 37. As to the obligation to accept, see sect. 27, *ante*, p. 556.

(*c*) See sect. 38 for definition of "unpaid seller" and "seller" in this part of the Act: ss. 38—48 inclusive.

(*d*) See sect. 41, *post*; *Grice* v. *Richardson*, 3 App.Cas. 319; 47 L.J. P.C. 48.

(*e*) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not: sect. 62 (3).

(*f*) See sect. 44 *et seq.*, *post*.

(*g*) 56 & 57 Vict. c. 71, s. 39 (1).

(*h*) *Ib.* s. 39 (2).

(*i*) *Hodgson* v. *Loy*, 7 T.R. 440; *Sweet* v. *Pym*, 1 East, 4; *Feise* v. *Wray*, 3 East, 93; *New* v. *Swain*, 1 Dan. & Ll. 193; *Edwards* v. *Brewer*, 2 M. & W. 375; 6 L.J. Ex. 135. See *Wegueiin* v. *Cellier*, L.R. 6 H.L. 286; 42 L.J. Ch. 758.

(*k*) 56 & 57 Vict. c. 71, s. 38 (1); *Griffiths* v. *Perry*, 1 E. & E. 680; 28 L.J. Q.B. 204; *Valpy* v. *Oakeley*, 6 Q.B. 941; 20 L.J. Q.B. 380.

(*l*) *Ib.* s. 38 (2); *The Tigress*, 1 Br. & L. 38; 32 L.J. Adm. 97; *Feise* v. *Wray*, 3 East, 93.

(*m*) *Newsom* v. *Thornton*, 6 East, 17.

(*n*) *Jenkyns* v. *Usborne*, 7 M. & Gr. 678; 13 L.J. C.P. 196.

person in this position (*o*), though it would probably be otherwise where he has actually paid it (*p*); and the rights of an unpaid vendor do not extend to persons who have forwarded goods to a creditor by way of payment, or in satisfaction and discharge of a debt due to the consignee (*q*).

Unpaid seller's lien.—Subject to the provisions of the Act of 1893 "the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—(a.) Where the goods have been sold without any stipulation as to credit; (b.) Where the goods have been sold on credit, but the term of credit has expired (*r*); (c.) Where the buyer becomes insolvent" (*s*).

"The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer" (*t*).

Vendor's lien for price of goods sold.—When different times are not expressly appointed for payment and delivery, the acts of payment and delivery are, as we have seen, concurrent, and constitute mutual conditions to be performed at the same time, so that the purchaser cannot demand the thing sold without paying or offering to pay the price, nor the vendor the price without delivering or offering to deliver the subject-matter of the sale. "If I sell you my horse for 10*l.*, if you will have the horse, I must have the money; or, if I will have the money, you must have the horse" (*u*).

Insolvency of purchaser.—When the purchaser becomes insolvent before the contract for sale has been completely performed, the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered (*x*). And it makes no difference in this respect whether the contract is for the sale of specific goods or for the sale of goods

(*o*) *Siffken* v. *Ray*, 6 East, 371.
(*p*) *Imperial Bank* v. *London & St. Kath. Docks Co.*, 5 Ch.D. 195; 46 L.J. Ch. 335.
(*q*) *Vertue* v. *Jewell*, 4 Camph. 31.
(*r*) See *New* v. *Swain*, 1 Dan. & Ll. 193; Parsons on Contracts, 546 (ed. 8); Blackburn on Sale, 458 (ed. 2); *Castle* v. *Sworder*, 6 H. & N. at p. 833; 30 L.J. Ex. 310.
(*s*) 56 & 57 Vict. c. 71, s. 41 (1).
(*t*) *Ib.* s. 41 (2); *Grice* v. *Richardson*, 3 App.Cas. 319; 47 L.J. P.C. 48.
(*u*) *Callonel* v. *Briggs*, 1 Salk. 112; *Lock* v. *Wright*, 1 Str. 571; *Morton* v. *Lamb*, 7 T.R. 125; *Rawson* v. *Johnson*, 1 East, 203; *Wilks* v. *Atkinson*, 1 Marsh. 412; *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30; *Bloxam* v. *Sanders*, 4 B. & C. 941; *Atkinson* v. *Smith*, 14 M. & W. 695; 15 L.J. Ex. 59.
(*x*) *Chalmers, Ex parte, Edwards, In re*, L.R. 8 Ch. 289; 42 L.J. Bankr. 37; *Morgan* v. *Bain*, L.R. 10 C.P. 15; 44 L.J. C.P. 47.

to be delivered by instalments (*y*). But there must be such an admission or proof of insolvency as amounts to a refusal to pay (*z*). Until actual possession of goods sold has been delivered to the purchaser the vendor's right of lien can be set up as against the assignee or trustee of the purchaser upon the insolvency of the latter (*a*). The trustee has a right to elect to complete the contract by paying cash within a reasonable time, but if he neglects to do so the vendor may re-sell the goods, and it seems that a sub-purchaser would also have an option of completing the contract (*b*).

Countermand of delivery orders.—Similarly, if possession has not been given, and the delivery completed, under a delivery order or dock-warrant, the vendor may, if the purchaser becomes insolvent before payment, countermand the order or warrant, although it has been accepted by the person to whom it is addressed, and require the latter to hold the goods on his, the vendor's, account, as before the order was made, provided the goods have not been re-sold and the warehouse-keeper or bailee has not attorned to the sub-purchaser in the manner presently mentioned. It has been held that possession had not been given, and that delivery was not complete, so as to prevent the vendor from countermanding his delivery order by reason of the insolvency of the purchaser in the following cases:—where ten tons of Riga flax were sold at 118*l.* per ton, to be paid for by the purchaser's acceptance at three months, and the ten tons were to be separated from a larger quantity lying in bulk upon a wharf, and the vendor gave to the purchaser a delivery order on the wharfinger for the ten tons, which order was accepted by him and entered in his books, but, before the weighing and separation of the ten tons from the bulk, the purchaser became insolvent (*c*);—where fifty tons of oil were sold at a fixed price, and an order for the delivery thereof was given to the purchaser, and forwarded to the wharfinger who had the custody of the oil, but it was the custom of the trade for the casks to be searched by the cooper of the vendor, and for the broker of both parties to examine them to ascertain the foot-dirt and water in each, with a view to certain allowances in respect thereof, and then the casks were to be filled up by the cooper at the expense of the vendor, and the purchaser became insolvent before these preliminary acts had been performed (*d*);—where a purchaser agreed

(*y*) *Chalmers, Ex parte, Edwards, In re*, *ante*, p. 567.

(*z*) *Phœnix Bessemer Steel Co., In re*, 4 Ch.D. 108; 46 L.J. Ch. 115; *Stapleton, Ex parte*, 10 Ch.D. 586.

(*a*) *Grice* v. *Richardson*, 3 App.Cas. 319; 47 L.J. P.C. 48.

(*b*) *Stapleton, Ex parte, supra*.

(*c*) *Busk* v. *Davis*, 2 M. & S. 397; *Shepley* v. *Davis*, 5 Taunt. 617.

(*d*) *Wallace* v. *Breeds*, 13 East, 522.

to purchase the "small parcel of starch" belonging to the vendor, which he had seen lying at the warehouse of a third party, at 6*l.* per cwt., to be paid for by bill at two months, fourteen days to be allowed for delivery, and the vendor gave a note to the purchaser addressed to the warehouse-keeper, directing him to "weigh and deliver" to the purchaser "all his starch," which order was forthwith lodged at the warehouse, and a large portion of the starch, on that and two subsequent days, was weighed and delivered to the purchaser, and removed pursuant to the order, but the purchaser became bankrupt whilst the residue remained unweighed in the warehouse, and the vendor countermanded the delivery of the unweighed residue (*e*). But the question whether the delivery of dock-warrants or delivery orders will bar the unpaid vendor's lien or not, is really a question of the intention of the parties, and depends largely upon custom and upon the circumstances of each case (*f*).

Where, on the other hand, 130 bales of bacon, lying at a wharf, were sold and weighed by the vendor, and set apart for the purchaser; and the price was ascertained, and was to be paid by bill at two months; and an order was given to the wharfinger to deliver the goods to the purchaser, who went to the wharf and presented the order, and with the assent of the wharfinger took possession of them and weighed the whole, and took away part, but became bankrupt before he had removed the residue, whereupon the vendor countermanded the delivery order; it was held that, the order having been executed and the goods actually delivered under it to the purchaser, they had irrecoverably become the property of the latter (*g*). And, where a specified quantity of oats in a particular bin in a warehouse was sold at an ascertained price, and a delivery order was entered by the warehouse-keeper in his books, and the oats were transferred into the names of the purchasers, and there were no oats in the bin besides the oats in question; it was held that the delivery was complete by the transfer in the books of the warehouse-keeper (*h*). Whenever the vendor has given the purchaser actual possession or what is equivalent to actual possession of the goods sold, all the vendor's rights over them are completely gone, although the things have not been removed from the vendor's premises (*i*).

(*e*) *Hanson* v. *Meyer*, 6 East, 614.

(*f*) *Imperial Bank* v. *London and St. Katharine Docks Co.*, 5 Ch.D. 195; 46 L.J. Ch. 335; *Merchant Banking Co.* v. *Phœnix Steel Co.*, 5 Ch.D. 205; 46 L.J. Ch. 418.

(*g*) *Hammond* v. *Anderson*, 1 Bos. & P. N.R. 69.

(*h*) *Swanwick* v *Sothern*, 9 Ad. & E. 895.

(*i*) *Tunsley* v. *Turner*, 2 Bing. N.C. 151; 4 L.J. C.P. 272; *Cooper* v. *Bill*, 3 H. & C. 722; 34 L.J. Ex. 161.

Shares and undivided quantities sold as such.—If the vendor himself is possessed only of an undivided share of a commodity, such as a quarter of a particular pipe of wine, or cistern of oil, or the half of a specific cargo of sugar in the hands of other part owners, or of a common bailee, and he sells his share and interest as an undivided quantity, just as he possesses it, and gives the purchaser credit for the payment of the price, and hands him a delivery order which is accepted by the party having the custody of the property, the vendor cannot, if the purchaser becomes bankrupt before payment, annul the sale and prevent his assignees from obtaining separate possession of his share (*k*).

Part delivery.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien (*l*).

Termination of seller's lien.—"The unpaid seller of goods loses his lien thereon—(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods; (b) when the buyer or his agent lawfully obtains possession of the goods; (c) by waiver thereof" (*m*).

"The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment for the price of the goods" (*n*).

Intervention of rights of sub-purchasers.—The indorsement and transfer of a delivery order from one purchaser to another will effect no change of possession of the goods, so long as the delivery order has not been presented to, and accepted by, the warehousekeeper, or party holding the goods as the agent of the vendor, and will not deprive the unpaid vendor of his right of countermand in case of the insolvency of the first purchaser (*o*). If the vendor is his own warehouseman, and gives to the purchaser a delivery order, or an acknowledgment that he holds the goods on account of, or to the order of, the latter, he has a right to revoke the order and retain possession of the goods in case of the insolvency of the purchaser before actual payment, so long as the delivery order remains in the hands of the latter, and the goods have not been re-sold, and the rights of third parties do not intervene (*p*). But, if the goods have been re-sold, and the second purchaser has received from his immediate vendor, the first purchaser, a delivery order

(*k*) *Whitehouse* v. *Frost*, 12 East, 614.
(*l*) 56 & 57 Vict. c. 71, s. 42. See s. 45, sub-s. (7), *post*.
(*m*) 56 & 57 Vict. c. 71, s. 43 (1).
(*n*) *Ib.* s. 43 (2).
(*o*) *M'Ewan* v. *Smith*, 2 H.L.C. 309.
(*p*) *Townley* v. *Crump*, 4 Ad. & E. 58; 5 L.J. K.B. 14.

addressed to the original vendor, which has been accepted by him, the original vendor cannot, after he has thus attorned to such second purchaser, refuse to deliver the goods to such second purchaser, pursuant to his acceptance, although the first purchaser to whom he sold becomes bankrupt before delivery and before payment of the price (*q*), and even although the goods were not weighed or measured over prior to the bankruptcy of the first purchaser (*r*). But it is otherwise, if the original vendor has given his immediate purchaser, the sub-vendor, no delivery order or dock-warrant, and has not furnished him with any evidence of title, or in any way been a party to the sub-sale (*s*).

Stoppage in transitu.—Subject to the provisions of the Sale of Goods Act, 1893, "when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price" (*t*). The doctrine of stoppage *in transitu* applies only to the case of goods sold and delivered (*u*). If the purchaser becomes bankrupt or insolvent before payment of the price, the vendor is entitled, so long as the goods are *in transitu*, and have not reached their final destination or come into the manual possession of the purchaser, or that of any other party whom he may have appointed his agent finally to take possession of and keep the goods for him, to re-take them and put himself into the same situation as if he had never parted with the actual possession of them (*x*).

But when the goods have arrived at their destination, and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the transit is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But, however fixed, the goods have arrived at their destination, and the *transitus* is at an end, when they have got into the hands of someone who holds them for the purchaser or for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to

(*q*) *Hawes* v. *Watson*, 2 B. & C. 540; *Green* v. *Haythorne*, 1 Stark. 447; *Stoveld* v. *Hughes*, 14 East. 308; *Pearson* v. *Dawson*, E. B. & E. 448; 27 L.J. Q.B. 248; *Cooper* v. *Bill*, 3 H. & C. 722; 34 L.J. Ex. 161.

(*r*) *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L.J. Ex. 185; *Knights* v. *Wiffen*, L.R. 5 Q.B. 660; 40 L.J. Q.B. 15.

(*s*) *Craven* v. *Ryder*, 6 Taunt. 433; *Griffiths* v. *Perry*, 1 E. & E. 680; 28 L.J. Q.B. 294; *Moakes* v. *Nicholson*, 19 C.B. N.S. 290; 34 L.J. C.P. 273. See 56 & 57 Vict. c. 71, s. 47, *post*.

(*t*) 56 & 57 Vict. c. 71, s. 44.

(*u*) *Gibson* v. *Carruthers*, 8 M. & W. 334; 11 L.J. Ex. 138, *per* Parke, B.

(*x*) *Gibson* v. *Carruthers*, 8 M. & W. 338—341; 11 L.J. Ex. 138; *Lickbarrow* v. *Mason*, 6 East, 21; 1 Sm. L.Cas. 674 (ed. 10); *Kendall* v. *Marshall, Stevens & Co.*, 11 Q.B.D. 356; 52 L.J. Q.B. 313.

the vendor. The difficulty in each case lies in applying these principles (*y*).

Duration of transit—Carriers and forwarding agents.—"Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee" (*z*).

Goods delivered to a carrier to be conveyed from a vendor to a purchaser are held to be *in transitu*, although they may have been consigned to a carrier specially appointed by the purchaser to receive them (*a*), or may be under the charge of a general forwarding agent of the purchaser (*b*), or in the hands of a packer (*c*), or wharfinger (*d*), or innkeeper (*e*), or any other middleman forming a mere link in the chain of communication from the vendor to the purchaser, and they remain *in transitu* until they have reached the hands of the purchaser, or of one who is his agent, as a warehouseman, or a packer (*f*), or a shipping agent, to give them a new destination (*g*), or have been actually delivered to the purchaser or his agent for custody, and not a mere intermediary (*h*), although the goods may have been shipped and the prior carriage and wharfage dues paid by the general shipping agent of the purchaser (*i*).

The *transitus* is not determined merely by the arrival of the goods at the place of destination, but is deemed to continue until they have come into the actual or constructive possession of the purchaser (*k*). If, therefore, they are in the hands of custom-house officers at the port of destination, or are placed in quarantine, the *transitus* is not determined, and the right of stoppage is not taken away (*l*). If the goods are not addressed directly to the purchaser, but to the vendor's own agent at the place of destination, accompanied by an order directing him to deliver them to the purchaser, the goods continue in the constructive possession of the

(*y*) *Per* Cave, J., in *Bethell* v. *Clark*, 19 Q.B.D. 553, 561; affirmed 20 Q.B.D. 615; 57 L.J. Q.B. 302.

(*z*) 56 & 57 Vict. c. 71, s. 45 (1).

(*a*) *Rosevear Clay Co., Ex parte*, 11 Ch.D. 560; 40 L.J. Bankr. 100.

(*b*) *Nicholls* v. *Le Feuvre*, 2 Bing. N.C. 81; 4 L.J. C.P. 281.

(*c*) *Scott* v. *Pettit*, 3 Bos. & P. 469.

(*d*) *Jackson* v. *Nichol*, 5 Bing. N.C. 508; 8 L.J. C.P. 294.

(*e*) *Hunter* v. *Beale*, 3 T.R. 466.

(*f*) *Leeds* v. *Wright*, 3 Bos. & P. 320.

(*g*) *Dixon* v. *Baldwen*, 5 East. 175; *Allan* v. *Gripper*, 2 Cr. & J. 218; 1 L.J. Ex. 71; *Dodson* v. *Wentworth*, 4 M. & Gr. 1080; 12 L.J. C.P. 59; *Coates* v. *Railton*, 6 B. & C. 422; 5 L.J. (O.S.) K.B. 209; *Bolton* v. *Lancashire and Yorkshire Ry.*, L.R. 1 C.P. 431; 35 L.J. C.P. 137; *Rosevear Clay Co., Ex parte, supra.*

(*h*) *James* v. *Griffin*, 2 M. & W. 623; 6 L.J. Ex. 241; *Rosevear Clay Co., Ex parte, supra.*

(*i*) *Nicholls* v. *Le Feuvre, supra.*

(*k*) *Whitehead* v. *Anderson*, 9 M. & W. 518; 11 L.J. Ex. 157; *Coventry* v. *Gladstone*, L.R. 6 Eq. 44; 37 L.J. Ch. 492.

(*l*) *Northey* v. *Field*, 2 Esp. 613; *Holst* v. *Pownal*, 1 Esp. 240.

vendor until they have been actually handed over to the purchaser, or until the vendor's agent has attorned to the latter and agreed to hold the goods on his account and subject to his orders as previously mentioned. But goods are not *in transitu* when they are journeying in the purchaser's own cart or carriage under the custody or care of his own servant or agent.

"If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end" (*m*).

"If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer" (*n*).

So long as the carrier holds the goods as a mere instrument of conveyance, or in the character of a forwarding agent, the *transitus* continues, and the unpaid vendor has a right to stop them; but, if the carrier enters expressly, or by implication, into a new agreement with the purchaser, distinct from the original contract for carriage, to hold the goods for the purchaser as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new or further order to be given by him, the *transitus* is at an end, and the goods are constructively in the possession of the purchaser, and cannot be retaken by the vendor (*o*). But the assent of the carrier to hold the goods as an agent for custody on behalf of the purchaser must be clearly established in order to put an end to the *transitus* and deprive the vendor of his right to stop the goods. A mere promise by the carrier to deliver the goods to the purchaser as soon as they can be got at is not enough to bring them into the possession, actual or constructive, of the purchaser (*p*). If the purchaser, having no warehouse of his own, is in the habit of using the warehouse of his wharfinger, or carrier, or packer, as his own, and of making it the repository of his goods until he has sold them or shipped them for exportation, the *transitus* is at an end, and the delivery is complete, when the goods arrive at the warehouse and customary place of deposit; although they may immediately afterwards

(*m*) 56 & 57 Vict. c. 71, s. 45 (2); *Whitehead* v. *Anderson*, 9 M. & W. 518; 11 L.J. Ex. 157; *Ellis* v. *Hunt*, 3 T.R. 464.

(*n*) 56 & 57 Vict. c. 71, s. 45 (3).

(*o*) *Slubey* v. *Heyward*, 2 H. Bl. 504; *Hammond* v. *Anderson*, 1 Bos. & P. N.R. 69; *Whitehead* v. *Anderson*, 9 M. & W. 518; 11 L.J. Ex. 157; *Cooper*, *Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

(*p*) *Coventry* v. *Gladstone*, L.R. 6 Eq. 44; 37 L.J. Ch. 492.

have received a fresh destination by command of the purchaser (*q*).

Goods in the hands of the purchaser's agents for custody, on the other hand, are not *in transitu*, but are in the actual possession of the purchaser, and cannot be re-taken by the unpaid vendor. An agent for custody, as distinguished from a forwarding agent, is a person who has received goods by the direction and authority of the purchaser as a depositary or bailee invested with authority to receive goods and sell them for the purchaser, or to hold them generally on account of the latter at his disposal, and not for the purpose of helping the goods on a stage further in a direct course of transmission to him. The delivery to such agent is a delivery to the principal, and the *transitus*, consequently, is determined as soon as the goods reach his hands; and, if the transit be once at an end, it cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new destination (*r*). Where goods, ordered by a purchaser for the Valparaiso market, were forwarded by railway to the shipping agents of the purchaser at Liverpool, and were put on board a vessel bound for Valparaiso, but were afterwards re-landed by order of an agent of the purchaser to be re-packed, it was held that the *transitus* was determined, and that the goods had come into the actual possession of the purchaser (*s*).

"If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back" (*t*). The purchaser or consignee may prolong the right to stop *in transitu* by not taking possession of the goods on their arrival at the place of destination. Thus, although the goods may have been landed and warehoused at a place commonly used by the purchaser as a place of deposit, yet, if the latter, finding himself to be in failing circumstances, has previously declared it to be his intention not to accept the goods, and not to take possession of them as owner, there has been no actual delivery, and the unpaid vendor's right of recovering possession has not been destroyed (*u*). On the 27th October goods were delivered by the

(*q*) *Scott* v. *Pettit*, 3 Bos. & P. 469; *Allan* v. *Gripper*, 2 Cr. & J. 218; 1 L.J. Ex. 71; *Foster* v. *Frampton*, 6 B. & C. 107; 5 L.J. (O.S.) K.B. 71; *Dodson* v. *Wentworth*, 4 M. & Gr. 1080; 12 L.J. C.P. 59; *Lickbarrow* v. *Mason*, 1 Sm. L.Cas. 727 (ed. 10).

(*r*) *Dixon* v. *Baldwen*, 5 East, 175; *Leeds* v. *Wright*, 3 Bos. & P. 300; *Kendall* v. *Marshall, Stevens & Co.*, 11 Q.B.D. 356; 52 L.J. Q.B. 313; *Miles, Ex parte, Isaacs, In re*, 15 Q.B.D. 39; 54 L.J. Q.B. 566.

(*s*) *Valpy* v. *Gibson*, 4 C.B. 837; 16 L.J. C.P. 241; for instance where transit held not to be ended, see *Watson, Ex parte*, 5 Ch.D. 35; 46 L.J. Bankr. 97.

(*t*) 56 & 57 Vict. c. 71, s. 45 (4).

(*u*) *James* v. *Griffin*, 2 M. & W. 623; 6 L.J. Ex. 241; *Bolton* v. *Lancashire & Yorkshire Ry.*, L.R. 1 C.P. 431; 35 L.J. C.P. 137; see also *Nicholson* v. *Bower*, 1

vendor in London for shipment to Falmouth, and an invoice sent to the purchaser. At Falmouth they were taken to the warehouse of an agent of the Steam Packet Company, who was in the habit of holding goods from steamers at the risk and to the order of the purchasers and giving notice to them. Before the goods were landed the purchaser committed an act of bankruptcy by absconding, and so no notice was given to him, and on November 4th he was adjudicated bankrupt. On that day the vendor stopped the goods in the warehouse. It was held that the *transitus* was not at an end (*x*).

Duration of transit—Delivery on buyer's ship.—"When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer" (*y*). If the purchaser charters and despatches a vessel to a distant port to receive the goods, and they are put on board, the fact of their being *in transitu* will depend upon the character in which the master or commander receives them. If the charter-party amounts, as it generally does, merely to a contract for the carriage of merchandise, the captain having the general control of the vessel, and continuing the servant of the shipowners, the goods will be received by him in the character of a carrier and will be *in transitu* (*z*). But, if the charter-party amounts to a demise or bailment of the ship, the charterer becoming the temporary owner, and the master or commander his servant or agent, the delivery of the goods on board will be a delivery to the charterer or purchaser, and the possession of the master his possession, and the vendor will have no right to re-take them (*a*), unless the goods are shipped under a bill of lading reserving to the vendor the control over them (*b*). A delivery on board the purchaser's own ship and to his own master is not inconsistent with the vendor's annexing terms to the delivery by bill of lading, which may enable him to retain a right to claim the goods, and prevent delivery if the terms are not complied with (*c*). Where goods shipped on board a vessel were to be delivered to the purchaser "in the port of London," and the vessel arrived at her moorings in the river Thames, and

E. & E. 172; 28 L.J. Q.B. 97; *Heinekey* v. *Earle*, 8 E. & B. 410; 28 L.J. Q.B. 79.

(*x*) *Barrow, Ex parte*, 6 Ch.D. 783; 46 L.J. Bankr. 71.

(*y*) 56 & 57 Vict. c. 71, s. 45 (5).

(*z*) *Bothlingk* v. *Inglis*, 3 East, 381; *Watson, Ex parte*, 5 Ch.D. 35; 46 L.J. Bankr. 97; *Rodger* v. *Comptoir d'Escompte de Paris*, L.R. 2 P.C. 393; 40 L.J. P.C. 1.

(*a*) *Hunter* v. *McTaggart*, cited 3 East, 388; *Schotsmans* v. *Lancashire and Yorkshire Ry.*, L.R. 2 Ch. 332; 35 L.J. Ch. 100.

(*b*) *Van Casteel* v. *Booker*, 2 Exch. 691; 18 L.J. Ex. 9; *Turner* v. *Liverpool Docks Trustees*, 6 Exch. 543; 20 L.J. Ex. 393; *Berndtson* v. *Strang*, L.R. 4 Eq. 481; 36 L.J. Ch. 879.

(*c*) *Ogle* v. *Atkinson*, 5 Taunt. 759; *Moakes* v. *Nicholson*, 19 C.B. N.S. 290; 34 L.J. C.P. 273.

the goods were put into the lighters of a wharfinger employed and paid by the purchaser, it was held that the *transitus* was not determined (*d*). Neither is the *transitus* determined by the actual arrival of the goods in boats or lighters alongside the purchaser's wharf, if the boats and lighters are used merely as the vehicle of conveyance, and not as places of deposit and ultimate reception (*e*). Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end (*f*). Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods (*g*). Where twenty mats of flax were sold by a merchant of Hull to a manufacturer near Leeds, and were forwarded by railway to Leeds, and arrived at the carriers' shed at the railway terminus at Leeds, and it was the custom of the carriers to give notice to the manufacturer of the arrival of goods consigned to him, and for the latter to send waggons to convey them to his mills to be manufactured; and, on the arrival of the flax, notice was given to the manufacturer by letter that, unless the goods were sent for, they would remain at warehouse rent; and the manufacturer sent his cart, and took away ten of the mats, but, before the others were removed, he became bankrupt; it was held that the goods had arrived at the place of destination, and had come into the constructive possession of the vendee, and that the *transitus* consequently was at an end (*h*).

It seems that the delivery of an essential part of a machine would operate as a delivery of the whole, so as to bar the right of stoppage *in transitu* (*i*).

The vendor's right to stop *in transitu* cannot be defeated by any claim of lien on the part of a carrier, wharfinger or any other middleman, to secure payment of a general balance due to such middleman from the consignee (*k*), nor by a foreign attachment laid upon the goods by a creditor (*l*). While a carrier retains his lien, there is no such delivery to the consignee as to take away the consignor's right to stop *in transitu* (*m*).

(*d*) *Jackson* v. *Nichol*, 5 Bing. N.C. 508; 8 L.J. C.P. 294.

(*e*) *Tucker* v. *Humphrey*, 4 Bing. 516; 6 L.J. (O.S.) C.P. 92.

(*f*) 56 & 57 Vict. c. 71, s. 45 (6).

(*g*) *Ib.* s. 45 (7).

(*h*) *Wentworth* v. *Outhwaite*, 10 M. & W. 436; 12 L.J. Ex. 172; see *Dixon* v. *Yates*, 5 B. & Ad. 313; 2 L.J. K.B. 198; *Jones* v. *Jones*, 8 M. & W. 431; 10 L.J. Ex. 481; *Cooper*, *Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49; *Kemp* v. *Falk*, 7 App.Cas. 573; 52 L.J. Ch. 167.

(*i*) *Cooper*, *Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

(*k*) *Oppenheim* v. *Russell*, 3 Bos. & P. 42; *Richardson* v. *Goss*, *ib.* 119.

(*l*) *Salte* v. *Field*, 5 T.R. 211.

(*m*) *Crawshay* v. *Eades*, 1 B. & C. 181; 1 L.J. (O.S.) K.B. 90.

Mode of stopping in transitu.—"The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer" (*n*). "When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller" (*o*). The old rule of law, that a stoppage *in transitu* could be effected only by the corporeal touch of the goods, no longer prevails (*p*). A notice to a carrier having charge of the goods is sufficient. The stoppage may be effected either by the unpaid seller himself or his authorised agent; but not by a person who has no authority from the seller to stop the goods; and a subsequent ratification by the seller of an unauthorised stoppage is not equivalent to a precedent authority (*q*).

Re-sale by buyer—Rights of sub-purchasers.—"Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that where a document of title to goods (*r*) has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage *in transitu* can only be exercised subject to the rights of the transferee" (*s*).

If the purchaser re-sells the goods whilst they are *in transitu*, and receives the price, and then becomes insolvent, the first vendor

(*n*) 56 & 57 Vict. c. 71, s. 46 (1); *Whitehead* v. *Anderson*, 9 M. & W. 518; 11 L.J. Ex. 157.

(*o*) Sect. 46 (2).

(*p*) *Dixon* v. *Baldwen*, 5 East, 175; *Litt* v. *Cowley*, 7 Taunt. 169; 2 Marsh. 457; *Hutchings* v. *Nunes*, 1 Moo. P.C. N.S. 243.

(*q*) *Bird* v. *Brown*, 4 Ex. 786; 19 L.J. Ex. 154; *Hutchings* v. *Nunes*, 1 Moo. P.C. N.S. 243.

(*r*) "Document of title to goods" has the same meaning as it has in the Factors Acts; and "Factors Acts" mean the Factors Act, 1889 and any enactment amending or substituted for the same: sect. 62.

(*s*) 56 & 57 Vict. c. 71, s. 47.

may stop the goods at any time before they have come into the possession of such second purchaser, and hold them as a security for the due payment of the original purchase-money, unless the second purchaser claims as the *bonâ fide* indorsee and holder of a bill of lading. As between a vendor and his immediate vendee, a bill of lading may be countermanded, in case of the insolvency of the latter, at any time before it has been actually executed, like any other order or direction to a common carrier. But, as between a first vendor and *bonâ fide* sub-purchasers, the case is different. The first vendor by indorsing and delivering a bill of lading to his immediate purchaser, accredits the title of the latter to the goods, and holds him out to the mercantile world as the owner of them; and the *bonâ fide* indorsement and delivery by such purchaser of such bill of lading to a second purchaser deprive the first vendor of all power and control over the goods, and destroy his right to stop *in transitu* as against the latter (*t*). If the assignee of the bill of lading, however, has given no consideration for the indorsement of such bill of lading, or if he knew of the insolvency of his vendor at the time he took the bill, he will be in no better situation than the latter (*u*). It was held that a pre-existing debt was not such a consideration for the indorsement of a bill of lading as to defeat the right of the unpaid vendor to stop *in transitu* (*x*). But this has been dissented from, and it has been held that it is immaterial that the consideration was past and not given at the time when the bill of lading was transferred (*y*). A pledge of the bill of lading does not destroy the consignor's right of stoppage *in transitu* altogether; and he will be entitled to the surplus goods after satisfying the charge of the pledgee (*z*); nor does the fact of the bill of lading being made out in the name of a sub-purchaser defeat this right (*a*).

Effect on sale of lien or stoppage in transitu.—"Subject to the provisions of this section"—that is, section 48—"a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage *in transitu* (*b*). Where an unpaid seller who has exercised his right of lien or stoppage *in transitu*

(*t*) *Lickbarrow* v. *Mason*, 6 East 20 (*a*); 1 H. Bl. 357; 1 Sm. L.Cas. 674 (ed. 10); *Gurney* v. *Behrend*, 23 L.J. Q.B. 265; 3 E. & B. 622; *Slubey* v. *Heyward*, 2 H. Bl. 504; *Hibbert* v. *Carter*, 1 T.R. 745; *Westzinthus, In re*, 5 B. & Ad. 817; 3 L.J. K.B. 56; *The Argentina*, L.R. 1 A. & E. 370; *Pease* v. *Gloahec, The Marie Joseph*, L.R. 1 P.C. 219; 35 L.J. P.C. 66.

(*u*) *Waring* v. *Cox*, 1 Campb. 369; *Cuming* v. *Brown*, 9 East, 514.

(*x*) *Rodger* v. *Comptoir d'Escompte de Paris*, L.R. 2 P.C. 393; 38 L.J. P.C. 30.

(*y*) *Leask* v. *Scott*, 2 Q.B.D. 376; 46 L.J. Q.B. 576.

(*z*) *Spalding* v. *Ruding*, 12 L.J. Ch. 503; 6 Beav. 376; *Westzinthus, In re*, 5 B. & Ad. 817; 3 L.J. K.B. 56; *Kemp* v. *Falk*, 7 App.Cas. 573; 52 L.J. Ch. 167.

(*a*) *Golding, Davis & Co., Ex parte*, 13 Ch.D. 628.

(*b*) 56 & 57 Vict. c. 71, s. 48 (1).

re-sells the goods, the buyer acquires a good title thereto as against the original buyer" (*c*). It seems to be now established after considerable discussion that stoppage *in transitu* does not operate as a rescission of the contract of sale (*d*), but merely as a re-imposition of the unpaid vendor's lien. Consequently if a specific ascertained chattel has been sold, so that the right of property has passed to the purchaser, the exercise of the right of stoppage *in transitu* will not at once have the effect of re-vesting the right of property in the vendor (*e*).

Stoppage of part of goods sold under one entire contract of sale does not have the effect of re-vesting in the vendor that portion of them which has been actually delivered to the bankrupt purchaser. "What the effect of stoppage *in transitu* is," observed the Court of Exchequer, "whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped *in transitu* until he is paid the price of the whole, but has no right to re-take that which has arrived at its journey's end. His right of lien on the part stopped is re-vested, but no more" (*f*). If the sale is a sale of things of quantity generally, and the vendor will fulfil his contract by delivering any articles of the character and description mentioned in the contract, the vendor may, after he has recovered possession of the goods by the exercise of the right of stoppage, re-sell them (*g*); but he may be obliged to furnish other goods of a similar character and description to those originally bargained for, on tender of the price by the assignees.

When vendor may re-sell.—"Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract" (*h*). If ascertained chattels

(*c*) Sect. 48 (2).

(*d*) *Wentworth* v. *Outhwaite*, 10 M. & W. 452; 12 L.J. Ex. 172; *per* Lord Blackburn in *Kemp* v. *Falk*, 7 App.Cas. 573, 581; 52 L.J. Ch. 167.

(*e*) *Martindale* v. *Smith*, 1 Q.B. 389; 10 L.J. Q.B. 155.

(*f*) *Wentworth* v. *Outhwaite*, 10 M. & W. 451; 12 L.J. Ex. 172; *Tanner* v. *Scovell*, 14 M. & W. 28; 14 L.J. Ex. 321; *Valpy* v. *Oakeley*, 16 Q. B. 941; 20 L.J. Q.B. 380; *Chalmers, Ex parte*, L.R. 8 Ch. 289; 42 L.J. Bankr. 37; *Cooper, Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

(*g*) *Clay* v. *Harrison*, 10 B. & C. 99; 8 L.J. (O.S.) K.B. 90.

(*h*) 56 & 57 Vict. c. 71, s. 48 (3).

have been bargained and sold, and the right of property has passed to the purchaser, the vendor cannot rescind the contract and re-vest the right of property in himself, and re-sell the goods, by reason of the neglect of the vendee to take and pay for the goods at the time appointed (*i*); but, if the purchaser continues in default, and will not perform his part of the contract under such circumstances that his refusal amounts to a repudiation of his obligation, the vendor may rescind the contract and re-sell the goods within a reasonable period after he has given the purchaser express notice of his intention so to do. A mere notice to remove the goods and pay the price will not justify the vendor in re-selling (*k*); but, if the latter gives to the purchaser a distinct intimation of his intention to re-sell in case of the non-removal and non-payment of the goods within a reasonable period from the receipt of the notice, and the purchaser then refuses to pay for the goods, he may fairly be deemed either to have himself repudiated the contract, or to be an assenting party to the sale, or to have given the vendor an implied authority to re-sell (*l*). "Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages" (*m*).

Actions for breach of the contract—Remedies of seller—Action for price.—"Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods" (*n*). "Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract" (*o*).

The price of goods was formerly recoverable under one of two counts—namely, (1) goods bargained and sold, and (2) goods sold and delivered. The former count was applicable where upon the sale of goods the property had passed to the purchaser and the contract had been completed in all respects except delivery, and

(*i*) *Martindale* v. *Smith*, 1 Q. B. 389; 10 L.J. Q.B. 155; *Wilmshurst* v. *Bowker*, 7 M. & Gr, 882; 12 L.J. C.P. 475; *Key* v. *Cotesworth*, 7 Exch. 607; 22 L.J. Ex. 4; *Page* v. *Cowasjee*, L.R. 1 P.C. 127.

(*k*) *Greaves* v. *Ashlin*, 3 Campb. 426.

(*l*) *Maclean* v. *Dunn*, 4 Bing. 722; 6 L.J. (O.S.) C.P. 184; *Langfort* v. *Tiler*, 1 Salk. 113; *Withers* v. *Reynolds*, 2 B. & Ad. 882; 1 L.J. K.B. 30.

(*m*) 56 & 57 Vict. c. 71, s. 48 (4).

(*n*) Sect. 49 (1).

(*o*) Sect. 49 (2).

delivery was not part of the consideration for the price or a condition precedent to its recovery (*p*). The count for goods sold and delivered was applicable where upon the sale of goods the property had passed and the goods had been delivered to the purchaser and the price was payable at the time of action brought (*q*). The old forms of action have been abolished and with them has departed much of the clearness of thought which evolved them and which they maintained. But even now for a clear understanding of the older cases it is advisable to study the different forms of action. The price is recoverable as soon as, but not before, the property has passed (*r*).

Non-payment of price—Goods bargained and sold.—If goods are sold subject to a condition that, if the purchase-money be not paid by a particular day, they may be re-sold by the vendor, and the loss on the re-sale recovered from the purchaser making default, and the right of re-sale is exercised, or if the purchaser has refused to take and pay for the goods, and the goods have been re-sold by the vendor, the vendor cannot, after such re-sale, recover the price of the goods, but only the damage he has sustained by reason of the non-payment of the price (*s*). If the price to be paid for the goods is to be fixed by the valuation or award of a third party to be named by the purchaser, and the latter refuses to name or appoint such valuer, it was doubtful whether the vendor could sue for the price, or must bring an action against the purchaser for refusing to make the nomination or appointment (*t*). Everything that is to be done on the part of the vendor to complete the sale, and transfer the ownership of the thing sold to the purchaser, and place it at his disposal, so far at least as to enable the latter to obtain possession of it, and deal with it as he may think fit, on payment or tender of the price, must be performed before an action for the price can be maintained (*u*). When the right of property in the subject-matter of the sale has passed by the bargain to the purchaser, the latter is not released from his obligation to pay the price, by reason of the vendor's neglect to deliver the goods at the time appointed for delivery, unless the time for delivery is of the essence of the contract, and it appears to have been the inten-

(*p*) Bullen & Leake's Prec. p. 39 (ed. 1868).

(*q*) *Ib.*, p. 39.

(*r*) *Atkinson* v. *Bell*, 8 B. & C. 277; 6 L.J. (O.S.) K.B. 258; *Simmons* v. *Swift*, 5 B. & C. 857; 5 L.J. (O.S.) K.B. 10; *Turley* v. *Bates*, 5 H. & C. 200; sub. nom. *Furley* v. *Bates*, 33 L.J. Ex. 43.

(*s*) *Lamond* v. *Davall*, 9 Q.B. 1030; 16 L.J. Q.B. 136; *Hore* v. *Milner*, 1 Peake, 58; *Hagedorn* v. *Laing*, 6 Taunt. 162; *Maclean* v. *Dunn*, 4 Bing. 722; 6 L.J. (O.S.) C.P. 184; *Clarke* v. *Westrope*, 18 C.B. 765; 25 L.J. C.P. 287; *Keys* v. *Harwood*, 2 C.B. 905; 15 L.J. C.P. 207; *Bartholomew* v. *Markwick*, 15 C.B. N.S. 711; 33 L.J. C.P. 145.

(*t*) *Thurnell* v. *Balbirnie*, 2 M. & W. 786; 6 L.J. Ex. 255.

(*u*) *Smith* v. *Chance*, 2 B. & Ald. 753; *Boswell* v. *Kilborn*, 15 Moo. P.C. 309.

tion of the parties that the sale should be at an end in case of non-delivery on the day appointed. If the sale is a sale of an ascertained share of a particular chattel, such as a share of a coach or a horse, or a share of a butt of wine, or a cistern of oil, or a cargo of corn, sold as an undivided quantity at an ascertained price, the sale is complete, and the vendor is entitled to the price as soon as he has transferred his share and interest by a properly authenticated contract. In sales of this kind the vendor only undertakes to sell and transfer the share, and to convey to the purchaser the same right to the undivided quantity that he himself possessed. He does not engage to put the purchaser into possession of the coach, or the horse, or to divide the wine, or measure off the oil or the corn, and put the purchaser into separate possession of the share.

Goods sold and delivered.—An action for the price of goods sold and delivered could not be brought before delivery (*x*). When goods and chattels have been actually delivered to and received by a third party under circumstances fairly giving rise to a presumption that they were bought and sold, a jury may infer the existence of a contract of sale between the parties, although not one word was said about buying and selling, and no price was mentioned (*y*). When an Act of Parliament, for the purpose of protecting buyers, prescribes regulations to be followed in the sale and delivery, the vendor cannot, if he neglects to observe such regulations, recover the price (*z*). Where goods have been sold and delivered, but it is a condition that the goods should be capable of performing certain work, and the buyer prevents the possibility of the seller performing the condition, it must be taken to be performed, and the price is recoverable (*a*).

Goods sold on credit.—If goods are sold on credit, the vendor cannot sue for the price until the period of credit has expired (*b*), unless the giving of credit has been made conditional on the performance of some precedent act by the purchaser and the terms on which it was given have not been performed, in which case the sale is not in truth a sale on credit at all. If a bill not payable on demand is taken for the price, the sale is a sale on credit and no action can be brought until the bill is due (*c*). If the goods are sold upon the terms that the purchaser is to give his acceptance

(*x*) *Smith* v. *Chance, supra; Boulter* v. *Arnott*, 1 Cr. & M. 333; 2 L.J. Ex. 97.

(*y*) *Ante*, p. 419. *Bennett* v. *Henderson*, 2 Stark. 550; *Coles* v. *Bulman*, 6 C.B. 184; 17 L.J. C.P. 302; see also *Hart* v. *Mills*, 15 M. & W. 85; 15 L.J. Ex. 200.

(*z*) *Cundell* v. *Dawson*, 4 C.B. 378; 17 L.J. C.P. 311.

(*a*) *Mackay* v. *Dick*, 6 App.Cas. 251.

(*b*) *Paul* v. *Dod*, 2 C.B. 800; 15 L.J. C.P. 177; *Strutt* v. *Smith*, 1 Cr. M. & R. 312; 3 L.J. Ex. 357; *Price* v. *Nixon*, 5 Taunt. 338.

(*c*) *Helps* v. *Winterbottom*, 2 B. & Ad. 431; 9 L.J. (O.S.) K.B. 258.

at two or more months for the price, and are then delivered to the purchaser, and the latter refuses to give his acceptance according to the contract, the vendor cannot forthwith bring an action for goods sold and delivered, but must either sue on the promise to give the acceptance, or wait the termination of the period during which the bill had to run (*d*). If, however, the goods are sold on the terms that the vendor is to have a bill at three months or cash, and the purchaser fails to give the bill, the vendor may at once sue for a fair and reasonable price in cash (*e*). Where, by the terms of a contract of sale, the purchaser was to pay part of the price in cash and the residue by bills, payable in succession every three months, and the purchaser omitted to pay the cash, and to give the bills, it was held that the vendor could not maintain an action for the price of the goods until the expiration of the period at which the last bill would become due, but must sue on the special contract for the non-payment of the money and the non-delivery of the bills (*f*). But, where the defendant, when a portion of the goods has been delivered under the contract, repudiates the transaction and refuses to receive any more, the plaintiff has a right to treat the contract as rescinded, and to sue for the value of the goods which have been delivered (*g*). If the contract is entire for the delivery of an undivided quantity of goods at a certain price by a certain time, the vendor cannot, after delivering part of the goods, sue for the price of that part until the whole has been delivered (*h*); but, if he delivers part, and such part is retained and used by the purchaser after the time for the delivery of the whole has expired, the purchaser is bound, notwithstanding the non-performance of the contract by the vendor, to pay what the part retained and used by him may be reasonably worth (*i*). Where delivery is to be made in different parcels over a specified period, the purchaser may be bound to accept such parcels as arrive in time though subsequent parcels may arrive late (*k*).

Damages for non-acceptance.—"Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance (*l*). The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach

(*d*) *Mussen* v. *Price*, 4 East, 147; *Dutton* v. *Solomonson*, 3 Bos. & P. 582.

(*e*) *Rugg* v. *Weir*, 16 C.B. N.S. 477. And see *ante*, p. 516, *Conditional Sale*.

(*f*) *Paul* v. *Dod*, 2 C.B. 800; 15 L.J. C.P. 177.

(*g*) *Bartholomew* v. *Markwick*, 15 C.B. N.S. 711; 33 L.J. C.P. 145; *Lee* v. *Risdon*, 7 Taunt. 189.

(*h*) *Reuter* v. *Sala*, 4 C.P.D. 239; 48 L.J. C.P. 492.

(*i*) *Oxendale* v. *Wetherell*, 9 B. & C. 386; 7 L.J. (O.S.) K.B. 264.

(*k*) *Brandt* v. *Lawrence*, 1 Q.B.D. 344; 46 L.J. Q.B. 237.

(*l*) 56 & 57 Vict. c. 71, s. 50 (1).

of contract (*m*). Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept" (*n*). If the right of property has not been divested out of the vendor, he cannot bring an action for the price of the goods; for he cannot have both the goods and the price; but he may sue the purchaser for his breach of contract in not accepting them, in which case the measure of damages will be the difference between the agreed price and the marketable value of the goods at the time they were refused acceptance by the purchaser, in addition to the costs, charges, and expenses necessarily incurred by the vendor in fulfilling his part of the contract. But the vendor is not bound to wait until the time comes for acceptance. He may treat an unqualified refusal by the purchaser to accept as a repudiation once for all of the contract and sue immediately. The measure of damages is the same in either case; but in the latter the jury have to surmise, instead of merely computing the difference between the contract price and the market price at the date or dates when the goods ought to be accepted (*o*). If the market price of the article has declined after the making of the contract, and the purchaser gives notice to the vendor that he will not accept, the proper measure of damages is not the difference between the contract price and the market price on the day the notice was given, but at the time when the contract ought to have been fulfilled by the acceptance of the goods, if it had been carried into effect as originally intended (*p*). If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of damages will be the difference between the price agreed to be given and the price realised on the re-sale, with the costs and expenses of the re-sale; but, if the re-sale has been unreasonably delayed until the market has fallen, the price realised on such re-sale will not afford a true criterion of the damage (*q*).

Remedies of the buyer—Damages for non-delivery.—"Where the seller wrongfully neglects or refuses to deliver the goods to the

(*m*) 56 & 57 Vict. c. 71, s. 50 (2).
(*n*) Sect. 50 (3).
(*o*) *Cort* v. *Ambergate Ry.*, 17 Q.B. 127; 20 L.J. Q.B. 460; *Hochster* v. *De La Tour*, 2 E. & B. 687; 22 L.J. Q.B. 455; *Frost* v. *Knight*, L.R. 2 Ex. 111; 41 L.J. Ex. 78; *Roper* v. *Johnson*, L.R. 8 C.P. 167; 42 L.J. C.P. 65.

(*p*) *Philpotts* v. *Evans*, 5 M. & W. 475; 9 L.J. Ex. 33; *Boorman* v. *Nash*, 9 B. & C. 145; 7 L.J. (O.S.) K.B. 150; *Startup* v. *Cortazzi*, 2 Cr. M. & R. 165; 4 L.J. Ex. 218.
(*q*) *Stewart* v. *Canty*, 8 M. & W. 160; 10 L.J. Ex. 348; *Pott* v. *Flather*, 16 L.J. Q.B. 366.

buyer, the buyer may maintain an action against the seller for damages for non-delivery" (*r*).

"The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract" (*s*).

"Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver" (*t*).

Where the defendant did not deliver a quantity of iron in three equal proportions as agreed, it was held that the true measure of damages, in the absence of proof by the defendant that the plaintiff might have mitigated the loss, was the sum of the differences between the contract and market prices of each third of the quantity on the respective dates at which they ought to have been delivered (*u*). But the plaintiff cannot by keeping the goods increase the damages. Thus where the plaintiff, as trustee of L., sued the defendant for damages arising from the defendant having sold to L. rupee paper upon a false representation, and L. sold the rupee paper some time after at a great loss, it was held that the true measure of damages was not this loss, but was the difference between the price paid and the price in the market on the same day on which he bought from the defendant (*x*). Where, after breach of a written agreement to deliver goods, the buyer, at the seller's request, waited several months before buying goods in the place of those contracted for, it was held that the true measure of damages was the difference between the contract price and the price of the substituted goods though this price was greater than that of such goods when the contract was first broken (*y*). If there is no market for the article contracted for, the measure of damages is the value of it at the time of the breach, and if the plaintiff does the best he can, and buys the nearest in price and quality that he can get, he is entitled to recover the difference in the price (*z*). If the goods are ordered in England by a merchant abroad, for the purpose of being exported and re-sold

(*r*) 56 & 57 Vict. c. 71, s. 51 (1).
(*s*) Sect. 51 (2).
(*t*) Sect. 51 (3); *Barrow* v. *Arnaud*, 8 Q.B. 595; 609; *Gainsford* v. *Carroll*, 2 B. & C. 624; 2 L.J. (O.S.) K.B. 112; *Peterson* v. *Ayre*, 13 C.B. 353; *Josling* v. *Irvine*, 6 H. & N. 512; 30 L.J. Ex. 78.
(*u*) *Brown* v. *Muller*, L.R. 7 Ex. 319; 41 L.J. Ex. 214; *Roper* v. *Johnson*, L.R. 8 C.P. 167; 42 L.J. C.P. 165. See also *Tyers* v. *Rosedale Iron Co.*, L.R. 10 Ex. 195; 44 L.J. Ex. 130.
(*x*) *Waddell* v. *Blockey*, 4 Q.B.D. 678; 48 L.J. Ex. 517.
(*y*) *Ogle* v. *Vane* (*Earl*), L.R. 3 Q.B. 272; 37 L.J. Q.B. 77.
(*z*) *Hinde* v. *Liddell*, L.R. 10 Q.B. 265; 44 L.J. Q.B. 105.

in a foreign market, and the order is accepted, and the vendor, knowing that the goods are required for a foreign market, undertakes to forward the goods but neglects so to do, the measure of damages is not the difference between the agreed price and the marketable value of the goods in England, but between the price and the marketable value of the goods at the place where they would have been re-sold by the purchaser (*a*). The purchaser cannot recover as special damage the loss of anticipated profits in the home market; nor, if he has contracted to re-sell the goods at a profit, can he recover such profit (*b*), unless the loss of such profits was or might reasonably have been contemplated by the vendor as naturally flowing from his breach.

If the vendor has a month, or any specific period of time, allowed to him for making the delivery, and finds, before the time has elapsed, that he will be unable to complete the delivery, and gives notice to the purchaser that he refuses to proceed therewith, and the price rises, the measure of damages is the difference between the contract price and the higher price of the subject-matter on the last day of the period within which the delivery ought to have been made (*c*). If the vendor of shares neglects to deliver the shares or complete the transfer, the measure of damages is the difference between the price agreed to be paid and the market price on the day on which the sale should have been perfected; and the purchaser is not entitled to damages in respect of a further advance of price taking place afterwards (*d*). But when the vendor holds in his hands the money of the purchaser, and thereby prevents him from using it, and from buying other shares therewith, or wrongfully sells the shares, the proper measure of damages would seem to be the highest price for which the same number of shares might be purchased in the market, either on the day the contract was broken, or at any time between that day and the day of trial, if the action has been brought without any unreasonable or improper delay (*e*). When the action is not brought upon the special contract, but for the recovery of the

(*a*) *Bridge* v. *Wain*, 1 Stark. 504; *O'Hanlan* v. *G. W. Ry.*, 6 B. & S. 484; 34 L.J. Q.B. 154; *Borries* v. *Hutchinson*, 18 C.B. N.S. 445; 34 L.J. C.P. 169. But see as to this case *Elbinger* v. *Armstrong*, L.R. 9 Q.B. 473; 43 L.J. Q.B. 211; *Grebert Borgnis* v. *Nugent*, 15 Q.B.D. 85; 54 L.J. Q.B. 511.

(*b*) *Williams* v. *Reynolds*, 6 B. & S. 495; 34 L.J. Q.B. 221, qualifying and restricting *Dunlop* v. *Higgins*, 1 H.L.C. 403, and overruling *Waters* v. *Towers*, 8 Exch. 401; 22 L.J. Ex. 186. See also *Thol* v. *Henderson*, 8 Q.B.D. 457; Mayne on Damages, 62 (ed. 6).

(*c*) *Leigh* v. *Paterson*, 8 Taunt. 540; *Loder* v. *Kekulé*, 3 C.B. N.S. 128; 27 L.J. C.P. 27.

(*d*) *Tempest* v. *Kilner*, 3 C.B. 253; 15 L.J. C.P. 10; *Gainsford* v. *Carroll*, 2 B. & C. 624; 2 L.J. (O.S.) K.B. 142; *Shaw* v. *Holland*, 15 M. & W. 138; 15 L.J. Ex. 87.

(*e*) *Owen* v. *Routh*, 14 C.B. 337; 23 L.J. C.P. 105; *Shaw* v. *Holland*, *supra*; *Michael* v. *Hart*, 71 L.J. K.B. 265; (1902) 1 K.B. 482.

purchase-money, as money had and received, on the ground of a total failure of the consideration for the payment, the whole purchase-money is recoverable (*ante*, p. 123).

Specific performance.—"In any action for breach of contract to deliver specific (*f*) or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment" (*g*).

Damages are in general as complete a remedy for the purchaser as the delivery of the goods contracted for, inasmuch as with the damages he may ordinarily purchase the same quantity of the like goods (*h*). But a contract for the sale of a specific chattel, such as a barge or a vessel, may be enforced *in specie* (*i*); and the court has an inherent power to order the delivery of a specific chattel having a "*pretium affectionis*," or a peculiar value resting on its individuality, such as "the Pusey Horn" (*k*), St. Margaret's silver tobacco-box (*l*), the silver altar-piece of the Duke of Somerset (*m*), the insignia and decorations of a lodge of freemasons (*n*), and old family pictures (*o*) and heirlooms (*p*), and none the less because the plaintiff's right to possession is founded on a contract of sale (*q*). A contract for the sale of 500 chests of tea is not a contract which can be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell certain chests of a particular kind of tea deposited in a particular locality may be enforced *in specie;* and the purchaser may obtain an injunction to prevent the seller from delivering it to any other person (*r*). Wherever the object of sale is such that there is an uncertainty whether the purchaser can procure another chattel of the same kind and value, or the possession of it is desirable for certain purposes which no other chattel of the same kind will answer, a specific performance will be decreed (*s*).

(*f*) "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made: sect. 62.

(*g*) 56 & 57 Vict. c. 71, s. 52.

(*h*) Story's Eq. Jur. § 717; *Buxton* v. *Lister*, 3 Atk. 383; *Pooley* v. *Budd*, 14 Beav. 34.

(*i*) *Claringbould* v. *Curtis*, 21 L.J. Ch. 541.

(*k*) *Pusey* v. *Pusey*, 1 Vern. 273.

(*l*) *Fells* v. *Read*, 3 Ves. 70.

(*m*) *Somerset* (*Duke*) v. *Cookson*, 3 P. Wms. 389.

(*n*) *Lloyd* v. *Loaring*, 6 Ves. 773.

(*o*) *Arundel* (*Lady*) v. *Phipps*, 10 Ves. 139; *Lowther* v. *Lowther*, 13 Ves. 95.

(*p*) *Macclesfield* (*Earl*) v. *Davis*, 3 Ves. & B. 16.

(*q*) *Arundel* (*Lady*) v. *Phipps*, *supra*; *Lowther* v. *Lowther*, *supra*.

(*r*) Lord Westbury, *Holroyd* v. *Marshall*, 33 L.J. Ch. 196; 10 H.L.C. 209.

(*s*) *Falcke* v. *Gray*, 29 L.J. Ch. 28; 4 Drew. 651.

Remedy for breach of warranty.—"Where there is a breach of warranty (*t*) by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) maintain an action against the seller for damages for the breach of warranty (*u*).

"The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty (*x*).

"In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty (*y*).

"The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage" (*z*).

Formerly there was a distinction between an action on the contract itself for the agreed price, and an action upon a bill of exchange or promissory note given by way of payment for the amount. In the former, the value only could be recovered; in the latter, the party holding bills given for the price of the goods supplied could recover on them, unless there had been a total failure of the consideration. If the consideration failed partially, as by the inferiority of the article furnished, the buyer had his remedy by cross-action (*a*). Thus, where a contract was entered into for the purchase of goods of "good quality and moderate price," and the price was estimated at 1,000*l.*, and bills were given for that amount, it was held to be no defence to an action on the bills that the goods turned out to be worth much less than the estimated price, and that the acceptor had paid on the bills more than the real value of the goods (*b*).

Breach of warranty—Damages.—If the purchaser brings his action against the vendor for a breach of warranty of the quality or

(*t*) See definition of "warranty," sect. 62; *Cutler* v. *Close*, 5 C. & P. 337; *Allen* v. *Cameron*, 1 Cr. & M. 832; 2 L.J. Ex. 263; *Turner* v. *Diaper*, 2 M. & Gr. 241.

(*u*) 56 & 57 Vict. c. 71, s. 53 (1).

(*x*) Sect. 53 (2).

(*y*) Sect. 53 (3).

(*z*) Sect. 53 (4); *Mondel* v. *Steel*, 8 M. & W. 858; 10 L.J. Ex. 426; *Rigge* v. *Burbidge*, 15 M. & W. 598; 15 L.J. Ex. 309.

(*a*) *Tye* v. *Gwynne*, 2 Camp. 346; *Camac* v. *Warriner*, 1 C.B. 357; *Trickey* v. *Larne*, 6 M. & W. 278; 9 L.J. Ex. 141; *Warwick* v. *Nairn*, 10 Exch. 762; compare also *Moggridge* v. *Jones*, 3 Campb. 38.

(*b*) *Obbard* v. *Betham*, M. & M. 483. See as to counterclaim, Ord. XIX. r. 3.

soundness of the thing sold, and the goods have been received back by the vendor (*ante*, pp. 516, 518), the measure of damages is the marketable value which the goods would have possessed in the hands of the purchaser at the time of the delivery, if they had corresponded with the warranty given. If they have not been returned by the purchaser, the measure of damages is then the difference between their marketable value to the purchaser in their defective state at the time of delivery, and the value they would have possessed had they answered the warranty; and, if they have been re-sold by the purchaser without delay, and before any considerable fluctuations in the market have taken place, it is the difference between the price realised on the re-sale, after deducting the cost and expenses of the re-sale, and the price they would have fetched if they had answered the warranty.

Where goods had been purchased with a warranty in England, to be exported and re-sold in China, and the goods, on their arrival in Canton, were found not to answer the warranty, the measure of damages was held to be, not the difference between the agreed price and the price realised on the re-sale in China, but between the last-named price and what they would have sold for in the Chinese market had they corresponded with the warranty (*c*). And, where the plaintiff, a horse-dealer, purchased horses at Northallerton Fair with a warranty of soundness, with a view of re-selling them in the London market, and the horses on their arrival in London were found to be unsound, the fair measure of damages was held to be the difference between their marketable value in London as unsound horses, and what would have been their marketable value if they had been sound, and had corresponded with the warranty, of which the price paid by the plaintiff was strong but not conclusive evidence; and it was also held that, if any of them had been re-sold in London with a warranty before the unsoundness was discovered, the price realised on such re-sale would be evidence of their marketable value in a sound condition corresponding with the warranty; and, if they were subsequently returned and sold a third time as unsound horses, without a warranty, the price realised on such third sale would be evidence of their actual marketable value in an unsound state; and the difference between the price realised on the two sales would be the measure of the damages fairly recoverable from the original vendor as resulting from his breach of warranty. If the purchaser estimated his damages according to the last-named standard, he would not of course be entitled to recover the costs, charges, and expenses

(*c*) *Bridge* v. *Wain*, 1 Stark. 504.

of bringing the animals to London; but if he recovered only the difference between the price paid at the fair and the actual value of the horses in their unsound condition, he would be entitled to recover the costs and expenses of bringing them up to market. The expenses of obtaining a certificate of unsoundness from the Veterinary College cannot be recovered from the vendor; nor can any legal expenses which were not the necessary result of the defendant's breach of contract (*d*). If the purchaser, as soon as he has discovered the unsoundness of a horse, and consequent breach of warranty, tenders back the horse to the vendor, he may recover the expense of the keep during the time that he is preparing to re-sell the animal to the best advantage (*e*).

Special damages—Re-sale with a warranty—Costs of legal proceedings.—If special damages of which the vendor has notice have been sustained by the purchaser, they may be recovered from the vendor (*ante*, p. 257). Thus, where the plaintiff, having bought of the defendant a horse warranted sound, re-sold the horse with a like warranty, and was sued for a breach thereof by the second purchaser, and then gave the defendant notice of the action, and offered him the option of defending it, but the defendant gave no answer, and the plaintiff failed in the action and had to pay damages and 88*l.* costs, it was held that he was entitled to recover these costs, in addition to the damages he had been compelled to pay to his immediate purchaser (*f*). So, where the defendant sold the plaintiff a picture warranted to be painted by Claude, and the plaintiff afterwards re-sold the picture with a like warranty, and the picture turned out not to be a Claude, and the second purchaser sued the plaintiff for the breach of warranty, and recovered a certain sum for damages, and costs, and the plaintiff then sued the defendant, it was held that he was entitled to recover the amount of the damages and costs paid to the second purchaser, and also his own costs incurred in defending the action brought by the latter (*g*). But, if the plaintiff has made a rash and improvident defence; if, for instance, he has had an opportunity of testing the thing purchased, and might have ascertained by examination whether it did or did not correspond with the warranty, and has neglected so to do, and runs his chance of an action, he will not be permitted to recover the cost of his defence (*h*). But, even where the purchaser is justi-

(*d*) *Clare* v. *Maynard*, 6 Ad. & E. 519; 6 L.J. K.B. 138; *Cox* v. *Walker*, 7 Car. & P. 744; also cited 6 Ad. & E. 523, note (*a*).

(*e*) *Caswell* v. *Coare*, 1 Taunt. 566; *Mackenzie* v. *Hancock*, Ry. & M. 436; *Chesterman* v. *Lamb*, 2 Ad. & E. 129.

(*f*) *Lewis* v. *Peake*, 7 Taunt. 153.

(*g*) *Pennell* v. *Woodburn*, 7 C. & P. 118; *Dingle* v. *Hare*, 7 C.B. N.S. 145; 29 L.J. C.P. 143; *Randall* v. *Raper*, E. B. & E. 84; 27 L.J. Q.B. 266; *Hammond* v. *Bussey*, 20 Q.B.D. 79; 57 L.J. Q.B. 58.

(*h*) *Wrightup* v. *Chamberlain*, 7 Sc. 598.

fied in defending the action brought against him by a sub-purchaser it would seem that he is entitled to recover his costs only as between party and party, and not as between solicitor and client, except in the case of a contract, express or implied, to indemnify (*i*).

Interest and special damages.—Nothing in the Sale of Goods Act, 1893, is to affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed (*k*).

Sale by auction.—"In the case of a sale by auction—(1.) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale: (2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid: (3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer: (4.) A sale by auction may be notified to be subject to a reserved price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction" (*l*).

Sale and transfer of tenant's fixtures and trade fixtures.—If an article affixed to the freehold is sold with a view to its immediate severance therefrom, the contract is simply a contract for the purchase and sale of a chattel (*m*). If it is not purchased with a view to immediate severance, the contract is then a contract for the sale and purchase of a fixture. A contract for the sale and fixing up in a dwelling-house of a copper or a stove is not a contract for the sale of fixtures, but of goods and chattels, and for the performance of work and labour. If a contract is made for the erection upon the soil, or in a dwelling-house, of machinery, presses, &c., the contract would seem to be properly a contract for work and labour and the supply of materials. It is a contract for

(*i*) *Howard* v. *Lovegrove*, L.R. 6 Ex. 43; 40 L.J. Ex. 13, commenting on *Grace* v. *Morgan*, 2 Bing. N.C. 534; 5 L.J. C.P. 180.

(*k*) 56 & 57 Vict. c. 71, s. 54.

(*l*) Sect. 58; as to sales by auction, see also *ante*, pp. 16, 441.

(*m*) See 56 & 57 Vict. c. 71, s. 62, under which "goods" includes things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

the erection, and not for the sale, of a fixture, and is the same in principle as a contract to erect a pillar or build a house (*n*).

Authentication of contracts for the sale of fixtures.—A contract for the sale of fixtures, as such, is not a contract for the sale of an interest in land, nor for the sale of goods and chattels (*ante*, p. 27). A signed writing, consequently, is not necessary, as between vendor and purchaser, for the authentication of the contract (*o*). Where fixtures have been sold at a price to be ascertained by valuation, if, after the valuation has been made and delivered to the purchaser, the latter takes possession of the fixtures, or exercises dominion over them, he will be deemed to have adopted the valuation and assented to the price as ascertained by the brokers (*p*).

SECTION III.

OF CONTRACTS FOR THE SALE OF INCORPOREALS.

Grants and transfers of incorporeal rights and incorporeal hereditaments, such as rights of common, rights of way or watercourse, advowsons, tithes, rents, annuities, and profits issuing out of land, must, in order to be valid and irrevocable at common law, be made by DEED (*a*). Thus a right to take tolls for the passage of a ferry or a bridge must be transferred by deed (*b*). A right to go upon another man's land, as to remove fixtures (*c*), or to shoot and sport over a manor, or to fish in the waters thereof, whether it be a mere licence of pleasure authorising the licensee to take, but not to carry away, or a licence of profit authorising him both to take and carry off, the game or the fish, is an incorporeal right lying in grant, and can only be created by deed (*d*). A parol licence or permission will, so long as it has not been countermanded, justify an entry upon the land (*e*); but it can confer no indefeasible right,

(*n*) *Pinner* v. *Arnold*, 2 Cr. M. & R. 613; 5 L.J. Ex. 1.

(*o*) *Lee* v. *Gaskell*, 1 Q.B.D. 700; 45 L.J. Q.B. 540.

(*p*) *Salmon* v. *Watson*, 4 Moore, 73.

(*a*) Bac. Abr. Grants, E.; Co. Litt. 9 a, 42 a; 14 Vin. Abr. Grant (G.) (a); 2 Roll. Abr. Grant (G.); *Jones* v. *Robin*, 10 Q. B. 620; 17 L.J. Q.B. 121.

(*b*) *Reg.* v. *Salisbury* (*Marquis*), 8 Ad. & E. 716, 739; 7 L.J. M.C. 110.

(*c*) *Ruffey* v. *Henderson*, 21 L.J. Q.B. 49; 17 Q.B. 574.

(*d*) *Somerset* (*Duke*) v. *Fogwell*, 5 B. & C. 875; 5 L.J. (O.S.) K.B. 49; *Bird* v. *Higginson*, 6 Ad. & E. 824; 6 L.J. Ex. 282; *Thomas* v. *Fredericks*, 16 L.J. Q.B. 393; 10 Q.B. 775; *Ewart* v. *Graham*, 7 H.L.C. 331; 29 L.J.Ex. 88.

(*e*) *Feltham* v. *Cartwright*, 7 Sc. 695; 9 L.J. C.P. 67.

and may be recalled at the pleasure of the grantor, unless a valuable consideration has been given and received for it, so as to give the licensee a right to the enjoyment of the privilege. But, although the right itself cannot be created at common law, so as to be indefeasible, without deed, yet a landowner may, by a writing satisfying the Statute of Frauds, agree to allow another to come upon his land and take a profit from the soil, or to exercise and enjoy thereon certain privileges, and will be responsible in damages, if he interrupt such enjoyment (*f*). And, if a landowner gives a parol licence or permission to another to enjoy some profit or privilege on the land of the licensor necessarily involving the expenditure of money for its enjoyment, and the licensor stands by and allows the licensee to expend his money on the land in reliance on the promised enjoyment of the privilege, the licence cannot afterwards be withdrawn without tendering the licensee compensation for his expenditure (*g*). Where a colliery proprietor, wanting to construct a railway across the defendant's land, wrote a letter to the defendant, offering him a fair price for the land, and, getting no answer to his letter, and supposing that he had a right, under the powers of a local Act, to make the railway, entered upon the defendant's land, and constructed earthworks and formed a railway, and used it for three or four years with the acquiescence of the defendant, and the parties afterwards met to settle the price that was to be paid for the land, and, not being able to agree upon it, the defendant brought an action of ejectment, the Court of Chancery granted an injunction to restrain the defendant from obstructing or interfering with the plaintiff's use of the railway, on such a sum of money being paid into court as would constitute a sufficient security to the defendant for the price of the land (*h*). So, also, when a party has agreed to pay a certain sum for a licence of profit, and has had the benefit and enjoyment of the licence, it is no answer, in an action for the money agreed to be paid, to say that the licence was not under seal. Therefore, where an action was brought for a sum of money agreed to be paid for the use and enjoyment of a licence to fish, it was held that the defendant could not resist the action on the ground that the licence was not under seal (*i*). And, where the defendant by memorandum in writing agreed with the plaintiff for a valuable consideration to permit the plaintiff to enter upon the defendant's land for the purpose of gathering cinders, it was

(*f*) *Smart* v. *Jones*, 15 C.B. N.S. 717; 33 L.J. C.P. 154.

(*g*) *Ramsden* v. *Dyson*, L.R. 1 H.L. 129, 170; *Clavering's case*, 5 Ves. 690.

(*h*) *Powell* v. *Thomas*, 6 Hare, 300; *Laird* v. *Birkenhead Ry.*, 1 Johns. 500; 29 L.J. Ch. 218.

(*i*) *Holford* v. *Pritchard*, 3 Exch. 793; 18 L.J. Ex. 315.

held to be no answer to an action for a breach of this agreement, to set up that it was not under seal (*k*). A parol licence to enjoy an easement over or upon the soil and freehold of another is at once determined by a transfer of the property; and the grantee of the licence is consequently a trespasser, if he afterwards enters upon the land in the exercise of his supposed right, although he has received no notice of the transfer (*l*).

A mere licence of pleasure amounts only to a personal contract, or to an ordinary covenant between the parties, and does not transfer to the licensee or his heirs any right over, or interest in, the soil and freehold of the licensor. "If one license me and my heirs to come and hunt in his park, I must have a writing (that is a deed) of that licence; for a thing passes by the licence which endures in perpetuity: but, if he license me one time to hunt, this is good without deed; for no inheritance passes" (*m*). If the licence be a mere personal licence of pleasure, the licensee cannot take away to his own use the game killed, or go with servants upon the land, still less send servants to kill for him, or assign his licence to another. A licence under seal to convey coals or timber in carts, or water in drains or channels, across the land of the licensor, is a licence of profit, and not of pleasure, and would amount to a grant of a right of way or of a watercourse. A licence under seal may be of such a nature as to operate in respect of some things as a licence of pleasure merely, and as to others as a grant of an incorporeal hereditament and a direct transfer of an estate or interest in the land.

In a contract for the sale of a patent right, the vendor does not profess to sell an indefeasible patent right, but merely such a right as he actually possesses under the patent (*n*). If, therefore, subsequently to the sale, the patent turns out to be invalid, without any fraud on the part of the vendor, the purchaser has no ground for claiming back his purchase-money (*o*). A contract for the sale of a patent right may be specifically enforced (*p*).

Title to shares in mining companies.—The shareholders in joint-stock companies possessed of land are entitled to no direct interest in the land. No part of the realty is held in trust for them; but all they are entitled to is, that the real and personal property held by the company should be used by the company for

(*k*) *Smart* v. *Jones*, *ante*, p. 593.

(*l*) *Wallis* v. *Harrison*, 4 M. & W. 538; 8 L.J. Ex. 44; *Russell* v. *Harford*, L.R. 2 Eq. 507; *Roberts* v. *Rose*, L.R. 2 Ex. 82; 35 L J. Ex. 62.

(*m*) Year Book, 11 Hen. 7, fol. 86, cited by Parke, B., *Wickham* v. *Hawker*, 7 M. & W. 79; 10 L.J. Ex. 153.

(*n*) *Hall* v. *Conder*, 2 C.B. N.S. 41; 26 L.J. C.P. 138.

(*o*) *Lawes* v. *Purser*, 6 E. & B. 935; 26 L.J. Q.B. 25.

(*p*) *Cogent* v. *Gibson*, 33 Beav. 557.

their benefit (*q*). A purchaser of shares in a mining company is not entitled to a regular deduction of the title of the vendor of the share as on the sale of real estate. The vendor may establish his title by the cost-book or register of the mine (*r*). The partners, in whom the legal right in the mine or minerals is vested by deed of grant, hold the mine and the partnership joint-stock plant and machinery, in trust to exercise the right to search for minerals, and make a profit for the benefit of the co-adventurers; and it has been held that the shares of this profit, and consequently the shares in the mine, are personal property, which may be transferred without note in writing, no interest in the soil passing by the transfer, but only a right to participate in the profits of the mine. When mining shares are sold in the share market, it is the practice for each party to make a memorandum of the sale in his own book, in the same manner as is made by brokers and jobbers on the Stock Exchange. The vendor afterwards hands a certificate of the sale to the captain or purser of the mine, authorising him to transfer the shares to the purchaser in the usual way; and the purchaser signs an acceptance of the shares written underneath the certificate of sale, which being presented to the captain or purser of the mine, the name of the purchaser is substituted in the place of the vendor in the cost-book, and the transfer is complete (*s*). And, as soon as the share or interest in the profits of the concern is transferred by the outgoing shareholder, the latter is released from all liability upon contracts subsequently entered into by the purser or managers of the company (*t*).

Title to shares, scrip, and letters of allotment.—The mere possession of letters of allotment of shares or of scrip certificates of shares in projected railway companies is *primâ facie* evidence of ownership and of the power of disposition over them. But, in the case of registered joint-stock companies, or companies incorporated by Act of Parliament, the title to shares is evidenced by production of a certificate of proprietorship and by reference to the register of the shareholders of the company. The directors of every registered joint-stock company and incorporated railway company are directed (25 & 26 Vict. c. 89, s. 25, and 8 & 9 Vict. c. 16) to cause books to be kept, to be called the register of shareholders, and to enter from time to time therein the names, addresses, and occupations of the shareholders in the company; the shares

(*q*) *Watson* v. *Spratley*, 10 Exch. 222, 244; 24 L.J. Ex. 53; *Powell* v. *Jessop*, 18 C.B. 336; 25 L.J. C.P. 199; *Walker* v. *Bartlett*, 18 C.B. 845; 25 L.J. C.P. 263; *Edwards* v. *Hall*, 25 L.J. Ch. 82; 6 De G. M. & G. 74; *Caddick* v. *Skidmore*, 3 Jur. N.S. 1185.

(*r*) *Curling* v. *Flight*, 5 Hare, 242.

(*s*) *Watson* v. *Spratley*, 24 L.J. Ex. 53; 10 Exch. 222.

(*t*) *Harvey* v. *Kay*, 9 B. & C. 356; 7 L.J. (O.S.) K.B. 167.

held by them, distinguishing each share by its number (*u*); the amount paid on such shares; the date at which the name of any person was entered in the register as a shareholder; and the date at which any person ceased to be a shareholder in respect of any share (*v*). Provision is made by the Companies Act, 1862 (*x*), and by the Railway Acts, for establishing the title to shares in case of the death or bankruptcy or insolvency of shareholders, or the marriage of female shareholders. A certificate of shares is merely a solemn affirmation under the seal of the company that a certain amount of stock stands in the name mentioned in the certificate. A person, therefore, who receives such certificates as an equitable mortgage, must inquire into the title of the intended mortgagor, because if he is only trustee, the intending mortgagee's title will be inferior to that of the cestui que trust (*y*).

Any person entitled to a share in a registered joint-stock company in consequence of the death, bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, or in any way other than by transfer, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the company; and any person who has become entitled to a share in any way other than by transfer, may, instead of being registered himself, elect to have some person to be named by him registered as a holder of such share, by executing to his nominee a deed of transfer of such share, which must be presented to the company with such evidence as they may require of the title of the transferor (*z*). Under the Companies Act, 1862, a certificate under the common seal of the company (s. 31), or the register (s. 37), is *primâ facie* evidence of the ownership of a share (*a*).

Executory contracts for the sale of shares are generally effected by brokers on the Stock Exchange, who enter the transaction in their books, and transmit bought and sold notes to their principals, specifying the number and value of the shares and the price to be paid for them. Executory contracts for the sale of letters of

(*u*) It would seem that a contract to issue fully paid-up shares need not specify the numbers of the shares: *Delta Syndicate Co., In re*, 30 Ch.D. 153; 54 L.J. Ch. 724.

(*v*) There is a similar provision as to debenture holders contained in 26 & 27 Vict. c. 118.

(*x*) Sched. Table A.

(*y*) *Shropshire Union Ry.* v. *Reg.*, L.R. 7 H.L. 496; 45 L.J. Q.B. 31; *Carritt* v. *Real and Personal Advance Co.*, 42 Ch.D. 263; 58 L.J. Ch. 688. See, per Lord Selborne, *Société Générale de Paris* v. *Walker*, 11 App.Cas. 20; 55 L.J. Q.B. 169. As to the value of a certification of shares, see *Bishop* v. *Balkis Consolidated Co.*, 25 Q.B.D. 77, 112; 59 L.J. Q.B. 565; *Balkis Consolidated Co.* v. *Tomkinson*, (1893) A.C. 396; 63 L.J. Q.B. 134; *Dixon* v. *Kennaway*, (1900) 1 Ch. 833; 69 L.J. Ch. 501.

(*z*) 25 & 26 Vict. c. 89, Table A., Nos. 12—16; *Copeland* v. *N. E. Ry.*, 6 E. & B. 277, 284.

(*a*) *Cornwall Mining Co.* v. *Bennett*, 5 H. & N. 423; 29 L.J. Ex. 157.

allotment, scrip, and shares in railway companies, or shares in mining companies, or registered joint-stock companies, do not, as we have already seen, come within the operation of the Statute of Frauds, as they "are neither an interest in land (*b*), nor are they goods and merchandises" (*c*), within the meaning of that Act. But, by 30 Vict. c. 29, contracts for the sale or transfer of any shares, stock, or other interest in a joint-stock banking company constituted under or regulated by any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument (except by the Banks of England or Ireland), are null and void, unless they set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished on the register or books of the company. Where there is no register of shares or stock by distinguishing numbers, the contract must set forth the person in whose name such shares, stock, or interest, stand as the registered proprietor in the books of the company (*d*). When a bargain has been made for the sale of a certain number of ascertained shares in a particular railway company or a registered joint-stock company, the property in the shares passes by the bargain to the purchaser, and the latter becomes the equitable owner of the shares, and is entitled to a decree for specific performance, when the time for the making of the transfer arrives (*e*). This transfer of the equitable ownership is naturally accompanied with a transfer of the benefit and the burthen incident to the holding of the shares, as in the case of the transfer of the equitable ownership of lands, so that, if a call is made on the shares between the time of the making of the bargain and the time appointed for the transfer of the shares, the purchaser will be bound to pay the call, and the Court will compel him to accept and register a transfer of the shares, and clothe himself with the legal title to them, and do all proper acts to relieve the vendor from liability as the registered legal owner (*f*). If, after the making of a bargain for the sale of shares, a dividend is declared, the dividend will belong to the purchaser (*g*); for by the custom of the Stock Exchange the dividend until it becomes

(*b*) *Humble* v. *Mitchell*, 11 Ad. & E. 205; 9 L.J. Q.B. 29; *Bradley* v. *Holdsworth*, 3 M. & W. 422; 7 L.J. Ex. 153.

(*c*) *Knight* v. *Barber*, 16 M. & W. 66; 16 L.J. Ex. 18.

(*d*) A custom of the Stock Exchange to the contrary is void: see *Neilson* v. *James*, 9 Q.B.D. 546; 51 L.J. Q.B. 369; *Perry* v. *Barnett*, 15 Q.B.D. 388; 54 L.J. Q.B. 466; but see also *Seymour* v. *Bridge*, 14 Q.B.D. 460; 54 L.J. Q.B. 347. As to transfers of shares by executors, see *Barton* v. *L. & N. W. Ry.*, 24 Q.B.D. 77; *Barton* v. *North Staffordshire Ry.*, 38 Ch.D. 458; 57 L.J. Ch. 800.

(*e*) *Duncuft* v. *Albrecht*, 12 Sim. 189, 199; *Ross* v. *Moses*, 1 C.B. 227.

(*f*) *Straffon, Ex parte*, 22 L.J. Ch. 194; 1 De G. M. & G. 576; *Wynne* v. *Price*, 3 De G. & S. 310; *New Brunswick Co.* v. *Muggeridge*, 4 Dr. 686.

(*g*) *Black* v. *Homersham*, 4 Ex.D. 24; 48 L.J. Ex. 79.

payable is included in the price of the share; and, if the vendor receives it, he will hold it as a trustee for the purchaser. If, on the other hand, before the transfer is executed, a petition is presented for winding up the company under the Companies Act, 1862 (*h*), the contract is not rendered void by section 153 of that Act; and, if the broker has, in accordance with the rules and regulations of the Stock Exchange, been compelled to pay the price of the shares to the vendor, he will be entitled to recover back from his principal the money so paid (*i*).

Agreements for transfer of shares.—If the owner of shares, subject to liabilities which deprive them of all marketable value, wishes to divest himself of the shares and the attendant liabilities, and another person is willing to accept the shares, and take the chances of the speculation, and they enter into an agreement for the purpose, the contract will be specifically enforced (*j*). But the court will not enforce an agreement to purchase, made after the presentation of a petition to wind up a company but before advertisement, by making the purchaser a contributory, when both parties were ignorant of the pending petition at the time of the agreement (*k*). A transfer of shares which is otherwise *bonâ fide*, cannot be set aside at the instance of the company, either because the vendor paid money to the purchaser to take the shares, or because the certificate of transfer contains false representations as to the consideration paid (*l*).

Mode of performance.—Where shares are bought or sold through a broker on the Stock Exchange, the principal enters into an implied contract to sell or buy according to the customs and usages prevalent in that body (*m*). According to the practice of the Stock Exchange, the broker who buys shares prepares the transfer deed and tenders it to the selling broker for execution (*n*), and pays the price on the transfer being returned to him executed by the vendor and accompanied by the vendor's certificates of proprietorship. Generally there are intermediate sales, and in that case the first purchaser on a day before the selling-day, called the name-day, gives to the vendor's broker the name of an ultimate purchaser to whom the shares are to be transferred. The vendor's broker thereupon prepares a deed of transfer to the ultimate purchaser, gets it executed by the vendor, and on the

(*h*) 25 & 26 Vict. c. 89.
(*i*) *Chapman* v. *Shepherd*, L.R. 2 C.P. 228; 36 L.J. C.P. 113.
(*j*) *Cheale* v. *Kenward*, 3 De G. & J. 27; 26 L.J. Ch. 784.
(*k*) *Emmerson's case*, L.R. 1 Ch. 433; 36 L.J. Ch. 177.
(*l*) *Hafod Lead Mining Co., In re*, 35 L.J. Ch. 304; 35 Beav. 391.
(*m*) *Hodgkinson* v. *Kelly*, L.R. 6 Eq. 496; 37 L.J. Ch. 837. As to customs on Stock Exchange, see *post*, p. 879.
(*n*) *Stephens* v. *De Medina*, 4 Q.B. 422; 12 L.J. Q.B. 120.

selling-day hands it and the share certificates to the broker of the ultimate purchaser, who pays the price agreed upon between the ultimate purchaser and the jobber, the vendor's broker paying the balance to or receiving it from the broker as the case may require. When this has been done, the liability of the first purchaser ceases, if the ultimate purchaser is a person to whom no reasonable objection can be made (*o*). In order to relieve the jobber from liability, the ultimate purchaser whose name is given on the name-day must be a person of full age (*p*), who is willing to accept and pay for the shares (*q*); but if such purchaser authorises his name to be given, he is bound by the acceptance of the transfer and payment of the price by his brokers on his behalf (*r*). The jobber may, however, agree to guarantee that the ultimate purchaser shall register the transfer; and, if he does so, and the transfer is not registered, he will be liable to indemnify the vendor against the consequences of such want of registration (*s*). It is not the duty of the vendor or of the selling broker to get the transfer registered. All he has to do is to execute the transfer deed and return it to the purchaser (*t*). It is then the duty of the latter to execute it and leave it, with the certificates of proprietorship, at the office of the company for registration and for new certificates of proprietorship to be granted to him in his own name. Until this is done, and the transfer has been registered, and the new certificates granted, the purchaser's title to the shares is incomplete (*u*). Each prior holder confers on the *bonâ fide* holders for value of certificates with blank transfers, an authority to fill in the names of the transferee, and each prior holder is estopped from denying such authority, and is estopped to this extent and no further from denying the title of such *bonâ fide* holder for the time being (*v*). A contract to deliver shares in a projected company does not require the actual delivery of scrip certificates, which are the mere *indicia* of property; but the party contracting to deliver sufficiently performs his engagement, when he places the other in the position of being the legal owner of them (*x*). It is not incumbent on the vendor to obtain the consent of the directors to

(*o*) *Paine* v. *Hutchinson*, L.R. 3 Ch. 388; 37 L.J. Ch. 485; *Coles* v. *Bristowe*, L.R. 4 Ch. 3; 38 L.J. Ch. 81; *Grissell* v. *Bristowe*, L.R. 4 C.P. 36; 38 L.J. C.P. 10; *Maxted* v. *Paine*, L.R. 6 Ex. 132; 40 L.J. Ex. 57; *Loring* v. *Davis*, 32 Ch.D. 625; 55 L.J. Ch. 725.

(*p*) *Merry* v. *Nickalls*, L.R. 7 H.L. 530; 45 L.J. Ch. 575.

(*q*) *Maxted* v. *Paine*, L.R. 4 Ex. 81; 38 L.J. Ex. 41.

(*r*) *Bowring* v. *Shepherd*, L.R. 6 Q.B. 309; 40 L.J. Q.B. 129.

(*s*) *Cruse* v. *Paine*, L.R. 4 Ch. 441; 38 L.J. Ch. 225.

(*t*) *Taylor* v. *Stray*, 2 C.B. N.S. 175, 195; 26 L.J. C.P. 287.

(*u*) *Stray* v. *Russell*, 28 L.J. Q.B. 279, 287; 29 L.J. Q.B. 115; *London Founders' Assoc.* v. *Clarke*, 20 Q.B.D. 576; 57 L.J. Q.B. 291.

(*v*) *Colonial Bank* v. *Hepworth*, 36 Ch.D. 36; 56 L.J. Ch. 1089; *Williams* v. *Colonial Bank*, 38 Ch.D. 388; 15 App.Cas. 268.

(*x*) *Hunt* v. *Gunn*, 13 C.B. N.S. 226.

the transfer, unless the deed of settlement, or articles of association of the company, make the approval of the directors a condition precedent to the right of the shareholder to transfer his shares (*y*). A clause in a deed of settlement, that no shareholder shall transfer his shares except in such manner as the directors shall approve, does not prevent a shareholder from entering into a contract for the sale of his shares; and, if such a contract has been entered into, it will be enforced as between the vendor and purchaser, and the latter will be compelled to do all that is necessary to be done by him to obtain the consent of the directors to the registration of the transfer (*z*). But the court will not compel the directors to assent; nor will specific performance be decreed where they refuse to do so (*a*).

Executory contracts for the sale of shares in railway and parliamentary works' companies are fulfilled on the part of the vendor by a tender of letters of allotment of shares, if there are no shares in the market; and the letters of allotment are commonly bought and received as shares upon the Stock Exchange (*b*). In the case of the sale of scrip or letters of allotment of shares in projected companies which can be lawfully bought and sold, no right of property in any particular scrip or shares passes to the purchaser until actual delivery; and the vendor will fulfil his contract by tendering to the purchaser any scrip that may be in the market (*c*). But a purchaser is not, of course, bound to accept shares or scrip, or any securities, of a different kind from those he bargained for and agreed to buy (*d*).

Time of performance.—The time for the completion of an executory contract for the sale of shares is regulated by the custom of the Stock Exchange. If particular days are set apart for the settlement of accounts between brokers and their customers, and for the delivery and transfer of shares that have been agreed to be bought and sold in the intervening period, all contracts for the sale and purchase of shares to be completed on a particular day will be deemed to be made for the next settling day that will arrive after the time so appointed (*e*). When no time is specified for the completion of the contract, the printed rules and customs of

(*y*) *Wilkinson* v. *Lloyd*, 7 Q.B. 27; 14 L.J. Q.B. 165; *Stray* v. *Russell*, *ante*, p. 599.

(*z*) *Poole* v. *Middleton*, 29 Beav. 646.

(*a*) *Bermingham* v. *Sheridan*, 33 Beav. 660; 33 L.J. Ch. 751.

(*b*) *Stray* v. *Russell*, 28 L.J. Q.B. 284; 29 L.J. Q.B. 115; *Mitchell* v. *Newhall*, 15 M. & W. 309; 15 L.J. Ex. 292; *Tempest* v. *Kilner*, 3 C.B. 249; 15 L.J. C.P. 10; *Lamert* v. *Heath*, 15 M. & W. 486; 15 L.J. Ex. 297.

(*c*) *Heseltine* v. *Siggers*, 18 L.J. Exch. 166; 1 Exch. 856; and see *Hunt* v. *Gunn*, 13 C.B. N.S. 226.

(*d*) *Keele* v. *Wheeler*, 7 M. & Gr. 665; 13 L.J. C.P. 170.

(*e*) *Fletcher* v. *Marshall*, 15 M. & W. 755; *Bayliffe* v. *Butterworth*, 17 L.J. Ex. 78; 1 Exch. 425.

the Stock Exchange are admissible in evidence to show what is a reasonable time under all the circumstances of the case for the fulfilment of the bargain (*f*). Where a written contract for the sale of mining shares was silent as to the time of the delivery of the shares, but fixed the time for payment of the price, it was held that evidence was admissible to show that, by a custom amongst brokers, the vendor under such a contract was not bound to deliver the shares until he was offered payment of the price (*g*).

Implied undertakings and indemnities annexed to contracts for sale and purchase of shares—Payment of calls.—Where the plaintiff sold mining shares to the defendant, and delivered to him a document addressed to the secretary of the mine, by which the plaintiff requested him to enter a transfer of the shares from his name into that of a transferee, whose name was left in blank that it might be filled up by the holder of the document, and the blank was left in order that the defendant might insert either his own name or that of any other person to whom he might sell the shares, and the plaintiff by delivering this document to the defendant had done all that it was incumbent on him to do to pass the property in the shares to the defendant, who, upon the receipt of it, became potentially the owner of the shares, and might have made his title perfect at any time; it was held that there was an implied undertaking on the part of the defendant to indemnify the plaintiff in respect of all calls that might lawfully be made on the shares whilst they remained untransferred in the books of the company (*h*). But, if the shares are again sold, there is no implied contract of indemnity between the original vendor and those who buy from the first purchaser. The privity of contract, and the attendant liabilities, are confined to those who deal together as vendors and purchasers, and do not extend to parties who are strangers to each other and have never come together in any way (*i*). But, where a man sells or buys shares through his broker on the Stock Exchange, he enters into an implied contract to sell or buy according to the usages prevalent in that body; and, therefore, such an implied indemnity does exist where there have been intermediate sales in the manner above described, but the transfer is made by the original vendor direct to the ultimate purchaser, whose duty it then becomes to execute the deed and register the transfer (*k*), a

(*f*) *Stewart* v. *Cauty*, 8 M. & W. 160; 10 L.J. Ex. 348.

(*g*) *Field* v. *Lelean*, 30 L.J. Ex. 168; 6 H. & N. 617, commenting on *Spartali* v. *Benecke*, 10 C.B. 212; 19 L.J. C.P. 293.

(*h*) *Walker* v. *Bartlett*, 18 C.B. 863; 25 L.J. C.P. 263; *Wynne* v. *Price*, 3 De G. & S. 310.

(*i*) *Sayles* v. *Blane*, 14 Q.B. 205; 19 L.J. Q.B. 19.

(*k*) *Hawkins* v. *Maltby*, L.R. 4 Ch. 200; 38 L.J. Ch. 313.

duty which he may be compelled specifically to perform (*l*). Where the ultimate purchaser gave the name of one of his workmen as the person to whom the shares were to be transferred, and the transfer was executed to the workman, it was held that the master, as the real purchaser and equitable owner, was bound to indemnify the vendor against all subsequent calls in respect of the shares (*m*). The vendee does not become relieved from his obligation to indemnify his vendor by re-selling and transferring the shares to some third person (*n*).

Rights of scripholders.—Where a defendant had signed the subscription contract of a projected railway company, and had received an allotment of shares with scrip certificates, which he sold before the special Act of incorporation of the company had been obtained, and the shares passed through several hands, and the holder neglected to send the scrip for registration, and the company entered the name of the original allottee in the register as the proprietor of the shares, and the latter, apprehending that a call would be made upon him, again sold the shares; it was held that he was bound to pay over to the scripholder the amount of the purchase-money (*o*).

Transfer deeds.—It is essential to the validity of a deed of transfer of shares that it be duly stamped with the proper *ad valorem* stamp imposed on transfers made upon a sale (*oo*), also that the name of the purchaser, the number and distinguishing marks of the shares, and the price to be paid for them, be inserted in the deed before the execution thereof by the vendor; for material blanks in a deed cannot, as we have seen, be afterwards filled up in the absence of the vendor. The rule of law upon this subject cannot be altered or affected by the practice or custom of the Stock Exchange (*p*). But an error in the transfer in distinguishing the numbers is immaterial, if the transferor has at the time a sufficient number of shares (*q*). Where a vendor of shares executed printed forms of deeds of transfer, in which the number of shares to be sold, the distinguishing marks of those shares, and the

(*l*) *Overend, Gurney & Co., In re, Musgrave and Hart's case*, L.R. 5 Eq. 193; 37 L.J. Ch. 161.

(*m*) *Castellan* v. *Hobson*, L.R. 10 Eq. 47; 39 L.J. Ch. 490.

(*n*) *Kellock* v. *Enthoven*, L.R. 9 Q.B. 241; 43 L.J. Q.B. 90.

(*o*) *Beckitt* v. *Billbrough*, 19 L.J. Ch. 522.

(*oo*) See the Stamp Act, 1891, in Appendix.

(*p*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; 9 L.J. Ex. 217; *Tayler* v. *Great Indian Peninsular Ry.*, 4 De G. & J. 559, 574; 28 L.J. Ch. 285, 709; *Swan, Ex parte*, 7 C.B. N.S. 434, 448; 30 L.J. C.P. 113. See *France* v. *Clark*, 26 Ch.D. 257; 53 L.J. Ch. 585; *Société Générale de Paris* v. *Walker*, 11 App.Cas. 20; 55 L.J. Q.B. 569; *Nanney* v. *Morgan*, 37 Ch D. 346; 57 L.J. Ch. 311; *Roots* v. *Williamson*, 38 Ch.D. 485; 57 L.J. Ch. 995.

(*q*) *Ind's case*, L.R. 7 Ch. 485; 41 L.J. Ch. 564.

names of the transferees, were left in blank, but the stamps which the transfer bore were sufficient in value to cover a transfer of all the vendor's shares, and the broker, after the transfer deed had been delivered to him, fraudulently filled up the blanks with the whole of the vendor's shares, when he had been authorised to sell only a portion, and absconded with the purchase-money, and the fraud was discovered before the transfers had been registered, it was held that the transfers were void; and the Court of Chancery granted an injunction to restrain the registration of the transfers, and prevent any steps being taken to complete the title of the purchaser (*r*). Where a broker employed by the plaintiff to purchase shares which the plaintiff paid for, procured the instrument of transfer to the plaintiff and the plaintiff's signature thereto, and received from the plaintiff the certificate and transfer for the purpose of registration, and soon afterwards, having fraudulently procured the plaintiff to cancel his signature to the transfer, by means of the cancelled transfer and the certificates, induced the vendor to execute a fresh transfer to himself, and thereupon procured the shares to be registered in his own name, and then mortgaged them, it was held that the effect of the first transfer was not destroyed by the cancellation, fraudulently procured; and the registration in the name of the broker and the transfers to his mortgagee were decreed to be set aside (*s*).

Where the previous consent of the company is made essential to the validity of a transfer of shares, such consent may be presumed from the conduct and acts of the company, and they may be estopped from disputing it (*t*). Transfer deeds of shares generally contain an agreement on the part of the purchaser to take and hold the shares subject to the conditions on which the transferor himself held them, or to hold them subject to the regulations of the particular company. One of these rules generally is that the registered owner shall pay calls. If, therefore, a purchaser of shares, after he has executed a deed of transfer, and had the deed delivered to him or to his agent for the purpose of registration, omits to get the deed registered, and the vendor is compelled to pay calls by reason of his name being left on the register, he is entitled to be indemnified by the transferee (*u*). A transfer of shares to an infant is not void, but only

(*r*) *Tayler* v. *Great Indian Peninsular Ry., supra; Swan, Ex parte, supra; Swan* v. *North British Australian Co.*, 2 H. & C. 175; 32 L.J. Ex. 273; *France* v. *Clark, supra.*

(*s*) *Donaldson* v. *Gillot*, L.R. 3 Eq. 274.

(*t*) *Lane, In re*, 33 L.J. Ch. 84; 1 De G. J. & S. 504.

(*u*) *Walker* v. *Bartlett*, 18 C.B. 863; 25 L.J. C.P. 263; distinguishing *Humble* v. *Langston*, 7 M. & W. 517; 10 L.J. Ex. 442.

voidable; and, if the infant after arriving at full age keeps the shares, he cannot afterwards avoid the transfer on the ground of his infancy (*x*).

Registration of forged transfers.—If a transfer of shares has been forged, and the forged transfer entered in the company's books, and the name of the shareholder expunged from the registry on the strength of the forged document, the shareholder does not thereby lose one iota of his rights against the company; he can compel them to restore his name, and may enforce payment of the dividends due to him, whether his name has been restored or not. And, if both the shareholder and the party claiming under the forged transfer bring actions against the company for the recovery of the dividends declared on the shares, the court will not compel them to interplead to establish their rights. If the company have registered a forged transfer, they are answerable to a purchaser under the forged transfer for the value of the shares (*y*). Where trust-money was invested in railway debentures made payable to three trustees, and the debentures were left in the hands of one of the trustees, who received the interest upon them, and subsequently sold the debentures to a *bonâ fide* purchaser, and forged the names of his co-trustees to a transfer of the debentures, and the purchaser presented the debentures at the transfer office of the railway company, and got them transferred into his own name, it was held that the transfer was null and void, and that the trustees were still entitled to the debentures; and the Court of Chancery ordered them to be delivered up to the trustees, and directed the transfer and entry thereof in the company's books to be cancelled. "No laches," it was observed, "could be imputed to the trustees for suffering one of their number to hold the debentures; for some of them must hold them, unless they are deposited with bankers, or placed in a box secured by a number of different locks of which each trustee shall hold one of the keys; and negligence cannot be imputed to trustees for not taking such precautions as these" (*z*).

Where stock in a railway company stood in the names of two proprietors and the one sold the stock and signed a transfer of

(*x*) *Lumsden's case*, L.R. 4 Ch. 31; 39 L.J. Ch. 124. See, however, *ante*, p. 373, 37 & 38 Vict. c. 62.

(*y*) *Dalton* v. *Midland Ry.*, 13 C.B. 474; 22 L.J. C.P. 177; *Hildyard* v. *South Sea Co.*, 2 P. Wms. 75; *Bahia & San Francisco Ry., In re*, L.R. 3 Q.B. 584; 37 L.J. Q.B. 176; *Shaw* v. *Port Philip Gold Mining Co.*, 13 Q.B.D. 103; 53 L.J. Q.B. 369; *Hart* v. *Frontino & Bolivia, &c. Co.*, L.R. 5 Ex. 111; 39 L.J. Ex. 93; *Johnston* v. *Renton*, L.R. 9 Eq. 181; 39 L.J. Ch. 390; see *Sim* v. *Anglo-American Tel. Co.*, 5 Q.B.D. 188; 49 L.J. Q.B. 392; *Balkis Consolidated Co.* v. *Tomkinson*, (1893) A.C. 396; 63 L.J. Q.B. 134. As to power of companies to compensate purchasers of stock for losses by forged transfers, see 54 & 55 Vict. c. 43, and 55 & 56 Vict. c. 36.

(*z*) *Cottam* v. *Eastern Counties Ry.*, 1 Jo. & H. 247; 30 L.J. Ch. 217.

the shares, and forged the signature of his co-proprietor, and the company registered the forged transfer and paid the purchaser the dividends, and the forgery was not discovered for many years, it was held that the company was nevertheless bound to replace the stock (*a*). If the forgery has been occasioned by the plaintiff's gross negligence and misconduct, amounting to an estoppel or a ratification (*b*), or if he has acted so as to be *particeps criminis*, he will be precluded from setting up or relying upon the forgery (*c*); but the negligence or misconduct must be the proximate cause of the forgery and the direct means of effecting it (*d*).

Transfers of stock in the public funds are regulated by the 33 and 34 Vict. c. 71, which also provides for the issue of stock certificates transferable by delivery. Persons to whom transfers of stock are made in the books of the Bank of England are required to underwrite their acceptance of the transfer; but their neglect so to do does not enable the transferor to treat the transfer as a nullity (*e*).

Specific performance of contracts for purchase and sale of stock and shares.—The court will not decree specific performance of a contract for the sale of stock in the public funds generally, as one portion of stock is as good as another, and it must be the same thing to the purchaser, whether he receives the stock agreed to be sold to him, or the money that will purchase it in the market. The purchaser, therefore, is left to his remedy by way of action for damages (*f*). But, if the contract is for certain specific stock or shares in a particular railway company, or joint-stock company, the court will decree a specific performance as against the vendor, provided the rights of third parties have not in the meantime intervened (*g*). A sale of an annuity payable out of the dividends of particular stock has been enforced in specie (*h*). There is no analogy between a contract for the purchase of a quantity of three per cent. consols, or any other stock generally, and where the vendor fulfils his contract by tendering any stock of the description bargained for, and a contract for certain specific, numbered railway shares, mining shares, or scrip (*i*). Where certain numbered railway shares were sold by auction, and the purchaser paid

(*a*) *Taylor* v. *Midland Ry.*, 28 Beav. 287; 29 L.J. Ch. 733; *Sloman* v. *Bank of England*, 14 Sim. 475; 14 L.J. Ch. 226; *Barton* v. *N. Staffordshire Ry.*, 38 Ch.D. 458; 57 L.J. Ch. 800.

(*b*) *Ireland* (*Bank of*) v. *Evans' Charities*, 5 H.L.C. 389, 413. See *Cooper, In re*, 20 Ch.D. 611; 51 L.J. Ch. 862.

(*c*) *Swan, Ex parte*, 7 C.B. N.S. 434; 30 L.J. C.P. 113.

(*d*) *Swan* v. *North British Australian Co.*, 2 H. & C. 175; 32 L.J. Ex. 273, *ante*, p. 603.

(*e*) *Foster* v. *Bank of England*, 8 Q.B. 705; 15 L.J. Q.B. 212; as to the ordinary mode of transferring stock, see Stutfield's Law of the Stock Exchange.

(*f*) *Cud* v. *Rutter*, 20 Vin. Abr. tit. "Stocks," pl. 9; 1 P. Wms. 570.

(*g*) *Doloret* v. *Rothschild*, 1 Sim. & St. 590; 2 L.J. (O.S.) Ch. 125.

(*h*) *Withy* v. *Cottle*, 1 Sim. & St. 174; 1 L.J. (O.S.) Ch. 117.

(*i*) *Duncuft* v. *Albrecht*, 12 Sim. 189, 199.

his purchase-money, but did not take a transfer of the shares, and then sold to a third party who refused to register himself as owner of the shares, and calls were made on the shares which were left unpaid, it was held that the orginal vendor was entitled to a decree for specific performance against the original purchaser (*k*). The court will not enforce performance of a contract for the purchase of scrip certificates in projected companies, and will not, when the company has been completely registered or incorporated, compel the purchaser to take a transfer of the corresponding shares from his vendor, or to indemnify the latter from calls subsequently made (*l*). Nor will specific performance be decreed where the directors, under the powers conferred by the deed of association, refuse to assent to the transfer (*m*). If a party has signed an application for shares in a registered joint-stock company, and shares have been allotted to him in consequence of his application, the Court of Chancery will compel him to sign the written acceptance of the transfer, and pay the calls due on the shares (*n*). But where there is a contract to lend money to a company in instalments on the security of debentures to be issued by the company, and the lender makes default in payment, the court will not grant specific performance, but the company can only recover damages for the actual loss caused by the breach of contract (*o*).

(*k*) *Shaw* v. *Fisher*, 12 Jur. 152; 2 De G. & S. 11; *Paine* v. *Hutchinson*, L.R. 3 Ch. 388; 37 L.J. Ch. 485.

(*l*) *Jackson* v. *Cocker*, 4 Beav. 59; 10 L.J. Ch. 236; *Columbine* v. *Chichester*, 2 Ph. 27; 15 L.J. Ch. 408.

(*m*) *Bermingham* v. *Sheridan*, 33 Beav. 660; 33 L.J. Ch. 571.

(*n*) *New Brunswick Co.* v. *Muggeridge*, 1 Dr. & S. 363; 30 L.J. Ch. 242.

(*o*) *South African Territories* v. *Wallington*, (1898) A.C. 309; 67 L.J. Q.B. 470.

CHAPTER II.

THE CONTRACT OF LETTING.

SECTION I.

LANDLORD AND TENANT.

Leases.—A lease is a contract whereby the temporary use and possession of a house or land are granted by the owner to another for a stipulated or implied remuneration. He who grants the possession and use of the property to be enjoyed for hire is called the lessor or landlord; and he who has the enjoyment of it, paying the rent or hire, is called the lessee or tenant. If the land or realty is granted by deed to be enjoyed for a term, without any payment of rent by the grantee, the grant amounts to a gratuitous loan of the use of the land, and does not create a contract of letting and hiring between the parties. On the other hand a demise for a term of years, if it is by deed, and for the whole term which the lessor has in the premises, operates as an assignment (*a*).

Agreements for leases.—All agreements for leases must be authenticated by some note or memorandum, signed according to the provisions of the Statute of Frauds (*ante*, p. 21); and all leases exceeding three years in duration, required by the Statute of Frauds to be evidenced by a signed writing, must now be authenticated by deed (*ante*, p. 40). Every lease, therefore, in writing, not under seal, for a term exceeding three years in duration, amounts only to an agreement to grant a lease for the term specified (*b*). But, if an oral agreement for a lease has been entered into, and the intended

(*a*) *Parmenter* v. *Webber*, 8 Taunt. 593; *Beardman* v. *Wilson*, L.R. 4 C.P. 57; 38 L.J. C.P. 91.

(*b*) *Bond* v. *Rosling*, *Parker* v. *Taswell*, *Tidey* v. *Mollett*, 16 C.B. N.S. 298; 33 L.J. C.P. 235, *ante*, p. 41; *Burton* v. *Reevell*, 16 M. & W. 307; 16 L.J. Ex. 85; *Rollason* v. *Leon*, 7 H. & N. 73; 31 L.J. Ex. 96.

lessee, relying on the promise of the lessor to grant the lease, takes possession of the land, and expends money in building, draining, and improving, and there is, therefore, a part performance of the contract, the court will enforce the oral contract, and compel the lessor to grant the lease agreed upon, on the ground that, by refusing to grant the lease and give the party possession in execution of the contract, he is guilty of a direct fraud (*c*). Part performance by a sub-lessee is equivalent to part performance by the lessee (*d*). When a party has actually been let into possession under an oral contract of demise, and rent has been paid to and received by the landlord, a tenancy from year to year between the parties arises by implication of law (*post*, p. 614). Possession taken before but continued after an oral contract for a lease for more than three years, if unequivocally referable to the contract, constitutes part performance (*e*). Every contract to grant a lease implies an agreement by the party contracting to grant the lease that he has a good right and title so to do (*f*). There may be an independent and collateral agreement to hold land at a rent, which, although it does not operate as a demise without taking possession, yet is a binding undertaking to pay the amount of the rent (*g*).

Present demises.—No precise words are requisite to constitute a present demise. An estate or term of years in the land may be created and vested in a third party, by giving him a licence to enjoy a house, or making an agreement with him that he "shall reside" therein, provided some certain rent or specified service is reserved, or something is given as the consideration of the contract, and possession is given and accepted under the contract (*h*). If there are any words showing a present intention that one is to give and the other to have possession for a determinate term, a tenancy is created; and this intention may be manifested by expressions contained in a series of letters, as well as by the formal words of a single instrument (*i*). And, on the other hand, although there be formal words of present demise, yet, if there appears from the face of the entire contract a contrary intention, the instrument will be considered only an agreement for a future lease, and will not operate as a present demise (*k*).

(*c*) *Morphett* v. *Jones*, 1 Swanst. 172; *Gregory* v. *Mighell*, 18 Ves. 328; *Mundy* v. *Joliffe*, 5 Myl. & Cr. 167; 8 L.J. Ch. 62; *Parker* v. *Smith*, 1 Coll. 608. See, however, as to this case, the observations of Lord Selborne, L.C., in *Maddison* v. *Alderson*, 8 App.Cas. 467, at p. 482; 52 L.J. Q.B. 737.

(*d*) *Williams* v. *Evans*, L.R. 19 Eq. 547; 44 L.J. Ch. 319.

(*e*) *Hodson* v. *Heuland*, (1896) 2 Ch. 428; 65 L.J. Ch. 754.

(*f*) *Stranks* v. *St. John*, L.R. 2 C.P. 376; 36 L.J. C.P. 118.

(*g*) *Adams* v. *Hagger*, 4 Q.B.D. 480.

(*h*) Co. Litt. 45, b; Bac. Ab. Leases (K.); *Right* v. *Proctor*, 4 Burr. 2209.

(*i*) *Chapman* v. *Bluck*, 5 Sc. 515, 531; 7 L.J. C.P. 100; *Jones* v. *Reynolds*, 1 Q.B. 506; 10 L.J. Q.B. 193.

(*k*) *Morgan* v. *Bissell*, 3 Taunt. 72;

It is a rule of law that, whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession and profits of the land, and the other come into them for such a determinate time, for a certain hire or rent, such words, whether they run in the form of an assignment, or of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose (*l*). A lease may be made either for life, or for years, or at will; and a contract for letting and hiring of land will, if it cannot operate as an assignment, be supported as a lease, although it was intended to pass all the lessor's interest (*m*). Whenever the house or land of one man has been occupied by another, the *primâ facie* presumption is that the use and occupation are to be paid for; and the landlord is entitled to maintain an action to recover a reasonable hire and reward for the use of the land, unless the tenant can show that he entered into possession of the property under circumstances fairly leading to an opposite conclusion. A landlord, on the other hand, who has permitted a tenant to occupy property, and has received rent from the latter for such use and occupation, will be bound by his own acts, and cannot afterwards treat such tenant as a trespasser and turn him out of possession without a proper notice to quit. But, if the tenant is a pauper who has been provided with a dwelling-house by the parish, or an old servant who has been accommodated with a cottage and garden by his master, or the son or other near relation of the owner, the possession and occupation do not raise a presumption of a contract of letting and hiring between the parties. The transaction amounts only to a *commodatum*, or gratuitous loan of the property for use. The possession of the tenant is the possession of the landlord or owner; and the former may at any time be removed at the will and pleasure of the latter (*n*).

Proof of terms of holding.—If a tenancy is actually created by entry on the land and payment of rent, the terms of the tenancy may be proved by oral testimony. Where land was about to be let, and printed papers of the terms of holding were distributed among parties, who assented verbally to the printed terms, and subsequently became tenants, it was held that a witness might

Doe v. *Powell*, 8 Sc. N.R. 687; *Gore* v. *Lloyd*, 12 M. & W. 463; 13 L.J. Ex. 366; *Doe* v. *Clarke*, 7 Q.B. 211; 14 L.J. Q.B. 233; *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L.J. Q.B. 164.

(*l*) Bac. Abr. Leases (K); Shep. Touch. ch. 14, 272; Bro. Abr. (Lease), pl. 60; *Cottee* v. *Richardson*, 7 Exch. 143; 21 L.J. Ex. 52.

(*m*) *Pollock* v. *Stacy*, 9 Q.B. 1033; 16 L.J. Q.B. 132.

(*n*) *Bertie* v. *Beaumont*, 16 East, 33; *Hunt* v. *Colson*, 3 M. & Sc. 790; *Doe* v. *Stanton*, 2 B. & Ald. 371.

look at the printed paper to refresh his memory when he was asked to prove the terms of the holding from recollection (*o*).

Lease by estoppel.—We have already seen (*ante*, p. 67) that no man is permitted to prove anything in contradiction of his own deed. Where, therefore, a man grants a lease under seal, he is not permitted to avoid his own grant by proving that he had no interest in the demised premises, unless he is a trustee for the public, deriving his authority from an Act of Parliament (*p*). As between him and his lessee, the lease operates by way of estoppel. "And if one makes a lease for years, by indenture, of lands wherein he hath nothing at the time of such lease made, and after purchases those very lands, this shall make good and unavoidable his lease, as well as if he had been in the actual possession and seisin thereof at the time of such lease made; because he, having by indenture expressly demised those lands, is, by his own act, estopped and concluded to say he did not demise them; and if he cannot aver that he did not demise them, then there is nothing to take off or impeach the validity of the indenture, which expressly affirms that he did demise them; and consequently the lessee may take advantage thereof, whenever the lessor comes to such an estate in those lands as is capable to sustain and support that lease" (*q*). And, when the estoppel becomes good in point of interest, the heir of the lessor, and all persons claiming under the lessor by assignment or otherwise, are bound by the estoppel (*r*). Upon the execution of the lease there is created, in contemplation of law, a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee. So long, therefore, as a lessee enjoys everything which his lease purports to grant, he has no concern with the title of the lessor or the heir or assignee of the lessor (*s*). If, however, it appears, by the recitals of the lease, that the lessor had no interest in the land, or that he had only an equitable interest, at the time of the demise, there will be no estoppel (*t*). The lessee is also in like manner estopped from denying the lessor's title to grant the lease, and setting up such want of title as an answer to an action for the rent by the lessor or his assignee (*u*); for the law will not suffer the tenant to abuse a possession gained by the con-

(*o*) *Bolton* (*Lord*) v. *Tomlin*, 5 Ad. & E. 856; 6 L.J. K.B. 45.

(*p*) *Fairtitle* v. *Gilbert*, 2 T.R. 169.

(*q*) Bac. Abr. Lease (O).

(*r*) *Trevivan* v. *Lawrence*, 1 Salk. 276; *Goodtitle* v. *Morse*, 3 T.R. 365, 371; 2 Wms. Saund. 418, a; *Doe* v. *Thompson*, 9 Q.B. 1043.

(*s*) *Cuthbertson* v. *Irving*, 6 H. & N. 135; 29 L.J. Ex. 485.

(*t*) *Pargeter* v. *Harris*, 7 Q.B. 708; 15 L.J. Q.B. 113; *Greenaway* v. *Hart*, 14 C.B. 340; 23 L.J. C.P. 115; but see *Morton* v. *Woods*, L.R. 4 Q.B. 293; 38 L.J. Q.B. 81; *Punnett*, *Ex parte*, 16 Ch.D. 226; 50 L.J. Ch. 212.

(*u*) *Cuthbertson* v. *Irving*, *supra*.

fidence of the landlord, and turn it to the injury of the latter (*x*). But he may show that the lessor's title has expired (*y*); and, if he is evicted and deprived of the use and enjoyment of the demised premises by some person claiming by title paramount, the eviction is pleadable in bar to a demand of the rent; but it must be an actual, and not a mere constructive, eviction (*z*). An attornment to a receiver appointed by the court constitutes a tenancy by estoppel between the tenant and the receiver which the court applies for the purpose of collecting the rents till a decree can be pronounced, taking care that the tenant shall be protected both while the receiver continues to act and when he is withdrawn (*a*).

Demises by agents.—If the steward of a person not named says to an occupier, "I let you into possession in the name of the landlord," he may afterwards show by parol evidence who that landlord is; and it is not open to the tenant to dispute the title of the unnamed landlord (*b*). Where an agreement was entered into by an agent in his own name for the letting of a house, and the rent was made payable to the agent in his own name, but at the commencement of the agreement he described himself as agent for the proprietors, it was held that he might show who were the proprietors at the time the agreement was signed, and that the tenant was estopped from disputing their title (*c*). A land-agent, or collector of rents, has, as such, no implied authority to grant leases (*d*).

Ascertainment and identification of subject-matter of demise.—It may always be shown by parol evidence what was, and what was not, parcel of the demise (*e*). If a general description be used in a lease, all the things usually comprehended under such general description will pass to the lessee, unless the surrounding circumstances plainly show that such could not have been the intention. By parol evidence of extrinsic circumstances, a general term may be restricted so as to pass much less than is ordinarily comprised under the common legal acceptance of the term, and, on the other hand, a limited description may be enlarged, so as to comprehend much more than it generally comprises (*f*). Under the word

(*x*) *Dolby* v. *Iles*, 11 Ad. & E. 335; 9 L.J. Q.B. 51; *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50; *Levy* v. *Lewis*, 30 L.J. C.P. 141; 9 C.B. N.S. 872.

(*y*) *Claridge* v. *M'Kenzie*, 4 Sc. N.R. 796, 811; 11 L.J. C.P. 72; *Doe* v. *Skirrow*, 7 Ad. & E. 157; *Downs* v. *Cooper*, 2 Q.B. 263; 11 L.J. Q.B. 2.

(*z*) *Delaney* v. *Fox*, 2 C.B. N.S. 768; 26 L.J. C.P. 248.

(*a*) *Evans* v. *Mathias*, 7 E. & B. 590; 26 L.J. Q.B. 309.

(*b*) Tindal, C.J., *Fleming* v. *Gooding*, 10 Bing. 550; 3 L.J. C.P. 214.

(*c*) *Per* Mellor, J., *Prescott* v. *Ingram*, June 23rd, 1864; *Fleming* v. *Gooding*, *supra*.

(*d*) *Collen* v. *Gardner*, 21 Beav. 540.

(*e*) *Skipwith* v. *Green*, 8 Mod. 311.

(*f*) *Doe* v. *Burt*, 1 T.R. 703; *Bryan* v. *Wetherhead*, Cro. Car. 17; *Kerslake* v. *White*, 2 Stark. 508; *Martyr* v. *Lawrence*, 10 Jur. N.S. 859; 2 De G. J. & S. 261.

"cottage" or "house," on the other hand, land may pass, if it can be shown that the land has for a length of time been used and occupied with the cottage or house at one entire rent, and has been commonly reputed to be part and parcel thereof. "Being found to be all one, it passeth well by the lease." Divers things that, by continual enjoyment with the principal thing demised, have by common reputation been deemed to belong to it, may well pass as part and parcel of the principal thing demised, if extrinsic circumstances show that such must have been the intention of the parties (*g*). Wherever there is a sufficient description to ascertain the thing demised, a part of the description which is inaccurate may be rejected (*h*).

Things appurtenant.—When a man grants a thing to be used for hire, he grants it with all such appurtenances as properly belong to it, and with all such rights of way as are necessary to enable the hirer to have that use of the thing demised for which the hire is agreed to be paid (*i*). But a grant of realty, to be used by the grantee for a term for rent or hire, transfers to the latter a right only, as we shall presently see, to use the subject-matter of the demise in the way in which it has been previously used. Many things, therefore, which pass by a grant in fee, so as to give the grantee an absolute dominion over them, do not pass by a lease so as to give the lessee a right to use them as part of the proceeds of the subject-matter of the demise. The lessee, for example, has a right only to the casual profits of trees; he has no right to cut them down and sever them from the freehold and inheritance. He has a right to the profits of mines and quarries opened at the time of the demise, but has no right to open fresh mines and quarries where none before existed.

Commencement and duration of leases.—Leases for lives, as well as leases for terms of years, may now be made to commence from a day that is passed, or from a day to come, as well as from the day of the making of the lease. If the lease is limited to commence "from the date," or "from the day of the date," the words are either inclusive or exclusive, according to the context of the written instrument, and the apparent intention of the contracting parties (*j*). A lease "from the day of the date," and "from henceforth," is the same thing; if, therefore, a lease be dated the

(*g*) *Gennings* v. *Lake*, Cro. Car. 168; *Ongley* v. *Chambers*, 1 Bing. 483, 496; 2 L.J. (O.S.) C.P. 49.

(*h*) *Doe* v. *Galloway*, 5 B. & Ad. 49; 2 L.J. K.B. 182; *Cowen* v. *Truefitt*, (1899) 2 Ch. 309; 68 L.J. Ch. 563.

(*i*) *Morris* v. *Edgington*, 3 Taunt. 31; *Kooystra* v. *Lucas*, 5 B. & Ald. 830; *Harding* v. *Wilson*, 2 B. & C. 96; 1 L.J. (O.S.) K.B. 238; *Maitland* v. *Mackinnon*, 1 H. & C. 607; 32 L.J. Ex. 49.

(*j*) *Pugh* v. *Leeds* (*Duke*), Cowp. 714; and see *ante*, p. 54.

1st of December, and be granted to commence "from henceforth," and be sealed and delivered on the 12th of December, the lease commences in contemplation of law from the 1st of December (*k*). If in the case of a present demise no time is mentioned for the commencement of the lease, or if the date is an impossible date, the term will be deemed to begin from the day of the delivery of the deed, or of the making of the demise, if extrinsic circumstances do not rebut such a presumption (*l*). But it is otherwise in the case of an executory demise (*m*). The commencement of the term is necessarily controlled by extrinsic circumstances, as well as by the express terms of the deed (*n*). Where a lease was dated the 25th of March, 1783, and the term was granted to commence "from the 25th of March now last past," and it was proved that the deed was not executed until some time after the day on which it was dated, it was held that the term commenced on the 25th of March, 1783, and not on the 25th of March, 1782 (*o*). If the land is demised "for a year, and so on from year to year," or "for a year, and afterwards from year to year," this is a lease for two years certain at least (*p*). But, if the demise is from year to year, so long as both parties please, it is a lease only for a year certain, and is determinable at the end of the first as well as of any subsequent year (*q*). If the demise is for "one year certain," and six months' notice afterwards, the lease is only a lease for a year (*r*). If the land is expressed to be demised for years generally, the lease is said to be good for two years at the least (*s*). A house and land were demised for the term of six months, and so on from six months to six months, until one of the parties shall give the other six calendar months' notice of his intention to determine the tenancy, and it was held that this was a lease for one year at least (*t*).

If a lease is granted for seven, fourteen, or twenty-one years, and the lessee enters and takes possession of the demised premises, the legal construction of the lease is that the lessee is entitled at his option to take that term which is most beneficial to himself. The lessee therefore has the option, at the expiration of the first

(*k*) *Llewelyn* v. *Williams*, Cro. Jac. 258.

(*l*) *Styles* v. *Wardle*, 4 B. & C. 908; 4 L.J. (O.S.) K.B. 81; *Higham* v. *Cookes*, 4 Leon. 144; Co. Litt. 46, b.

(*m*) *Marshall* v. *Berridge*, 19 Ch.D. 233; 51 L.J. Ch. 329, overruling *Jaques* v. *Miller*, 6 Ch.D. 153.

(*n*) *Lander's Contract, In re*, (1892) 3 Ch. 41; 61 L.J. Ch. 707.

(*o*) *Steele* v. *Mart*, 6 D. & R. 392; 4 B. & C. 272.

(*p*) Bac. Abr. Leases (L), 838; *Legg* v. *Strudwick*, 2 Salk. 414; *Denn* v. *Cartwright*, 4 East, 29; *Doe* v. *Green*, 9 Ad. & E. 658; 8 L.J. Q.B. 100.

(*q*) *Doe* v. *Smaridge*, 7 Q.B. 957; 14 L.J. Q.B. 327.

(*r*) *Thompson* v. *Maberly*, 2 Campb. 573; *Jones* v. *Nixon*, 1 H. & C. 48; 31 L.J. Ex. 505.

(*s*) Bro. Abr. Lease, 13; 6 Co. 35, 36.

(*t*) *Reg.* v. *Chawton Inhabitants*, 1 Q.B. 247; 10 L.J. M.C. 55.

seven years, of continuing the lease on for another seven years; and, after that term has expired, for the full period of twenty-one years if he chooses so to do, the courts leaning in favour of that construction which is the most favourable to the lessee (*u*). Where the lessor agreed not to raise the rent nor turn the tenant out of possession so long as the rent was duly paid quarterly, it was held that this operated as an agreement for a tenancy from year to year. If in a lease under seal the lessor covenants not to raise the rent, nor turn out the tenant, so long as the rent is duly paid, this is a lease for life. If the undertaking is contained in a lease not under seal, it operates only as a simple contract or agreement, for a breach of which the tenant may recover damages from the lessor; but it does not prevent the latter from ejecting the tenant after the ordinary notice to quit (*v*). If the full extent and duration of the term are uncertain, but there is a certainty for some specific portion of time, the lease will be good for such term or portion of time, and void as to the residue (*x*). If no time at all is mentioned for the duration of the term, and there has been no entry upon the land nor payment of rent, there is no lease at all; but, if the lessee has actually entered and taken possession, the duration of the term of hiring will be regulated by the nature of the subject-matter of the demise, the times limited for the payment of the rent, and the custom of the country where the property is situate.

Leases from year to year.—In the case of a general demise of farms or lands, no term being mentioned, the presumption is by custom in favour of a yearly hiring (*y*) in the absence of an express limitation of the term. If a corn-field or an orchard is demised at a customary and ordinary rent, the hiring will be deemed to be for a year, and so on from year to year, in order that the tenant may reap the harvest and gather the fruits when they come to perfection, as the rent is reasonably presumed to be paid for the enjoyment thereof, and not for the barren occupation of the land itself. "If the produce of the demised lands requires two years to come to perfection, as if it be liquorice, madder, &c., a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first or third year" (*z*). Where lands were demised to J. H., his heirs, executors, and assigns for ever, at a yearly rent, with a proviso for re-entry in case of non-payment of rent, it was held that the deed created only

(*u*) *Dann* v. *Spurrier*, 3 Bos. & P. 399, 404; *Doe* v. *Dixon*, 9 East, 15; *Goodright* v. *Richardson*, 3 T.R. 462.

(*v*) *Doe* v. *Browne*, 8 East, 165; see *Wood* v. *Beard*, 2 Ex.D. 30; 46 L.J. Ex. 100.

(*x*) *Gwynne* v. *Mainstone*, 3 C. & P. 302.

(*y*) 13 Hen. 8, 15, b.; *Doe* v. *Watt*, 7 T.R. 85.

(*z*) Adams on Eject. 99 (ed. 4).

a tenancy from year to year (*a*). If an intended lessee enters into possession of realty under an agreement for a lease, he is tenant at will or tenant by sufferance until the lease is made; but, if he remains in possession and pays rent, he becomes tenant from year to year until the lease is duly executed according to the agreement (*b*). In such a case the tenant holds on such of the terms of the agreement as are applicable to a yearly tenancy; and, if he enters under an agreement for a seven years' lease by which he is to do certain repairs in the last year of the term, and holds during the whole of the seven years, he must do the repairs (*c*). And, if he holds over after the expiration of the term, and the landlord receives from him rent which has accrued due subsequently to the expiration of the lease, he becomes a tenant from year to year (*d*).

If a man takes possession of premises under an invalid lease from a tenant for life, and the remainderman accepts rent, or does any act recognising the party in possession as his tenant, the latter forthwith becomes a lessee from year to year (*e*); but the mere acceptance of two shillings and sixpence in a chief rent is not sufficient evidence of a tenancy from year to year (*f*). So, if a man enters into possession as an intended purchaser, and agrees "to pay and allow" to the vendor "at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase in equal half-yearly payments," he becomes tenant to the intended vendor "at a fixed rent of 100*l.* per annum, payable half-yearly" (*g*). A tenancy from year to year is ordinarily implied from the payment and acceptance of rent; but this *primâ facie* presumption may be rebutted by showing that the money was paid or received by mistake. Since the Judicature Act the rules of equity prevail; and if there is an agreement for a lease, the tenant holds under the terms of it before any payment of rent (*h*). The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, has long been exploded (*i*). A tenancy from year to year re-commences every year (*j*). A demise by a tenant from year to year to another,

(*a*) *Doe* v. *Gardiner*, 12 C.B. 319; 21 L.J. C.P. 222.

(*b*) *Mann* v. *Lovejoy*, R. & M. 355; *Doe* v. *Pullen*, 3 Sc. 271, 276; 5 L.J. C.P. 229; *Doe* v. *Smith*, 1 M. & R. 137; *Knight* v. *Bennett*, 11 Moore, 223: 4 L.J. (O.S.) C.P. 95; *Doe* v. *Amey*, 12 Ad. & E. 476; 4 P. & D. 177; *Braythwayte* v. *Hitchcock*, 10 M. & W. 494; 12 L.J. Ex. 38.

(*c*) *Martin* v. *Smith*, L.R. 9 Ex. 50; 43 L.J. Ex. 42.

(*d*) *Bishop* v. *Howard*, 2 B. & C. 100; 1 L.J. (O.S.) K.B. 243.

(*e*) *Doe* v. *Morse*, 1 B. & Ad. 365.

(*f*) *Smith* v. *Widlake*, 3 C.P.D. 10; 47 L.J. C.P. 282.

(*g*) *Saunders* v. *Musgrave*, 6 B. & C. 524; 5 L.J. (O.S.) K.B. 192.

(*h*) *Walsh* v. *Lonsdale*, 21 Ch.D. 9; 52 L.J. Ch. 2.

(*i*) *Doe* v. *Browne*, 8 East, 167.

(*j*) *Tomkins* v. *Lawrance*, 8 C. & P. 731; *Gandy* v. *Jubber*, 33 L.J. Q.B. 151; 5 B. & S. 78; *Doe* v. *Dobell*, 1 G. & Dav. 218; but this has been doubted, see *Bartlett* v. *Baker*, 34 L.J. Ex. 8, 11; 3 H. & C. 153.

also to hold from year to year, is, in contemplation of law, a demise from year to year during the continuance of the original demise to the intermediate landlord (*k*).

Half-yearly, quarterly, monthly, and weekly hirings.—If an annual rent is reserved, the holding is from year to year, although the contract of demise provides that the tenant shall quit at a quarter's notice. Such a contract differs only from the usual letting from year to year in the agreement by the parties to reduce the ordinary six months' notice to quit to three months. But, if it is expressly agreed that the tenant is always to be subject to quit at six months' notice given him at any time, this constitutes a half-yearly tenancy, and the lessee will be presumed to hold from six months to six months from the time that he entered as tenant. If he is to hold until one of the parties shall give unto the other three months' notice to quit at the expiration of such notice, the tenancy will be a quarterly tenancy (*l*). In the case of a demise of an unfurnished mansion at an annual rent, payable half-yearly or quarterly, the hiring is a hiring from year to year. In the case of cottages or unfurnished apartments in a house demised at a monthly or weekly rent, the presumption is in favour of a monthly or a weekly tenancy. Where a wharf, warehouse, and buildings were let on the terms that a quarter's rent should be paid down on the day of the commencement of the tenancy, and should be continued to be paid in advance during the continuance of the hiring, it was held that this was a quarterly and not a yearly hiring (*m*). There is no objection in law to a tenancy determinable by a week's notice to quit, and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods (*n*).

Tenancy at will.—If the lessor reserves to himself a right of re-entry at his own will and pleasure, or the lease contains an express stipulation to the effect that the tenancy may be put an end to at the will of either party, the holding is a tenancy at will (*o*). The reservation of a yearly or quarterly rent is not inconsistent with a tenancy at will (*p*). A mere permission to occupy creates a tenancy at will. If a tenant for years holds over after the expiration of his lease, or continues in possession pending a treaty for a further lease (*q*), or is admitted into possession

(*k*) *Pike* v. *Eyre*, 9 B. & C. 909; 8 L.J. (O.S.) K.B. 69.

(*l*) *Doe* v. *Grafton*, 18 Q.B. 496; 21 L.J. Q.B. 276; *Kemp* v. *Derrett*, 3 Campb. 510.

(*m*) *Wilkinson* v. *Hall*, 4 Sc. 301; 6 L.J. C.P. 82; *Towne* v. *Campbell*, 3 C.B. 921; 16 L.J. C.P. 128.

(*n*) *Cornish* v. *Stubbs*, L.R. 5 C.P. 334; 39 L.J. C.P. 202.

(*o*) *Richardson* v. *Langridge*, 4 Taunt. 131; *Cudlip* v. *Rundal*, 4 Mod. 12; 3 Salk. 156; *Bayley* v. *Fitzmaurice*, 8 E. & B. 664; 27 L.J. Q.B. 143.

(*p*) Litt. sec. 72; *Doe* v. *Davies*, 7 Exch. 91; 21 L.J. Ex. 60; *Doe* v. *Cox*, 11 Q.B. 122; 17 L.J. Q.B. 3.

(*q*) Com. Dig. tit. Estates (H. 1); *Doe* v. *Stennet*, 2 Esp. 717.

pending a treaty for a purchase (*r*), he is strictly a tenant at the will of the landlord, and may be turned out of possession without notice to quit; but if, during the continuance of such tenancy at will, the tenant has offered, and the landlord has accepted, rent for the use of the property, the law infers that a yearly tenancy was meant to be created between them (*s*). A minister of a dissenting congregation, placed in the possession of a chapel and dwelling-house by trustees in whom the property is vested in trust to permit the chapel and dwelling-house to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined *instanter* by a demand of possession (*t*). A tenant at will is entitled to retain possession of the land he holds until the lessor has made a demand of possession (*u*), or has intimated, either by express words or by his conduct and actions, his determination to put an end to the tenancy. The holding may be determined by a letter, stating that, unless the tenant pays the lessor what he owes him, he will, without delay, take measures for recovering possession of the property (*x*), or by a demand of possession on the part of the landlord (*y*), or by his entry on the land without the tenant's consent and making livery of seisin to another (*z*), or exercising acts of ownership; also by his alienation of the reversion; by the tenant's quitting the premises; by the death of either of the parties; by the bankruptcy of the lessor; and, in short, by the doing of any act which amounts to a determination of the will on either side. An entry by the landlord for the purpose of repairing the premises and without objection by the tenant does not determine the tenancy (*a*). But a tenant at will cannot determine his tenancy by transferring his interest to a third party, without notice to his landlord (*b*). If the will is determined, and the landlord's consent to the occupation is withdrawn, so as to create an adverse possession, and the landlord afterwards does any act fairly leading to the presumption that he has renewed his consent to the holding, a fresh tenancy at will is created between the parties (*c*). A tenancy at will is deter-

(*r*) *Doe* v. *Chamberlaine*, 5 M. & W. 14; 9 L.J. Ex. 38.

(*s*) *Clayton* v. *Blakey*, 8 T.R. 3; *Dougal* v. *McCarthy*, (1896) 1 Q.B. 736; 62 L.J. Q.B. 462.

(*t*) *Doe* v. *M'Kaeg*, 10 B. & C. 721; *Doe* v. *Jones*, 10 B. & C. 718; 8 L.J. (O.S.) K.B. 310; *Revett* v. *Browne*, 2 Moo. & P. 12; 6 L.J. (O.S.) C.P. 194.

(*u*) *Right* v. *Beard*, 13 East, 210.

(*x*) *Doe* v. *Price*, 2 M. & Sc. 464; 9 Bing. 356.

(*y*) *Locke* v. *Matthews*, 13 C.B. N.S. 753; 32 L.J. C.P. 98.

(*z*) *Ball* v. *Cullimore*, 2 Cr. M. & R. 120; 4 L.J. Ex. 137.

(*a*) *Lynes* v. *Snaith*, (1899) 1 Q.B. 486; 68 L.J. Q.B. 275.

(*b*) *Pinhorn* v. *Souster*, 8 Exch. 763; 22 L.J. Ex. 266.

(*c*) *Doe* v. *Turner*, 7 M. & W. 232; 10 L.J. Ex. 213; *Turner* v. *Doe*, 9 M. & W. 643; 11 L.J. Ex. 453; *Doe* v. *Thomas*, 6 Exch. 854; 20 L.J. Ex. 367.

mined by a mortgage of the premises by the landlord, such mortgage being brought to the knowledge of the tenant (*d*).

Tenancy by sufferance.—When the landlord has demanded possession, or has done any act which is tantamount to a determination of the will, or when the tenant holds over at the expiration of a lease against the will of the lord, or after the expiration of a notice to quit, the tenant is said to be a tenant at sufferance in contradistinction to a tenant at will (*e*). The expression, however, is not calculated to give a correct idea of the nature of the holding, and does not seem to have been very happily chosen. Although termed tenant by sufferance, he is understood to hold wrongfully and against the will, and contrary to the permission, of the landlord. He has, consequently, no estate or interest at all in the land; and an action of ejectment may at any time be brought against him without notice or demand of possession; and, if the lord can get possession peaceably, he is entitled to take and retain possession, and so oust the wrongdoer (*f*). The difference, therefore, between a tenancy at will and what is called a tenancy by sufferance is that, in the one case, the tenant holds by right, and has an estate or term in the land, precarious though it be, and the relationship of lessor and lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission of the lord, and has no estate at all in the occupied premises. When a tenancy at sufferance has existed for twenty (now twelve) years, the landlord's right of entry is barred by statute, and the tenant becomes the absolute and complete owner of the property (*g*).

Leases under powers.—If a lease granted in the intended exercise of a power of leasing is invalid by reason of the non-observance of the terms of the power, such lease, if made *bonâ fide*, and if the lessee has entered thereunder, is deemed a contract to grant the lease, and all persons who would have been bound by the lease, if lawfully granted under the power, will be bound by such contract. Acceptance of rent under such invalid lease is a confirmation of the lease as against the person so accepting rent. Leases, also, invalid at the time of the grant thereof, may become valid, if the grantor subsequently acquires the requisite power of leasing (*h*). In a lease under a power, a covenant to renew the lease at its expiration is a good covenant, even though the lease

(*d*) *Jarman* v. *Hale*, (1899) 1 Q.B. 994; 68 L.J. Q.B. 681.

(*e*) Co. Litt. 57 b.

(*f*) *Fox* v. *Oakley*, Peake's Ad.Ca. 214. As to small tenements, see 1 & 2 Vict. c. 74.

(*g*) *Doe* v. *Gower*, 21 L.J. Q.B. 57; 17 Q.B. 589; 37 & 38 Vict. c. 57, s. 1.

(*h*) 12 & 13 Vict. c. 26; 13 Vict. c. 17. See *Gas Light & Coke Co.* v. *Towse*, *infra*.

was for the full term authorised by the power; but when the term expires and the new lease is to be made, it must be shown that the rent and covenants stipulated for are the best rent and the most proper covenants at that time (*i*).

Rights and liabilities of lessor and lessee.—Every lessor binds himself to give possession and not to give the party to whom he demises a mere right to take possession from a wrong-doer by an action (*k*); and every lessee binds himself to accept possession and pay rent (*l*). If a party has agreed to take a house from a particular day, provided certain things are before then done by the landlord, and the things are not done, he may decline to go on with the contract, and may refuse to take possession (*m*). A lessee who has contracted orally for the hire of realty, and who neglects or refuses to accept possession of the demised premises, cannot, as we have seen (*ante*, pp. 21, 40), be sued upon such oral agreement for damages for not taking possession, nor upon any oral promise to pay rent, nor for use and occupation. In the case of leases under seal, the law implies from the words "yielding and paying," or any equivalent words amounting to a reservation of rent, a covenant on the part of the lessee to pay the rent so reserved, and, in the case of parol leases, a promise to the like effect (*n*). But the liability of a lessee upon all express and implied covenants and agreements for the payment of rent is dependent upon his being put into possession, or being tendered and offered the opportunity of taking possession (*o*). The quiet enjoyment also by the lessee, as against the lessor and all that come in under him by title, and against others claiming by title paramount, during the time in respect of which the rent is claimed to have accrued due, is a condition precedent to the tenant's liability for the payment of such rent. But the tenant is not released from liability by reason of a mere constructive eviction (*p*), or a disturbance from a mere wrong-doer.

Covenants for quiet enjoyment.—From the use by a grantor of certain words having a known legal operation the law infers a covenant on the part of such grantor to protect the estate; as, if a man by deed demises land for years, the word "demise" imports or makes a covenant in law for quiet enjoyment (*q*). If by the

(*i*) *Gas Light & Coke Co.* v. *Towse*, 35 Ch.D. 519; 56 L.J. Ch. 889.

(*k*) *Coe* v. *Clay*, 3 Moo & P. 57; 7 L.J. (O.S.) C.P. 162; *Jinks* v. *Edwards*, 11 Exch. 775; *Neale* v. *Mackenzie*, 1 M. & W. 747; 6 L.J. Ex. 263; Bract. lib. 2, c. 28, fol. 62. As to agreements for a lease, see *Drury* v. *Macnamara*, 5 E. & B. 616; 25 L.J. Q.B. 5.

(*l*) *Stanley* v. *Hayes*, 3 Q.B. 105; 11 L.J. Q.B. 176; *Kelly* v. *Rogers*, (1892) 1 Q.B. 910; 61 L.J. Q.B. 604.

(*m*) *Tidey* v. *Mollett*, 16 C.B. N.S. 298; 33 L.J. C.P. 235, *ante*, p. 41.

(*n*) Bac. Abr. Leases, 633; Covenant, B. 342.

(*o*) *Holgate* v. *Kay*, 1 Car. & K. 341.

(*p*) *Delaney* v. *Fox*, 2 C.B. N.S. 768; 26 L.J. C.P. 248, *ante*, p. 611.

(*q*) *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737; 31 L.J. Q.B. 257.

terms of a lease the lessor "warrants" the demised premises to the lessee, this amounts to an express covenant for quiet enjoyment during the whole term (*r*). It is in every case a question of fact whether there has been a breach of the covenant for quiet enjoyment; but where the ordinary and lawful use of the demised land is substantially interfered with by the acts of the lessor or those claiming under him, the covenant is broken, even although neither the title to the land nor the possession of the land is otherwise affected (*s*). The interruption must have been caused either by the direct act of the lessor or those claiming under him, or by some act the consequences of which might have been foreseen when the covenant was entered into (*t*). Covenants for quiet enjoyment are broken, if the lessor builds on his own adjoining land so as to darken the lessee's windows, or does anything thereon which creates a nuisance. The erection of a gate across a lane through which the tenant has a way to the demised premises is a breach of a covenant for quiet enjoyment (*u*); and so is the placing of any structure upon any part of the demised premises (*x*). But a decree in Chancery that the land conveyed by the grantor is subject to a general right of common is not a breach of the grantee's covenant for quiet enjoyment where there has been no entry on the land (*y*). Where the lessors served the lessee's sub-tenants with notice not to pay rent to the lessee, and threatened legal proceedings, it was held to be a breach of the covenant for quiet enjoyment (*z*). The covenant is prospective, and is only a covenant that from the time of granting the lease the premises shall not be obstructed by any act done thereafter (*a*), or by the probable or necessary consequence of any act done before the granting of the lease (*b*). The usual express covenant by the lessor that the lessee shall quietly enjoy, &c., without interruption or disturbance by the lessor or any person claiming under him, is not broken by an entry on the tenant by the land-tax collector to distrain for arrears of land-tax due from the lessor, the disturbance not being by a person claiming by title from the lessor (*c*). And, where a covenant for quiet enjoyment

(*r*) *Williams* v. *Burrell*, 1 C.B. 429; 14 L.J. C.P. 98, *ante*, p. 47.

(*s*) *Sanderson* v. *Berwick* (*Mayor*), 13 Q.B.D. 547; 53 L.J. Q.B. 559. See *Jenkins* v. *Jackson*, 40 Ch.D. 71; 58 L.J. Ch. 124; *Robinson* v. *Kelvert*, 41 Ch.D. 88; 58 L.J. Ch. 392; *Manchester, S. & L. Ry.* v. *Anderson*, (1898) 2 Ch. 394; 67 L.J. Ch. 568; *Tebb* v. *Cave*, (1900) 1 Ch. 642; 69 L.J. Ch. 282.

(*t*) *Harrison* v. *Muncaster* (*Lord*), (1891) 2 Q.B. 680; 61 L.J. Q.B. 102.

(*u*) *Andrews* v. *Paradise*, 3 Mod. 319; *Morris* v. *Edgington*, 3 Taunt. 24.

(*x*) *Kidder* v. *West*, 3 Lev. 167.

(*y*) *Howard* v. *Maitland*, 11 Q.B.D. 695; 53 L.J. Q.B. 42.

(*z*) *Edge* v. *Boileau*, 16 Q.B.D. 117; 55 L.J. Q.B. 90.

(*a*) *Anderson* v. *Oppenheimer*, 5 Q.B.D. 602; 49 L.J. Q.B. 708.

(*b*) *Shaw* v. *Stenton*, 2 H. & N. 858.

(*c*) *Stanley* v. *Hayes*, 3 Q.B. 105; 11 Q.B. 176; *Kelly* v. *Rogers*, (1892) 1 Q.B. 910; 61 L.J. Q.B. 604; *Cohen* v. *Tannar*, (1900) 2 Q.B. 609; 69 L.J. Q.B. 904. As to an implied covenant for title on the part of the lessor, or that he has

is accompanied by a covenant by the lessee not to use the land for certain purposes, the first covenant does not guarantee to the tenant that he may lawfully use the land for any purpose not included in the restrictions in the lease (*d*). So, also, an express covenant that an underlessee should deliver up all landlord's fixtures at the end of the term does not raise an implied covenant that he may remove trade fixtures (*e*). Whenever a person demises the surface of land, reserving a right to win and work minerals, he cannot exercise the right so as to let down or injure the surface; for that would be derogating from his own grant, and would also be a breach of a covenant for quiet enjoyment (*f*). If a lessor's estate expires during the term, and the lessee is thereupon evicted by title paramount, no action can be maintained against the lessor for the breach of any implied covenant for title or for quiet enjoyment, any such implied covenant terminating with the expiration of the lessor's estate (*g*).

Covenants for payment of rent.—A covenant for the payment of rent at a specified time, when no place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain; and it is accordingly incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money (*h*). If the tenancy is a yearly tenancy, and no time is specified for the payment of the rent, the rent will be due once a year (*i*). If the rent is to be paid free of all outgoings, it must be paid free of land-tax and tithe commutation rent-charge (*k*). Where the lessor let his land at a rent payable quarterly, and afterwards mortgaged it, but remained in possession, and obtained from the lessee, who had no notice of the mortgage, a year's rent in advance, it was held that the payment of the rent before it became due was not a good payment as against the mortgagee, who, before the rent became due, gave the lessee notice to pay the rent to him (*l*).

Covenants not to "let, set, or demise," restrain an assignment (*m*); and covenants not to "let or assign" (*n*), or not to "assign or

power to grant an interest co-extensive with that which he assumes to grant, see *Line* v. *Stephenson*, 7 Sc. 69; 2 L.J. C.P. 263; *Bandy* v. *Cartwright*, 8 Exch. 913; 22 L.J. Ex. 285; *Stranks* v. *St. John*, L.R. 2 C.P. 376; 36 L.J. C.P. 118; *Budd-Scott* v. *Daniel*, (1902) 2 K.B. 351; 71 L.J. K.B. 706.

(*d*) *Dennett* v. *Atherton*, L.R. 7 Q.B. 316; 4 L.J. Q.B. 165.

(*e*) *Porter* v. *Drew*, 5 C.P.D. 143; 49 L.J. C.P. 482.

(*f*) *Proud* v. *Bates*, 34 L.J. Ch. 406. As to what is included under the term "minerals," see *Bell* v. *Wilson*, L.R. 1 Ch. 303; 34 L.J. Ch. 572.

(*g*) *Baynes* v. *Lloyd*, (1895) 2 Q.B. 610; 64 L.J. Q.B. 787.

(*h*) *Haldane* v. *Johnson*, 8 Exch. 689; 22 L.J. Ex. 264.

(*i*) *Collett* v. *Curling*, 10 Q.B. 785; 16 L.J. Q.B. 390.

(*k*) *Parish* v. *Sleeman*, 1 De G. F. & J. 326; 29 L.J. Ch. 96; *Sweet* v. *Seager*, 2 C.B. N.S. 119.

(*l*) *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *Cook* v. *Guerra*, L.R. 7 C.P. 132; 41 L.J. C.P. 89.

(*m*) *Greenaway* v. *Adams*, 12 Ves. 395.

(*n*) *Roe* v. *Harrison*, 2 T.R. 425.

otherwise part with," the demised premises (*o*), restrain an underlease; but a covenant not to "grant any underlease, or let, assign, or otherwise part with, the demised premises or any part thereof," is not broken by taking in a lodger who has the exclusive possession of the room he occupies (*p*). Where a lessee took a person into partnership, and agreed that he should have the exclusive use of a back chamber and some other parts of the demised premises, and the joint use of the rest, it was held that the covenant had been broken, and that the right to re-enter had accrued (*q*). And, in the case of a lease to two partners, an assignment by one partner of his undivided moiety of the lease to the other partner is a breach of a covenant not to assign (*r*). And the covenant is broken even where the lessee for the time being assigns to the original lessee (*s*). A covenant by a lessee that he will not let or underlet for more than a year does not prevent him from granting leases to commence at a future day (*t*). A devise of the term to a stranger is an assignment within the meaning of the proviso or covenant, but not a devise to the lessee's own executor (*u*), nor an assignment by act and operation of law (*x*), or by the act of God, nor an assignment by the sheriff under an execution, unless the execution has been obtained by collusion with the creditor in fraud of the covenant (*y*). If the lessee does assign or underlet, notwithstanding his covenant, the assignment or underlease is good, and the lessee is only liable to an action on his covenant (*z*), unless there is a proviso in the original lease for re-entry in case of a breach of the covenant (*a*). Where the lessee covenants not to assign without the consent of the lessor, "such consent not to be arbitrarily withheld," these words do not amount to a covenant by the lessor to give his consent; but an arbitrary refusal would leave the lessee at liberty to assign without consent (*b*). Where the lessor's consent is to be first obtained, and not to be unreasonably withheld from any assignment or underlease, an assignment or underlease without such consent is a breach of the covenant (*c*). Where a lessee under such a covenant contracted to assign subject to his landlord's approval, and he would not give leave, it was held that the lessee

(*o*) *Doe* v. *Worsley*, 1 Campb. 20.
(*p*) *Doe* v. *Laming*, 4 Campb. 73.
(*q*) *Doe* v. *Sales*, 1 M. & S. 297.
(*r*) See *Bristol Corporation* v. *Westcott*, 12 Ch.D. 461; *Varley* v. *Coppard*, L.R. 7 C.P. 505.
(*s*) *M'Eacharn* v. *Cotton*, 71 L.J. P.C. 20.
(*t*) *Croft* v. *Lumley*, 6 H.L.C. 672, 737; 27 L.J. Q.B. 321, 330.
(*u*) Bac. Abr. Lease, T.
(*x*) *Goring* v. *Warner*, 7 Vin. Abr. 85, pl. 9; *Doe* v. *Smith*, 5 Taunt. 795.
(*y*) *Doe* v. *Carter*, 8 T.R. 57, 300.
(*z*) *Paul* v. *Nurse*, 8 B. & C. 486; 7 L.J. (O.S.) K.B. 12.
(*a*) *Roe* v. *Harrison*, 2 T.R. 428.
(*b*) *Treloar* v. *Bigge*, L.R. 9 Ex. 151; 43 L.J. Ex. 95; *Lehmann* v. *McArthur*, L.R. 3 Ch. 496; 37 L.J. Ch. 625; *Sear* v. *House Property Society*, 16 Ch.D. 387; 50 L.J. Ch. 77.
(*c*) *Eastern Telegraph Co.* v. *Dent*, (1899) 1 Q.B. 835; 68 L.J. Q.B. 564.

was not bound to take legal proceedings to compel his landlord to consent, but might consider his contract with the third party at an end (*d*). By the Conveyancing Act, 1892, no fine may be exacted for a licence to assign unless it is expressly provided for in the lease (*e*). A covenant not to assign is not a usual covenant (*f*). The fact that a debtor has been adjudicated bankrupt on his own petition does not constitute a breach of a covenant not to assign (*g*).

Non-execution of lease by lessee.—A person who has neither sealed and delivered an indenture of lease, nor entered and taken possession under it, cannot be made responsible upon the covenants contained in the indenture; but, if he enters and takes possession by force of the lease, he is deemed in law to have covenanted to hold upon the terms of the indenture and to observe the conditions of the lease, and the lessor, therefore, may distrain or bring an action for the arrears of rent (*h*). If land is leased to two for a term of years, and one puts his seal, and the other agrees to this lease, and enters and takes the profits with him, he shall be charged to pay the rent, though he has not put his seal to the deed; but, if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross, if he does not put his seal to the deed, though he is a party to the lease, he is not a party to the condition (*i*). Where three windmills were demised by letters-patent under seal, which letters-patent contained a clause to the effect that the lessee and his assignees should repair and maintain the windmills during the term, and yield them up in good condition at the expiration thereof, and the lessee entered under the grant and took possession of the windmills, it was held that there resulted from the acceptance of the estate an express covenant to repair, which was annexed to the term granted, and ran with the land, and bound both the lessee and his assignees by reason of the privity of estate (*k*). Where a lessee entered into possession of a house under an agreement to repair, and paid rent, and the lessor sold the estate and assigned all his interest to the plaintiff, and the lessee continued to occupy and paid rent to the plaintiff, it was held that the lessee must be presumed, in the absence of evidence to the contrary, to have agreed to continue to hold of the plaintiff on the same terms as he held of the original lessor, and that he was

(*d*) *Lehmann* v. *McArthur*, *ante*, p. 622.

(*e*) 55 & 56 Vict. c. 13, s. 3. See *Cosh's Contract*, *In re*, (1897) 1 Ch. 9; 66 L.J. Ch. 28.

(*f*) *Hampshire* v. *Wickens*, 7 Ch.D. 555; 47 L.J. Ch. 243; *Bishop* v. *Taylor*, 60 L.J. Q.B. 556; *Wilson* v. *Redhead*, 28 W.R. 795.

(*g*) *Riggs*, *In re*, (1901) 2 K.B. 16; 70 L.J. K.B. 541.

(*h*) *Brett* v. *Cumberland*, 2 Roll. 63; Litt. sec. 374, 58; *Lyme* (*Mayor*) v. *Henley*, 1 Bing. N.C. 237; *Gregg* v. *Coates*, 23 Beav. 33.

(*i*) 38 Ed. 3, p. 8; Bro. Abr. Dett. pl. 80; Fitz. Abr. Dett. pl. 117; Co. Litt. 231, b.; 2 Roll. Rep. 62.

(*k*) *Brett* v. *Cumberland*, *supra*.

therefore responsible to the plaintiff for a breach of his agreement to repair (*l*).

Non-execution of lease by lessor.—It is said that, if an indenture of lease be sealed only on the part of the lessee, and not on the part of the lessor, *nihil operat*, neither in respect of the interest nor in respect of the covenants; for the covenants depend upon the lease, and if there is no lease there is no covenant; for, if the lease had been made and afterwards surrendered, all the covenants had been void (*m*). Where an indenture of demise for the term of eleven years, containing covenants to pay rent and repair, was executed by the lessee alone, and the latter entered and took possession and paid rent for several years, and the lessor assigned his reversion without ever having executed the lease, it was held that the assignee of the reversion could not sue upon any of the covenants of the lease, as the lease for eleven years to which they were annexed had never been created; that the only reversion which could carry with it the right to sue upon the covenant was a reversion expectant upon the determination of the term for eleven years, which reversion had never been in existence by reason of the non-execution of the lease by the lessor (*n*). But, as between the original parties, where a privity of contract exists between them, the lessee may, under certain circumstances, be held liable upon the covenants contained in the indenture, though the lease has not been executed by the lessor and the term created. It has been said that every lease must be construed in connection with surrounding circumstances, and that a lessee may, by entering upon, and taking possession of, tenements under an indenture sealed by him, and by dispensing with the execution of the indenture by the lessor, render himself liable to be sued upon his covenants, as independent covenants, on the ground that a party may waive a condition in his favour and dispense with its performance; and that, if a lessee executes his part of an indenture of lease, and enters and takes possession of the demised premises, and has the use of them, and gathers all the produce and profits of the soil for the whole term intended to be granted without ever having required the lessor to execute the indenture, he ought in justice to be deemed to have waived his right to treat the execution of the lease by the lessor as a condition precedent to his liability upon his covenants; and the Court of Queen's Bench has held that a lessee who has executed an indenture of demise containing a covenant to repair, and has entered and enjoyed for the whole term intended

(*l*) *Arden* v. *Sullivan*, 14 Q.B. 832; 19 L.J. Q.B. 268.
(*m*) *Soprani* v. *Skurro*, Yelv. 18.
(*n*) *Cardwell* v. *Lucas*, 2 M. & W. 111; 5 L.J. Ex. 52.

to be granted, is liable on his covenant, though the lease has never been executed by the lessor, and that the covenant becomes, under such circumstances, an independent covenant within the rule laid down in Comyn's Digest (*o*); that, if one party executes his part of an indenture, it shall be his deed, though the other does not execute his part (*p*). But the Court of Exchequer has held that the entry and taking of possession by the lessee before the execution of the lease by the lessor do not render the covenants to pay rent and repair independent covenants (*q*).

Concealment of latent defects.—In contracts for the letting and hiring of realty, the lessor is not bound to disclose to the lessee latent defects interfering with the use and enjoyment of the property let to hire (*r*). A lessor of a house, for example, who knows that the house is in a ruinous and dangerous state and unfit for occupation, is not bound to disclose the fact to his lessee at the time that he grants the lease (*s*).

Having executed the lease, and put the lessee into possession of the demised premises, the lessor has done all that is necessary for him to do to entitle himself to the rent; he does not, in the case of demises of realty, warrant that the premises are, at the time of the demise, or that they shall continue to be during the term, in any particular condition, or fit for any particular purpose; and the lessee, therefore, is bound to pay his rent, although the subject-matter of the demise is not fit for the purpose for which he required it, and although he may have had no beneficial use of it. If, indeed, the lessor has been guilty of any fraudulent concealment of defects, or has resorted to any misrepresentation calculated to mislead the lessee in some important particular, the contract will be void, and the lessee will be discharged from the rent; but, in the absence of all fraud and deceit, he is bound by his express covenant or contract, and must pay his rent, although he has not had that beneficial use of the demised premises which was anticipated. Thus, there is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises (*t*). And, where the defendant took the eatage of a meadow from the plaintiff for the term of six months, at a rent of 40*l.*, and turned fifteen head of cattle into the

(*o*) Com. Dig. Fait (C.), 2.

(*p*) *Cooch* v. *Goodman*, 2 Q.B. 599; Littledale, J., *Richardson* v. *Gifford*, 1 Ad. & E. 55; 3 L.J. K.B. 122; *Hughes* v. *Clark*, 10 C.B. 905.

(*q*) *Pitman* v. *Woodbury*, 3 Exch. 4, 12; *Swatman* v. *Ambler*, 8 Exch. 72; 22 L.J. Ex. 81; and see *How* v. *Greek*, 34 L.J. Ex. 4; 3 H. & C. 391.

(*r*) *Hart* v. *Windsor*, 12 M. & W. 68; 13 L.J. Ex. 129; *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L.J. Ex. 297.

(*s*) *Keates* v. *Cadogan* (*Earl*), 10 C.B. 591; 20 L.J. C.P. 76. See, however, 48 & 49 Vict. c. 72, s. 12, and *Walker* v. *Hobbs*, 23 Q.B.D. 458; 59 L.J. Q.B. 93.

(*t*) *Erskine* v. *Adeane*, L.R. 8 Ch. 756; 42 L.J. Ch. 835.

meadow, eight of which died from the poisonous effects of a quantity of refuse paint which had been placed on a manure heap, and had inadvertently been spread over the grass prior to the defendant's occupation, and had afterwards been eaten by the cattle; and the defendant then took his stock off the land, and tendered back the possession of the meadow to the plaintiff, which she refused to receive; it was held that the defendant was liable for the rent, although the eddish at the time of the demise was wholly unfit for the purpose for which it was taken, and the defendant had not had any beneficial use of it (*u*).

Demises of houses unfit for habitation.—Where an action was brought for the non-payment of the rent of a house, and the defendant pleaded that the house was demised to him for the purpose of his inhabiting the same, and that, at the time of the demise and of his taking possession, and from thence until he quitted, the house was unfit for habitation, and he could not dwell therein, or have any beneficial use or occupation thereof, by reason of its being greatly infested with bugs, without any default on his part, and that, before the rent became due, and as soon as he discovered the condition of the tenement, he quitted it, and gave notice to the plaintiff, and tendered him the possession thereof; it was held that the plea was no answer to the action, inasmuch as the law, in the case of demises of unfurnished houses, implies no warranty on the part of the lessor that the house is at the time of the demise, or at the commencement of the term, in a fit condition for habitation (*x*).

Payment of rent.—Although, therefore, houses become ruinous and fall down, and fences and crops be destroyed by floods, or burned by lightning or accidental fire, or be thrown down by enemies, yet is the tenant liable to pay the rent so long as the land remains to him, and his legal title to the occupation and use thereof continues (*y*). If the landlord is bound by custom, or has entered into an express covenant to repair a house demised by him, and the lessee covenants to pay rent, the covenants are independent covenants, and the repairing of the house by the lessor is not a

(*u*) *Sutton* v. *Temple*, 12 M. & W. 52; 13 L.J. Ex. 17; 27 Hen. 6 (Trin. Term), fol. 10, pl. 6; Hil. Term, 14 Hen. 4, fol. 27, pl. 35; Bro. Abr. Dette, pl. 18, fol. 220.

(*x*) *Hart* v. *Windsor*, 12 M. & W. 68; 13 L.J. Ex. 129; *Manchester Warehouse Co.* v. *Carr*, 5 C.P.D. 507; 49 L.J. C.P. 809; as to bugs in furnished lodgings, see *Smith* v. *Marrable*, 11 M. & W. 5; 12 L.J. Ex. 223, *post*, p. 698.

(*y*) *Carter* v. *Cummins*, cited 1 Ch.C. 84; *Pindar* v. *Ainsley*, cited 1 T.R. 312; *Bayne* v. *Walker*, 3 Dow. 233; *Leeds* v. *Cheetham*, 1 Sim. 146; 5 L.J. (O.S.) Ch. 105; *Arden* v. *Pullen*, 10 M. & W. 321; 11 L.J. Ex. 359; *Bute (Marquis)* v. *Thompson*, 13 M. & W. 493, 494; 14 L.J. Ex. 95; *Lofft* v. *Dennis*, 1 E. & E. 474; 28 L.J. Q.B. 168; *Surplice* v. *Farnsworth*, 7 M. & Gr. 576; 13 L.J. C.P. 215.

condition precedent to the liability of the lessee upon his covenant (*z*).

Payment of rent.—Exception of damage by fire.—If the lessee has covenanted to pay rent, "damage by fire excepted," and part of the demised premises is destroyed or injured by fire, the whole of the rent is not thereby suspended, but the tenant is entitled to a reasonable abatement (*a*). And, if the lessee covenants to pay rent, and also to repair, with an express exception of casualties by fire and tempest, the exception is confined to the covenant to repair, and does not qualify or affect the liability upon the covenant to pay rent, unless it has been extended thereto by express words (*b*).

Payment of rent.—Extinction and suspension of rent by eviction.—If the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended; but the act must be something of a grave and permanent character, dispossessing the tenant, and not a mere temporary trespass (*c*); and there must be an actual dispossession of the tenant, and not a mere constructive eviction (*d*). The tenant is not released from liability by reason of an eviction by a mere wrong-doer and trespasser who has no title. Thus, where an action of debt was brought for three years' arrears of rent reserved upon a lease of a farm, and the defendant pleaded that Prince Rupert, an alien and enemy of the king, invaded the realm, and with divers armed men did enter upon the demised premises, and expel him therefrom, and keep him out, so that he could not enjoy the land during the term, "it was resolved that the matter of the plea was insufficient." And this distinction was taken that, where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Another reason was added that, as the lessee is to have the advantage of casual profits, he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor (*e*). So, where the

(*z*) T. Term, 27 Hen. 6, fol. 10, pl. 6; Bro. Abr. Dette, pl. 18; *Surplice* v. *Farnsworth*, *ante*, p. 626.

(*a*) *Bennett* v. *Ireland*, E. B. & E. 326; 28 L.J. Q.B. 48.

(*b*) *Monk* v. *Cooper*, 2 Str. 763: *Belfour* v. *Weston*, 1 T.R. 310.

(*c*) *Upton* v. *Townend*, 17 C.B. 30, 64; 25 L.J. C.P. 44; *Carpenter* v. *Parker*, 3 C.B. N.S. 206; 27 L.J. C.P. 78.

(*d*) *Delaney* v. *Fox*, 2 C.B. N.S. 768; 26 L.J. C.P. 248, *ante*, p. 611; *Wheeler* v. *Stevenson*, 6 H. & N. 158; 30 L.J. Ex. 46.

(*e*) *Paradine* v. *Jane*, Aleyn. 27; Sty. 47; *Barret* v. *Dutton*, 4 Campb. 333; *Maryon* v. *Carter*, 4 C. & P. 295; *Hills* v. *Sughrue*, 15 M. & W. 253; *Jervis* v.

parliament, during the civil wars, took possession of a house which had been demised to a lessee for a term of years, and turned it into an hospital for sick and maimed soldiers, and so prevented the lessee from having any beneficial occupation thereof for several years, notwithstanding which the lessor brought an action of debt for the rent, no question appears to have been made but that the lessee was bound at common law to make good the rent; and the lessee consequently brought his bill in equity for relief, on the ground that he had no remedy over against the wrong-doer, because it was an act of force in the parliament, which had been pardoned by the act of oblivion; but it does not appear that he got relief even in equity (*f*).

Payment of rent.—Eviction by railway companies under statutory powers.—If the tenant is lawfully evicted by a railway company under the powers of its Act, the tenant is discharged from the accruing rent, but not from rent that was due and in arrear at the time of the eviction. Where a yearly tenant received notice from a railway company to give up possession of certain land within six months from the notice, and the notice expired in the middle of a half-year, and the tenant gave up possession to the company without obtaining or requiring compensation in respect of his unexpired term and interest in the premises, it was held that he was liable to his landlord for the whole of the half-year's rent (*g*). When a certain portion only of lands or tenements held by tenants or lessees has been taken by a railway company under the powers of its Act, the rent is to be apportioned; and the rent to be paid by the tenant for the residue of the lands not taken by the company must be settled by agreement of the parties, or by two justices, or by a jury (*h*).

Payment of rent.—Assignment of reversion.—If the lessor, after granting the lease, conveys all his estate and interest in the demised premises, he has no longer any right to the accruing rent. The rent passes with the reversion to the lessor's grantee without any attornment on the part of the tenant; but the tenant is not to be prejudiced by payment of rent to the lessor, or by breach of any condition for non-payment of rent before notice

Tomkinson, 1 H. & N. 195; 26 L.J. Ex. 41; *Brown* v. *Royal Insurance Soc.*, 28 L.J. Q.B. 275.

(*f*) *Harrison* v. *North* (*Lord*), 1 Ch.Ca. 84; as to proof of expulsion, see *Poole* (*Mayor*) v. *Whitt*, 15 M. & W. 571; 16 L.J. Ex. 229; as to evidence of eviction, see *Morrison* v. *Chadwick*, 7 C.B. 283; 18 L.J. C.P. 193; *Henderson* v. *Mears*, 28 L.J. Q.B. 305; *Wheeler* v. *Stevenson*, 6 H. & N. 158; 30 L.J. Ex. 46.

(*g*) *Wainwright* v. *Ramsden*, 5 M. & W. 602; 9 L.J. Ex. 120; *post*, p. 665 *et seq.*

(*h*) 8 & 9 Vict. c. 18, s. 119; Bac. Abr. Rent, M.; *Ware, In re*, 9 Exch. 395; 23 L.J. Ex. 145.

of the conveyance has been given to him by the grantee (*i*). Prepayment is a good discharge for all rent which has become due before notice of the transfer (*k*), but not for rent which becomes due after notice (*l*).

Payment of ground-rent by tenant.—Deduction thereof from tenant's rent.—The immediate landlord is by the common law bound to protect his tenant from all paramount claims; and, when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is impliedly authorised to make the payment on the landlord's behalf; and the courts have held such payments to be payments in satisfaction of rent due, or accruing due, to the immediate landlord (*m*). But the tenant should deduct these payments from the next rent that becomes due, or from the rent of the current year; for, if he allows several payments of rent to pass without giving his immediate landlord notice of the payment, and claiming the deduction, he will lose his right to deduct the money he has paid from the rent (*n*). Payments of money on account of the landlord, not charged upon the demised premises and leviable upon the chattels of the occupier, cannot be given in evidence in satisfaction and discharge of the rent, unless they were expressly directed or sanctioned by the landlord (*o*). The Tithe Commutation Acts do not impose any personal liability on the landlord to pay the tithe rent-charge (*p*).

Deduction of income-tax, land-tax, sewers-rate, and other outgoings from rent.—As regards land-tax, paving-rates, and property and income-tax, charged on land demised to a tenant (*q*), the tenant ought to deduct the tax or rate out of the next rent that becomes due. If he fails to do this, he cannot deduct it from subsequent rent, nor can he recover it by action from the landlord (*r*). If the landlord is entitled to be relieved from the assessment, it is his duty to take the necessary steps for the

(*i*) 4 Ann. c. 16, ss. 9, 10. See *Allcock* v. *Moorhouse*, 9 Q.B.D. 366.

(*k*) *Cook* v. *Guerra*, L.R. 7 C.P. 132; 41 L.J. C.P. 89.

(*l*) *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *ante*, p. 621.

(*m*) *Graham* v. *Allsopp*, 3 Exch. 186, 198; 18 L.J. Ex. 85; *Taylor* v. *Zamira*, 6 Taunt. 524; *Jones* v. *Morris*, 3 Exch. 742; 18 L.J. Ex. 477.

(*n*) *Andrew* v. *Hancock*, 3 Moore, 278; *Spragg* v. *Hammond*, 4 Moore, 431; *Dawes* v. *Thomas*, (1892) 1 Q.B. 414; 61 L.J. Q.B. 482.

(*o*) *Davies* v. *Stacey*, 12 Ad. & E. 506; 9 L.J. Q.B. 393.

(*p*) *Griffinhoofe* v. *Daubuz*, 4 E. & B. 235; 24 L.J. Q.B. 20.

(*q*) 5 & 6 Vict. c. 35, ss. 60, 103; 16 & 17 Vict. c. 34, s. 40; 27 & 28 Vict. c. 18, s. 15. As to water-rate, see *Spanish Telegraph Co.* v. *Shepherd*, 13 Q. B.D. 202; 53 L.J. Q.B. 420; *Badcock* v. *Hunt*, 22 Q.B.D. 145; 58 L.J. Q.B. 134.

(*r*) *Andrew* v. *Hancock*, *supra*; *Denby* v. *Moore*, 1 B. & Ald. 123, 129; *Cumming* v. *Bedborough*, 15 M. & W. 438.

purpose; and, if, before he has done this, the assessment is made on the occupier, and the tax paid, it may be deducted from the rent, although at the time the deduction is made the landlord has obtained his exemption from the tax (*s*). The landlord is in general liable to pay taxes in proportion to the rent reserved, and not to the improved value. Where, therefore, a tenant built on land demised to him, and raised the annual value from 60*l.* to 300*l.*, it was held that he was only entitled to deduct sewers-rate and land-tax upon the original rent, and that he was himself properly chargeable in respect of the improved value (*t*). Where the lessor was also the owner of the tithe rent-charge upon the land, it was held that a covenant to pay "all taxes and assessments whatsoever for or in respect of the demised premises, save and except the level-tax, property-tax, and land-tax," did not include the tithe rent-charge, and that the lessee was not bound to pay it (*u*). Where the lessee covenanted to pay the rent without any deduction, &c., and further "to pay all manner of taxes, &c., charges and impositions whatever, &c., imposed by the authority of parliament or otherwise howsoever," and the lessor was compelled under an Act to abate a nuisance from bad drainage, it was held that he was not entitled to call upon the lessee to pay (*x*). An agreement by the landlord to repay the tenant all sums which he shall pay for the landlord's property-tax if the tenant will pay his rent in full without any deduction of landlord's property-tax, is good notwithstanding the provisions of the statute (*y*). A tenant who covenants to pay, bear, and discharge all assessments, charges, or impositions whatever, parliamentary, parochial, or otherwise, which at any time during the continuance of the demise may be charged, assessed or imposed on the lessor, for or in respect of the premises, is liable to recoup his landlord any expenses incurred by him in complying with an order made under the Public Health (London) Act, 1891, to abate a nuisance on the demised premises, inasmuch as such expenses are a charge on the lessor in respect of the premises (*z*). The expenses of paving a

(*s*) *Swatman* v. *Ambler*, 22 L.J. Ex. 81.

(*t*) *Smith* v. *Humble*, 15 C.B. 321.

(*u*) *Jeffrey* v. *Neale*, L.R. 6 C.P. 240; 40 L.J. C.P. 191.

(*x*) *Rawlins* v. *Briggs*, 3 C.P.D. 368; 47, L.J. C.P. 487, distinguishing *Thompson* v. *Lapworth*, L.R. 3 C.P. 149; 37 L.J. C.P. 74; see also *Hartley* v. *Hudson*, 4 C.P.D. 367; 48 L.J. C.P. 751; *Allum* v. *Dickinson*, 9 Q.B.D. 632; 52 L.J. Q.B. 190; *Wilkinson* v. *Collyer*, 13 Q.B.D. 1; 53 L.J. Q.B. 278; *Wix* v. *Rutson*, (1899) 1 Q.B. 474; 68 L.J. Q.B. 298. But see *Budd* v. *Marshall*, 5 C.P.D. 481; 50 L.J. C.P. 24. As to "all outgoings," see *Aldridge* v. *Ferne*, 17 Q.B. D. 212; 55 L.J. Q.B. 587.

(*y*) 5 & 6 Vict. c. 35, ss. 60, 103; *Lamb* v. *Brewster*, 4 Q.B.D. 220, 607; 48 L.J. Q.B. 421; as to agreements to pay rates, including a rate under 37 & 38 Vict. c. 54, s. 3 (rating of mines), see *Chaloner* v. *Bolckow*, 3 App.Cas. 933; 47 L.J. C.P. 562.

(*z*) *Smith* v. *Robinson*, (1893) 2 Q.B. 53; 62 L.J. Q.B. 509; but see *Foulger* v. *Arding*, (1902) 1 K.B. 700; 71 L.J. K.B. 499.

street incurred by a landlord under sect. 150 of the Public Health Act, 1875, are not recoverable by him from a tenant under a lease by which the tenant covenants to pay all rates, taxes, and assessments whatsoever which then are or during the said term shall be imposed or assessed upon the premises, or the landlord or tenant in respect thereof, by authority of parliament or otherwise (*a*). A lessee who covenants with the lessor to pay "taxes, rates, duties, assessments and impositions . . . which now are or shall be . . . assessed or imposed on or in respect of the . . . premises or of the rent hereby reserved" is liable as between himself and the landlord to pay the cost incurred by the latter in abating a nuisance arising from drains in compliance with a notice served upon him by the sanitary authority under the Public Health (London) Act, 1891 (*b*).

Right to distrain for rent.—The law relating to distress will be found at the end of the present chapter, but the right to distrain for rent is here stated generally. The lessor's right to enter in person or by deputy upon the demised premises and distrain the goods and chattels of the tenant for rent or services in arrear has existed in this country from so early a period, "that we have no memorial of its original with us" (*c*). This power is impliedly accorded to the lessor on every demise of realty where there is an express reservation of, or an agreement by the tenant to pay, a fixed ascertained rent or service (*d*). If there has been merely a permissive occupation of the property, without any previous payment of rent referable to some certain term of hiring, or to some definite portion of a year, the lessor has no right of entry upon the land nor power to distrain, but must proceed by way of action upon the implied promise of the tenant to pay a fair and reasonable compensation for the permissive use and enjoyment of property (*e*). By 34 & 35 Vict. c. 79, the goods of lodgers (*f*) are protected against distresses for rent due to the superior landlord; and by 35 & 36 Vict. c. 50, railway rolling stock is protected from distress when on the line.

Extinguishment of right to distrain by assignment of reversion.—If the lessor, after the making of the demise, conveys the property to a purchaser, he has no power to distrain for the rent that became due prior to the execution of the conveyance, as he is no longer

(*a*) *Baylis* v. *Jiggens*, (1898) 2 Q.B. 315; 67 L.J. Q.B. 793.

(*b*) *Brett* v. *Rogers*, (1897) 1 Q.B. 525; 66 L.J. Q.B. 287; *Farlow* v. *Stevenson*, (1900) 1 Ch. 128; 69 L.J. Ch. 106; but see *Foulger* v. *Arding*, *ante*, p. 630.

(*c*) Gilbert on Distress, p. 2 (ed. 4); 2 Bro. Abr. Distress, fol. 252; Bradby, 2.

(*d*) Litt. sect. 214.

(*e*) *Dunk* v. *Hunter*, 5 B. & Ald. 322, 325.

(*f*) An under-tenant may be a lodger: *Phillips* v. *Henson*, 3 C.P.D. 26; 47 L.J. C.P. 273. What is a lodger is a question of fact: *Ness* v. *Stephenson*, 9 Q.B.D. 245; *Heawood* v. *Bone*, 13 Q.B.D. 179.

possessed of the reversion expectant upon the determination of the lease (*g*). Neither can the purchaser distrain for such rent; for it was a fruit fallen from the reversion at the time of the conveyance of the demised premises to him (*h*). If, however, the conveyance was preceded by the ordinary agreement between vendor and purchaser vesting the equitable estate in the latter prior to the rent becoming due, the purchaser would be entitled to recover the rent by action (*i*).

Apportionment of rent and conditions.—The 4 & 5 Wm. 4, c. 22, respecting the apportionment of rent did not apply to leases created by parol (*k*). But by the Apportionment Act, 1870 (*l*), rents are to be deemed to accrue from day to day, and are apportionable in respect of time (*m*). By the Conveyancing Act, 1881, it is provided that, notwithstanding severance of the reversionary estate or the cesser of the term granted by a lease as to part only of the land, every condition contained in the lease shall be apportioned (*n*).

Compensation for use and occupation of land.—The landlord, where there is no agreement for any specific rent, is entitled to recover a reasonable satisfaction for the premises held or occupied by the tenant, without proof of any demise, on the implied promise resulting from the use of the property (*o*); but no action will lie, unless there is a promise either express or implied to pay for the use and occupation (*p*).

Constructive occupation.—An actual personal occupation is not necessary to entitle the landlord to compensation, when the lessee has entered and taken possession, and the term has become vested in him (*q*). But there must be proof of an actual entry on the land (*r*) and taking of possession, or it must be shown that "there

(*g*) Bro. Abr. Dette, pl. 39; *Parmenter* v. *Webber*, 8 Taunt. 593; *Preece* v. *Corrie*, 5 Bing. 24; 6 L.J. (O.S.) C.P. 205.

(*h*) *Midgley* v. *Lovelace*, Carth. 289; 12 Mod. 46.

(*i*) *Anon.*, Skin. 367; *Midgley* v. *Lovelace*, Carth. 290; as to the mode in which a distress must be levied and other incidents, see *post*, p. 708.

(*k*) *Cattley* v. *Arnold*, 28 L.J. Ch. 352; *Plummer* v. *Whiteley*, 29 L.J. Ch. 247; Johns. 585.

(*l*) 33 & 34 Vict. c. 35.

(*m*) *Hastings* (*Lord*), *Ex parte*, 62 L.J. Q.B. 628; *Barnett* v. *Eastman*, 67 L.J. Q.B. 517; *Ellis* v. *Rowbotham*, 69 L.J. Q.B. 379.

(*n*) 44 & 45 Vict. c. 41, s. 12; the section only applies to leases made after Dec. 31, 1881. In a case of a lease granted before the above Act, where there was a personal covenant by the defendant to pay rent, and he assigned the term, and his assignee surrendered a portion of the premises to the plaintiff, it was held that the plaintiff could recover rent for the portion not surrendered, and, possibly, for the whole: *Baynton* v. *Morgan*, 22 Q.B.D. 74; 58 L.J. Q.B. 139.

(*o*) 11 Geo. 2, c. 19, s. 14; *Churchward* v. *Ford*, 26 L.J. Ex. 354; 2 H. & N. 446; *Hellier* v. *Silcox*, 19 L.J. Q.B. 295; *Levy* v. *Lewis*, 9 C.B. N.S. 872; 30 L.J. C.P. 141; *Hardon* v. *Hesketh*, 4 H. & N. 175; 28 L.J. Ex. 137.

(*p*) *Turner* v. *Cameron's Steam Coal Co.*, 5 Exch. 932; 20 L.J. Ex. 71; *Carmier* v. *Mercer*, cited *Birch* v. *Wright*, 1 T.R. 387; *Newport* (*Mayor*) v. *Saunders*, 3 B. & Ad. 411; 1 L.J. K.B. 147.

(*q*) *Baker* v. *Holtzapffel*, 4 Taunt. 45; *Izon* v. *Gorton*, 7 Sc. 537; 8 L.J. C.P. 272; *Pollock* v. *Stacy*, 9 Q.B. 1033; 16 L.J. Q.B. 132.

(*r*) *Lowe* v. *Ross*, 5 Exch. 553; 19 L.J. Ex. 318; *How* v. *Kennett*, 3 Ad. & E. 659; 4 L.J. K.B. 220.

has been an occupation by some other parties standing in such a relation to the defendant that their occupation is his and that he is personally liable for it" (*s*). An entry by one of two joint lessees is an entry by both, so as to render both liable (*t*). The action is maintainable, where no certain rent has been reserved, and where there is, consequently, no right to distrain (*u*). The compensation accrues *de die in diem*, so that if there is no express contract for the payment of rent at specific periods, the lessor is entitled to be paid from day to day so long as the occupation lasts (*x*). Very slight circumstances, such as entry on the lands, the putting up a notice or advertisement, sending a woman to clean windows or rooms, or workmen to put up paper or do repairs, will suffice to establish the fact of entry and of actual occupation (*y*).

An occupation by an under-tenant of the lessee is the lessee's own occupation, as much as if he were himself personally present upon the land. But, if one of two joint lessees holds over after the expiration of his lease, without the assent of his co-lessee, the latter is not responsible in respect of the occupation of such co-lessee (*z*). The occupation of the wife before marriage is not the occupation of the husband (*a*). The actual possession and use by one of two executors of property holden on lease by their testator is not in law a possession and use by both, and does not render both chargeable as joint occupiers in their own right (*b*). If a lessor sells or transfers his legal estate and interest in the demised premises to a third party, and the lessee receives notice of the transfer, and is required to pay his rent to the transferee and refuses, he is liable to an action at the suit of the latter (*c*). The defendant may show that the plaintiff's interest in the premises has expired, or has been transferred to some third party; but he is estopped from denying the lessor's title to grant the property to be enjoyed, and cannot show that the lessor has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action (*d*). A tenant who has occupied land under a corporation and paid rent to the corporate body, is liable for use and occupation, although the corporation cannot in general

(*s*) *Bull* v. *Sibbs*, 8 T.R. 327.

(*t*) *Glen* v. *Dungey*, 4 Exch. 61; 18 L.J. Ex. 359.

(*u*) *Waring* v. *King*, 8 M. & W. 571; 11 L.J. Ex. 49; *Humerton* v. *Stead*, 3 B. & C. 478; 3 L.J. (O.S.) K.B. 33.

(*x*) *Packer* v. *Gibbins*, 1 Q.B. 421; 10 L.J. Q.B. 224.

(*y*) *Sullivan* v. *Jones*, 3 C. & P. 579; *Smith* v. *Twoart*, 2 M. & Gr. 841.

(*z*) *Ibbs* v. *Richardson*, 9 Ad. & E. 849; 8 L.J. Q.B. 126; *Christy* v. *Tancred*, 9 M. & W. 438, 448; 11 L.J. Ex. 109; *Draper* v. *Crofts*, 15 M. & W. 166; 15 L.J. Ex. 92.

(*a*) *Richardson* v. *Hall*, 3 Moore, 307.

(*b*) *Nation* v. *Tozer*, 1 Cr. M. & R. 175.

(*c*) *Lumley* v. *Hodyson*, 16 East, 104; *Birch* v. *Wright*, 1 T.R. 378; *Rennie* v. *Robinson*, 7 Moore, 539.

(*d*) *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50.

contract except by virtue of its common seal (*e*); and a corporation which has actually occupied and used lands, &c., may be made liable during the period of occupation, but not afterwards, unless there is a demise under seal (*f*).

If a man is let into possession under an agreement for a lease to be granted at a future time, and occupies, and receives the profits of, the land, he is liable for a reasonable compensation to be paid to the owner for the use and enjoyment of the property (*g*). But, if he takes possession of property as a purchaser, under a contract of purchase and sale, and the vendor is unable to make out a title, and the bargain, consequently, goes off, the purchaser is not, in general, bound to pay any compensation or remuneration to the owner for the temporary occupation and enjoyment of the property (*h*). If, however, after a contract of purchase and sale has gone off or been abandoned, the intended purchaser continues to occupy and take the rents and profits of the land, by the sufferance and permission of a party who is then entitled to the immediate possession, he is bound to pay a reasonable compensation to such party for the permissive use and occupation of the property (*i*). So, if the vendor of a house continues to reside in it after he has sold it, he is not liable in respect of such subsequent residence, unless it be shown that he was permitted to remain in possession upon the express or implied understanding that the occupation was to be paid for (*k*). If a lessor has agreed to complete a house demised by him, and the tenant enters and occupies, and the landlord neglects to fulfil his agreement, he is nevertheless entitled to recover a reasonable sum in respect of the use and occupation by the tenant of the incomplete house (*l*). If the tenant or occupier has entered as a trespasser and wrongdoer, and has remained in possession and used and occupied the land to the exclusion of the owner, it appears to be somewhat doubtful whether the latter may waive the tort, and consent to the occupation, and sue the tenant upon the ordinary implied promise to pay a reasonable remuneration for the occupation and enjoyment of the property. But, if the owner accepts rent from a trespasser, this is a waiver of the tort and a creation of a tenancy, with its accompanying rights and duties. If the landlord assigns his interest, and the tenant has notice of the assignment, and continues to occupy with the consent

(*e*) *Stafford (Mayor)* v. *Till*, 12 Moore, 260; 5 L.J. (O.S.) C.P. 77.

(*f*) *Finlay* v. *Bristol and Exeter Ry.*, 7 Exch. 409, 417; 21 L.J. Ex. 116; see *ante*, p. 347.

(*g*) *Thetford (Mayor)* v. *Tyler*, 8 Q.B. 95, 100; 15 L.J. Q.B. 33.

(*h*) *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Winterbottom* v. *Ingham*, 7 Q.B. 611; 14 L.J. Q.B. 298.

(*i*) *Howard* v. *Shaw*, 8 M. & W. 118, 122.

(*k*) *Tew* v. *Jones*, 13 M. & W. 12; see *Metropolitan Ry.* v. *Defries*, 2 Q.B.D. 189, 387.

(*l*) *Smith* v. *Eldridge*, 15 C.B. 236.

of the assignee, he may be sued by the latter (*m*), but not otherwise (*n*). A lessee is not liable for use and occupation after he has been adjudicated a bankrupt, whether the trustee accepts his interest in the premises or disclaims it (*o*).

Use and occupation by one of several joint-tenants or tenants-in-common.—By 4 Ann. c. 16, s. 27, it is enacted that actions of account may be maintained by one joint-tenant and tenant-in-common, his executors, &c., against the other as bailiff, for receiving more than comes to his just share or proportion, and against the executor, &c., of such joint-tenant or tenant-in-common. This statute applies to cases where two or more persons are tenants-in-common of land leased to a third party at a rent payable to each, or where there is a rent-charge, or any money payment, or payment in kind due to them from another person, and one receives the whole, or more than his proportionate share according to his interest in the subject of the tenancy, and not to cases where one has enjoyed more of the benefit of the land, and made more by personal occupation of it, than another. There are many cases in which a tenant-in-common may occupy and enjoy the common land solely, and have all the advantage to be derived from it, and yet not be liable to pay anything to his co-tenant-in-common (*p*).

Covenants and agreements to repair dilapidations.—There is no implied covenant or promise, either on the part of the lessor or the lessee of a house, to repair or uphold it during the term (*q*). There is no obligation on the part of a landlord to repair in the absence of an express contract in that behalf; and therefore, if a house demised falls, and destroys the furniture of the lessee, the landlord will not be responsible in damages (*r*). Where the lessor covenants to *keep* in repair, there is no breach until after notice of want of repair (*s*). But want of notice is no answer to an action for breach of a covenant to *put* into repair (*t*). Where the landlord covenants to keep in repair he must execute repairs having regard to the class of buildings to which the lease refers, and not merely to the condition of the particular building (*u*). Every covenant by a lessee that he will well and sufficiently repair and maintain the

(*m*) *Standen* v. *Chrismas*, 16 L.J. Q.B. 265; 10 Q.B. 142; 4 Ann. c. 16, s. 9.

(*n*) *Cook* v. *Moylan*, 1 Exch. 67; 16 L.J. Ex. 253; *Allcock* v. *Moorhouse*, 9 Q.B.D. 366.

(*o*) 46 & 47 Vict. c. 52, s. 55. See *Stacey* v. *Hill*, 69 L.J. Q.B. 796.

(*p*) *Henderson* v. *Eason*, 21 L.J. Q.B. 82; 17 Q.B. 701; *Leigh* v. *Dickeson*, 15 Q.B.D. 60; 54 L.J. Q.B. 18.

(*q*) Dyer, 36, b.

(*r*) *Gott* v. *Gandy*, 2 E. & B. 845; 23 L.J. Q.B. 1.

(*s*) *Makin* v. *Watkinson*, L.R. 6 Ex. 25; 40 L.J. Ex. 33; *L. & S. W. Ry.* v. *Flower*, 1 C.P.D. 77; 45 L.J. C.P. 54; *Manchester Warehouse Co.* v. *Carr*, 5 C.P.D. 507; 49 L.J. C.P. 809.

(*t*) *Coward* v. *Gregory*, L.R. 2 C.P. 153; 36 L.J. C.P. 1.

(*u*) *Saner* v. *Bilton*, 7 Ch.D. 815; 47 L.J. Ch. 267; such a covenant implies a licence from the tenant to enter to do the repairs: *Saner* v. *Bilton*, *supra*.

demised premises during the term, and deliver them up at the expiration thereof in good repair and condition, will be construed in connection with the age of the buildings, the state and condition of them at the time of the demise and the length of the lease (*x*). If the house is an old house, the tenant is bound to keep it up only as an old house, and cannot be compelled to replace old materials with new (*y*). If the lessee has covenanted to keep the demised premises in good repair during the term, and at the time of the demise they were old and in bad repair, he must put them in good repair as old premises, and not keep them in bad repair because they happened to be in that state when he took them. The age and class of the premises, however, with their general condition as to repair, must be looked at in order to measure the extent of the repairs to be done (*z*). If the lessee has covenanted to repair buildings, "the same being first put into repair by the lessor," the liability of the lessee does not arise until after all the buildings have been put into repair by the lessor (*a*), who is bound to repair in the first instance (*b*). When the lessee has entered into an express covenant or agreement to repair, uphold, and keep in repair a house, or any other structure or building demised to him, he is bound to re-build or re-construct it, if it is burned by an accidental fire, or blown down by tempest, or destroyed by floods or by an inevitable accident; for, when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenants to repair a house, or a bridge, and the house is burned down by lightning or an accidental fire, or thrown down by enemies, or the bridge is washed away, the lessee must re-build (*c*). The ordinary covenant to repair the demised tenements and dwelling-houses does not extend (so as to create a forfeiture under a proviso for re-entry in case of non-performance of covenant) to an entirely new structure erected during the term, not in existence and not forming part of any buildings on the premises at the time of the execution of the lease (*d*), unless it appears that the land was demised for building purposes, and that the erection of buildings

(*x*) *Proudfoot* v. *Hart*, 25 Q.B.D. 42; 59 L.J. Q.B. 389.

(*y*) *Harris* v. *Jones*, 1 Moo. & R. 173; *Gutteridge* v. *Munyard*, 1 Moo. & R. 336.

(*z*) *Payne* v. *Haine*, 16 M. & W. 545; 16 L.J. Ex. 130; *Proudfoot* v. *Hart*, *supra*; *Lister* v. *Lane*, (1893) 2 Q.B. 212; 62 L.J. Q.B. 583.

(*a*) *Neale* v. *Ratcliff*, 15 Q.B. 916; 20 L.J. Q.B. 130; *Coward* v. *Gregory*, 36 L.J. C.P. 1; L.R. 2 C.P. 153.

(*b*) *Cannock* v. *Jones*, 3 Exch. 233; 18 L.J. Ex. 204.

(*c*) 40 Ed. 3, fol. 6, pl. 11; *Paradine* v. *Jane*, Aleyn. 27; 2 Saund. 421 a (2); Dyer. 33 a, pl. 10; *Brecknock Co.* v. *Pritchard*, 6 T.R. 750; *Bullock* v. *Dommitt*, *ib.* 650; *Chesterfield* v. *Bolton*, 2 Comyn's Rep. 627.

(*d*) *Cornish* v. *Cleife*, 3 H. & C. 446; 34 L.J. Ex. 19.

by the lessee during the term was contemplated by the parties, and that the covenant was meant to extend to buildings thereafter to be erected (*e*).

Where a lease, executed on the 9th of November, contained a covenant on the part of the lessee to repair, and the tenant had taken possession and pulled down buildings in the preceding month of June, it was held that he could not be made responsible in an action of covenant, as the lease was not then executed, although the *habendum* of the lease stated that the premises were to be holden from the preceding 22nd June. The *habendum* marked only the duration of the tenant's interest, and could not operate retrospectively as a grant (*f*). If the lease is under seal, and the tenant has bound himself by covenant to repair, and the landlord assigns his interest, the assignee is entitled (*ante*, p. 207) to sue upon the covenant (*g*). A covenant to put into repair is not a continuing covenant (*h*); but covenants to keep in repair are covenants which run with the land, and are continuing covenants to the end of the term (*i*). And the recovery of damages for a breach of them is no bar to an action for a subsequent breach, but only matter in mitigation of damages (*k*). Such covenants extend to all additions and enlargements of structures existing at the time of the demise, but not to detached independent buildings erected after the making of the lease (*l*). If the landlord has evicted the tenant from part of the demised premises, the tenancy is not, as we have seen, thereby determined, and the tenant is not discharged from the performance of a covenant to repair (*m*). The landlord is entitled to recover damages for breach of a contract to yield up in repair at the end of the term, although he immediately proceeds to demolish the buildings (*n*).

Where a party entered into possession under a lease, which was void as to the duration of the term from its being an invalid execution of a power, but the lessee had the benefit of the possession of the land and the perception of the profits for the whole term purported to be granted, he was held liable upon his covenant to repair contained in the same lease (*o*). And, where articles of agreement under seal were entered into between an intended lessor

(*e*) *Dowse* v. *Cale*, 2 Vent. 136; 3 Lev. 264.

(*f*) *Shaw* v. *Kay*, 1 Exch. 412; 17 L.J. Ex. 17.

(*g*) *Bickford* v. *Parsons*, 17 L.J. C.P. 192; 5 C.B. 918.

(*h*) *Coward* v. *Gregory*, L.R. 2 C.P. 153; 36 L.J. C.P. 1.

(*i*) *Martyn* v. *Clue*, 22 L.J. Q.B. 147; 18 Q.B. 661.

(*k*) *Coward* v. *Gregory*, L.R. 2 C.P. 153; 36 L.J. C.P. 1.

(*l*) *Cornish* v. *Cleife*, 34 L.J. Ex. 19; 3 H. & C. 446.

(*m*) *Morrison* v. *Chadwick*, 7 C.B. 283; 18 L.J. C.P. 193, *ante*, p. 628.

(*n*) *Rawlings* v. *Morgan*, 18 C.B. N.S. 776; 34 L.J. C.P. 185.

(*o*) *Beale* v. *Sanders*, 3 Bing. N.C. 850; 6 L.J. C.P. 283.

and lessee for the grant of a lease for twenty-one years, as soon as a licence from the lord of the manor (the land being copyhold land) could be obtained, and the lessee covenanted to keep the premises in repair during the term so to be granted, and subsequently entered and took possession of the land, and occupied the same under the agreement for the full term of twenty-one years, it was held that he was responsible upon his covenant to repair, although the intended lease had never been made, nor any licence obtained from the lord (*p*). If the lessee has not entered and held under the indenture of demise executed by him, and upon the terms of the covenant he has thought fit to enter into, but under a distinct parol demise, then he is not liable upon the covenants of the lease (*q*). Where a lease made under a leasing power was void from non-compliance with the requirements of the power, but the lessee entered and took possession, and paid rent, and then assigned his interest, and the assignee entered and paid rent under the void lease, and continued in possession until the end of the term intended to have been granted, it was held that he must be taken to have promised to hold upon the terms of the lease, and that he was liable for not repairing according to the covenant therein contained (*r*). If a party assents verbally to certain printed terms of hiring, and enters and takes possession, he will be bound by the printed terms, although they are not signed either by him or by the lessor (*s*). Where a tenant gave a written undertaking to hire a house for three years, and to pay rent and repair during the term, but there was no lease or agreement on the part of the lessor, and the tenant entered and took possession and held the premises for more than three years, it was held that he was responsible for neglecting to repair (*t*).

The owner of two houses, 38 and 40, demised 38 by lease containing a covenant by the lessee to repair walls and party-walls. Afterwards he demised 40 similarly. No. 40 was built so as to extend over a gateway between it and 38, and it rested on the wall which was a party-wall between 38 and the gateway, but this wall did not belong to 40. In an action by the lessee of 40 against the owner, it was held that there was no implied covenant on his part to repair this party-wall (*u*). It was said that if an action were brought by the owner against the lessee of 40 it might be an answer to say that the owner had neglected some precedent obli-

(*p*) *Pistor* v. *Cater*, 9 M. & W. 315; 12 L.J. Ex. 129.
(*q*) *Pitman* v. *Woodbury*, 3 Exch. 4, 12.
(*r*) *Beale* v. *Sanders*, 3 Bing. N.C. 850; 6 L.J. C.P. 283; *Lee* v. *Smith*, 23 L.J. Ex. 199.
(*s*) *Bolton (Lord)* v. *Tomlin*, 5 Ad. & E. 856; 6 L.J. K.B. 45.
(*t*) *Richardson* v. *Gifford*, 1 Ad. & E. 52; 3 L.J. K.B. 122.
(*u*) *Colebeck* v. *Girdlers' Co.*, 1 Q.B.D. 234; 45 L.J. Q.B. 225.

gation, because 40 could not be repaired without first repairing this party-wall; but the suggestion is not very clear (*x*).

By the statute of Anne, as we have seen (*ante*, p. 628), the assignee of the reversion cannot sue for the rent without having given notice of the assignment; but there is no provision to that effect with respect to his right to sue or eject for a forfeiture for non-repair, for the tenant may not know to whom to pay the rent without notice, but he must know that he ought to repair (*y*).

Tenant's liability for damage to demised premises.—In the absence of an express covenant or agreement to repair, there results from the demise and acceptance of the lease by the lessee an implied covenant or promise, according as the lease is by deed or by simple contract, to use the property demised in a tenant-like manner, and restore it, at the expiration of the term, in the same state and condition as it was in when demised, subject only to ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required. The extent of the liability of the tenant for the preservation of the property depends upon the duration and value of his own term and interest therein. A tenant for life, for example, is bound to watch over the interests of the reversioner, and is responsible for permissive as well as commissive waste, whilst a tenant at will, or from year to year, is responsible only for commissive waste (*z*).

Permissive waste by lessees for terms of years.—A tenant for a term of years is responsible for permissive as well as commissive waste (*a*); but where he has not obliged himself by covenant to do repairs, he is not bound to rebuild; for if the subject of occupation perishes from time and natural decay, the landlord is the person to provide a new one, if he think fit (*b*). A tenant for years must not suffer the roof of a house to remain uncovered, so as to let the timbers rot, and must use all reasonable endeavours to keep the buildings wind and water-tight; but he is not bound to repair the principal timbers of the roof, nor to replace old materials with new, except where the expense is of a trifling character, and the mischief, if neglected and left unrepaired, would operate to the lasting injury of the inheritance. If a roof is blown off by tempest, he is not bound to put on a new roof, but if a few tiles only are stripped off, he is bound to replace them, or adopt means to keep out the wet (*c*). The extent of the liability of a lessee, not

(*x*) *Colebeck* v. *Girdlers' Co.*, *supra*.

(*y*) *Scaltock* v. *Harston*, 1 C.P.D. 106; 45 L.J. C.P. 125.

(*z*) *Harnett* v. *Maitland*, 16 M. & W. 257; 16 L.J. Ex. 134; *Herne* v. *Bembow*, 4 Taunt. 764; *Jones* v. *Hill*, 7 Taunt. 392; 1 Moore, 100; *Torriano* v. *Young*, 6 C. & P. 12.

(*a*) *Yellowly* v. *Gower*, 11 Exch. 294; 24 L.J. Exch. 299.

(*b*) Bayley, J., *Wise* v. *Metcalfe*, 10 B. & C. 314; 8 L.J. (O.S.) K.B. 126.

(*c*) See *Shrewsbury's (Lady) case*, 5 Co. 13, b.; *M'Kenzie* v. *M'Leod*, 4 M. & Sc.

holding under a covenant or agreement to repair, for permitting buildings demised to him to go to decay and ruin, will depend upon the age and general condition of the buildings at the time he took possession of them, the nature of the repairs required for their preservation, and the duration of his own term and interest in the property (*d*); for a tenant-at-will, or tenant from year to year, cannot be expected to do as much for the preservation of the property as a tenant for a long term of years. If a house is burnt by negligence, this, as we shall presently see, is waste; and if sea-walls and river-banks are destroyed from want of timely reparation, this will be waste; but if they receive the usual and customary repairs, and are destroyed by a great tempest or a violent inundation, the lessee is not responsible for waste if he fails to rebuild them (*e*). So, where a building is destroyed by what is under all the circumstances an apparently reasonable user of the building, the tenant is not liable for "waste" (*f*).

Commissive waste by tenants for terms of years.—The tenant by the lease has the use, not the dominion, of the property demised to him, and cannot make permanent changes and alterations in the property without the consent of the landlord, although such changes and alterations may greatly enhance the value of it; for the owner has a right to have his houses and lands kept in an unaltered state, surrounded by all their old features, landmarks, and associations (*g*). Therefore an action is maintainable by the reversioner pending the term against the tenant for inclosing and cultivating waste land included in the demise, and for continuing the grievance (*h*); also for the pulling down of an old building, and the substitution in lieu thereof of tenements of greater value (*i*), for stopping up the windows (*k*), or for removing a partition-wall in a house and enlarging a chamber (*l*). Where a lessee opened a new door in a house, whereby the house was not in any respect weakened or injured, it was held to be a question for the jury whether there was or was not any injury to the rights of the reversioner (*m*). But, if there is any substantial alteration in the form and arrangement of the house, the house is no longer the same house, and there is an invasion of the proprietary rights

253; 3 L.J. C.P. 79; *Salop* (*Countess*) v. *Crompton*, Cro. Eliz. 777.

(*d*) *Ferguson* v. ——, 2 Esp. 590; *Anworth* v. *Johnson*, 5 C. & P. 239.

(*e*) 2 Roll. Abr. Waste (C).

(*f*) *Manchester Warehouse Co.* v. *Carr*, 5 C.P.D. 507; 49 L.J. C.P. 809; following *Saner* v. *Bilton*, 7 Ch.D. 815; 47 L.J. Ch. 267.

(*g*) *Smyth* v. *Carter*, 18 Beav. 78; *West Ham Central Charity Board* v. *East London Waterworks*, (1900) 1 Ch. 624; 69 L.J. Ch. 257.

(*h*) *Queen's College* (*Provost, &c.*) v. *Hallett*, 14 East, 489.

(*i*) *Cole* v. *Green*, 1 Lev. 309.

(*k*) *Thomlinson* v. *Brown*, Sayer, 215.

(*l*) 2 Roll. Abr. 815, pl. 9.

(*m*) *Young* v. *Spencer*, 10 B. & C. 145; 8 L.J. (O.S.) K.B. 106.

of the landlord or reversioner. It is no answer to an action for the infringement of these rights to say that the defendant might, before the expiration of the lease, restore the premises to their former plight, and surrender them up to the landlord in their original condition (*n*).

The lessee cannot convert one species of edifice into another, such as a corn-mill into a fulling-mill, or malt-mill, or a water-mill into a wind-mill, though the conversion be to the pecuniary advantage of the landlord, as well as to the benefit of the tenant (*o*). He must not fell timber-trees (except for the necessary repairs of a house he has covenanted to repair), nor destroy spring-woods or young plants destined to become trees; but he may cut willows, maples, beeches, and thorns, if they do not shelter a dwelling-house or sustain a bank, or afford shelter to cattle, and the cutting of them is not prejudicial to the inheritance. He may also cut oaks and ashes where they are usually cut as underwood, and are in due course to grow up again from the stumps, and the cutting is warranted by local custom and usage. He must not dig for gravel, lime, clay, brick-earth, stone, or the like, except for the necessary repair and improvement of the demised premises, in fulfilment of the covenants of his lease. He must not remove virgin soil (*p*), nor open quarries or mines of metal or coal, for the purpose of selling the produce thereof; but he may work mines and quarries which were open and in existence at the time of the demise, as they then form part of the annual profits of the land. He must not convert arable land into pasture, or pasture into arable land, or plough up a warren, or stub up a wood to make it pasture, or divert the courses of streams, nor dry up ancient pools or fish-ponds, nor destroy fences, nor put land under water, nor destroy the stock or breed of anything. He must not take all the fish out of a fish-pond, or the doves from a dovecote, or the deer from a park, or the rabbits and conies from a warren, or the game from preserves; but he is entitled to the reasonable use and enjoyment of them, leaving as many in store for the landlord when he goes out as he found when he was intrusted with the possession and use of the property (*q*).

Waste may be committed by removing glass annexed to windows, for it is parcel of the house; and although the lessee himself, at his own cost, put the glass in the windows, yet, being once parcel of the house, he cannot take it away or waste it.

(*n*) *Queen's College* (*Provost, &c.*) v. *Hallett*, *ante*, p. 640; *Cole* v. *Forth*, *infra*.

(*o*) Bac. Abr. Waste; *Cole* v. *Forth*, 1 Mod. 94; Co. Litt. 53, a, 53, b.

(*p*) *Higgon* v. *Mortimer*, 6 C. & P. 616.

(*q*) *D'Arcy* (*Lord*) v. *Askwith*, Hob. 234; *Phillips* v. *Smith*, 14 M. & W. 589; 15 L.J. Ex. 201; Bac. Abr. Waste; Litt. s. 71.

Wainscot also, whether annexed to the house by the lessor or the lessee, is parcel of the house, and cannot be removed, unless it is purely of an ornamental character (*post*, p. 644); and there is no difference in law if it be fastened by great nails, or little nails, or by screws or irons put through the posts or walls (*r*); for every chattel affixed to the soil of another becomes a part of the soil, and belongs to the owner of the land, unless it is shown to have been affixed there in the necessary enjoyment of an easement by the person entitled to the easement, in which case it will belong to the latter, and not to the owner of the soil (*s*).

Waste by tenant from year to year.—A tenant from year to year is not responsible for permissive waste. Where an action on the case was brought by a lessor against a lessee holding for a term not then determined, for suffering a house demised to him to go to ruin for want of repairs to the roof and windows, it was held that such an action was not maintainable. "There is no doubt," observes Mansfield, C. J., "but that an action on the case may be maintained for wilful waste; but, at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable, such an action might be brought against a tenant-at-will who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage it" (*t*). But every tenant from year to year is bound to take all due and reasonable care of the premises demised to him, and if windows are broken by the wind or hail, and the rain gets in, he is liable for the non-repair of them, if the consequences of his neglect would be damage to the building from the rain. A tenant-at-will, or a tenant from year to year, is not bound, unless by special contract, to expend money in repairs and improvements. The lessee of land who erects a building thereon does not commit waste by so doing, unless it can be shown that such building is an injury to the inheritance (*u*). And so where the tenant of a farm near London erected glass houses upon it and turned it in part into a market garden, it was held that there was no waste, and the opinion was expressed that the Agricultural Holdings Act, 1883, had abolished some of the old common law doctrine of waste, and that buildings erected by a lessee on a demised land which rendered it more profitable would be improvements and could not be regarded as waste (*x*).

(*r*) *Herlakenden's case*, 4 Co. 63, b; *Wilde* v. *Waters*, 16 C.B. 637; 24 L.J. C.P. 193.

(*s*) *Lancaster* v. *Eve*, 5 C.B. N.S. 717; 28 L.J. C.P. 235.

(*t*) *Gibson* v. *Wells*, 1 Bos. & P. N.R. 290; *Herne* v. *Bembow*, 4 Taunt. 764; *Martin* v. *Gilham*, 7 Ad. & E. 540; 7 L.J. Q.B. 11.

(*u*) *Jones* v. *Chappell*, L.R. 20 Eq. 539; 44 L.J. Ch. 658.

(*x*) *Meux* v. *Cobley*, (1892) 2 Ch. 253; 61 L.J. Ch. 449. See *ante*, p. 640.

Timber trees.—Wherever trees are excepted from a demise, there is, by implication, a right in the landlord to enter on the land and cut the trees at all reasonable times (*y*).

Duty of tenant to preserve landlord's landmarks and boundaries.—Where a tenant for life, or for years, or at will, has land of his own adjoining to that which he holds as tenant, it is his duty to keep the boundaries between the two properties distinct, so that, at the expiration of the tenancy, the reversioner may be able without difficulty to resume the possession of what belongs to him; and, if the tenant neglects this duty, and suffers the boundaries to be confused, so that the reversioner cannot tell to what land he is entitled, the courts will give relief by compelling the tenant to restore the proper boundaries, if it can be done, or, if not, to give an equivalent. This relief is given not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or purchasers without notice (*z*).

Fences.—There is no implied agreement on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut on land demised to a tenant so as to prevent the tenant's cattle from straying on to them (*a*).

Restrictive covenants as to the user of premises entered into between lessor and lessee run with the land (*ante*, p. 282). When the benefit of a restrictive covenant has been once clearly annexed to one piece of land, there is a presumption that it passes by any assignment of that land without proof of special bargain (*b*). A general covenant by the lessee that he will not do, or suffer to be done, upon the demised premises anything which may become an annoyance to the tenants of the adjoining houses may prevent him from opening a shop or coal-office, or carrying on any trade or business in a dwelling-house (*c*).

A lessee covenanted not to do anything to annoy or diminish the value of the property adjoining, or build without the approval of the lessor, &c. The owner afterwards leased the adjoining property to another who made a similar covenant. The first lessee began to build with the approval of the lessor. It was held that the second lessee could not call upon the owner to restrain the first from building (*d*). The purchaser of each lot of a building estate entered into a covenant with the vendor and the purchasers of

(*y*) *Hewitt* v. *Isham*, 7 Exch. 77; 21 L.J. Ex. 35.
(*z*) *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 25 L.J. Ch. 888.
(*a*) *Erskine* v. *Adeane*, L.R. 8 Ch. 756; 42 L.J. Ch. 835.
(*b*) *Rogers* v. *Hosegood*, (1900) 2 Ch. 388; 69 L.J. Ch. 652.
(*c*) *Wilkinson* v. *Rogers*, 10 Jur. N.S. 5; 2 De G. J. & S. 62.
(*d*) *Master* v. *Hansard*, 4 Ch.D. 718; 46 L.J. Ch. 505; *Renals* v. *Cowlishaw*, 11 Ch.D. 866; 48 L.J. Ch. 830. See, however, *Nicoll* v. *Fenning*, 19 Ch.D. 258; 51 L.J. Ch. 166; *Spicer* v. *Martin*, 14 App.Cas. 12; 58 L.J. Ch. 309; *Mackenzie* v. *Childers*, 43 Ch.D. 265; 59 L.J. Ch. 188.

the other lots that he would not build beyond a specified line; a mortgagee of one of the lots, with notice of the covenant, but without restriction of his mortgagor, foreclosed and sold his lot to the defendant, with notice of the covenant; it was held that there was no implied restriction as between the mortgagor and mortgagee, and that the mortgagor was not entitled to enforce the restriction against the defendant (*e*). Where a building has been erected without complaint, the court will not grant a mandatory injunction to pull it down (*f*). Where a lessor covenanted that he would not let any other house in the same street "for the purpose of an eating house," and then let a house to a person who set up an eating house, although covenanting not to do so, it was held that the lessor was not liable to the first lessee (*g*).

Where the lessee covenanted not to carry on any "business, &c., whatsoever, or anything of the nature thereof, or to suffer anything which may grow to the annoyance, &c. of the neighbourhood," he was prohibited from using the premises as a throat hospital, where small payments were made by the patients (*h*); and where the lessee covenanted not to use the house "for any other purpose than a private residence," it was held that he broke it by taking in as boarders pupils attending a school in the neighbourhood (*i*). Where there was a covenant to pay an extra rent in case any noxious trade was carried on, it was held that this was not a licence to carry on the trade paying the rent, but was a covenant rendering void the lease at the option of the lessor (*k*).

Fixtures.—The question as to what articles are fixtures has been the subject of much discussion; but it would seem that where articles are strictly and properly part of the architectural design, and put there as such (*l*), and for the purpose of improving the inheritance (*m*), they are fixtures. Tapestry when physically annexed to the walls has been held to be a fixture (*n*), but not a collection of stuffed birds attached to removable trays in cases affixed to the walls (*o*).

(*e*) *King* v. *Dickeson*, 40 Ch.D. 596; 58 L.J. Ch. 464.

(*f*) *Gaskin* v. *Balls*, 13 Ch.D. 324.

(*g*) *Kemp* v. *Bird*, 5 Ch.D. 974; 46 L.J. Ch. 828; *Fitz* v. *Iles*, (1893) 1 Ch. 77; 62 L.J. Ch. 258; *Ashby* v. *Wilson*, (1900) 1 Ch. 66; 69 L.J. Ch. 47; *Holloway Brothers* v. *Hill*, (1902) 2 Ch. 612; 71 L.J. Ch. 818.

(*h*) *Bramwell* v. *Lacy*, 10 Ch.D. 691; 48 L.J. Ch. 339; see also *German* v. *Chapman*, 7 Ch.D. 271; 47 L.J. Ch. 250; *Rolls* v. *Miller*, 27 Ch.D. 71; 53 L.J. Ch. 682; *Tod Heatly* v. *Benham*, 40 Ch.D. 80; 58 L.J. Ch. 83; *Wood* v. *Cooper*, (1894) 3 Ch. 671; 63 L.J. Ch. 845; *Wauton* v. *Coppard*, (1899) 1 Ch. 92; 68 L.J. Ch. 8.

(*i*) *Hobson* v. *Tulloch*, (1898) 1 Ch. 424; 67 L.J. Ch. 205.

(*k*) *Weston* v. *Met. Asylum District*, 9 Q.B.D. 404; 51 L.J. Q.B. 399; *Harmann* v. *Powell*, 60 L.J. Q.B. 628.

(*l*) *D'Eyncourt* v. *Gregory*, L.R. 3 Eq. 382; 36 L.J. Ch. 107; see also *Leigh* v. *Taylor*, (1902) A.C. 157; (1901) 1 Ch. 523; 71 L.J. Ch. 272.

(*m*) *Monti* v. *Barnes*, (1901) 1 K.B. 205; 70 L.J. K.B. 225.

(*n*) *Norton* v. *Dashwood*, (1896) 2 Ch. 497; 65 L.J. Ch. 737; see also *Leigh* v. *Taylor*, *supra*.

(*o*) *Hill* v. *Bullock*, (1897) 2 Ch. 482; 66 L.J. Ch. 705.

Landlord's fixtures.—The term "landlord's fixtures" means such things as the landlord chooses to annex to the freehold and demise with it, and which, of course, the tenant has no right to remove, and must restore at the end of the term: such as grates, marble chimney-pieces, locks, keys, bars and bolts, steam-engines and boilers, hay-cutters, malt-mills, corn-crushers, grinding-stones, &c. (*p*).

Tenant's fixtures.—The rule formerly was, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards took it away, it was waste. In the progress of time this rule was relaxed, and many exceptions have been grafted upon it. One has been in favour of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like (*q*). Of all these, it is to be observed that they are exceptions only (*r*). Other exceptions have been grafted upon the rule in favour of the enjoyment of the occupation, and in favour of trade, and vessels, machinery, and utensils, which are immediately subservient to the purposes of trade (*s*). If a landlord lets a house unfurnished, without the conveniences of grates or gas-fittings, and the tenant, for the enjoyment of his occupation, fixes them in the house, he may, unless he has contracted to leave them behind, remove them during his term. Whether a particular fixed chattel belongs to the landlord or the tenant, must in some instances depend upon what the contracting parties propose to be the subject of the demise (*t*). Pillars of brick and mortar built on the floor of a dairy by a tenant to sustain milk-pans have, however, been held to be part of the freehold (*u*); also barns and beast-houses, waggon-houses, fuel-houses, pigeon-houses, carpenters' shops for mending waggons and carts, and agricultural buildings employed and used upon the farm, and let into the ground, and not merely placed on the surface thereof, or on a brick or stone floor (*x*); also railway-sleepers (*y*); also conservatories, hot-houses, or green-houses, erected on a brick or stone foundation, and attached thereto by permanent fastenings; so that if the tenant removes them after he has put them up he is guilty of waste (*z*). But if the tenant raises and constructs foundations of a permanent character for the reception

(*p*) *Walmsley* v. *Milne*, 7 C.B. N.S. 115; 29 L.J. C.P. 97.

(*q*) See the cases collected in Amos & Ferard on Fixtures, p. 105 *et seq.* (ed. 3).

(*r*) *Buckland* v. *Butterfield*, 4 Moore, 440, 447.

(*s*) See the cases collected in Amos & Ferard on Fixtures, p. 97 *et seq.* (ed. 3).

(*t*) *Bishop* v. *Elliott*, 24 L.J. Ex. 33; 11 Exch. 113; *Sumner* v. *Bromilow*, 34 L.J. Q.B. 130.

(*u*) *Leach* v. *Thomas*, 7 C. & P. 327.

(*x*) *Elwes* v. *Maw*, 3 East, 38; 2 Smith's L.C. 183 (ed. 10); *Wood* v. *Hewett*, 8 Q.B. 913; 15 L.J. Q.B. 247.

(*y*) *Turner* v. *Cameron*, L.R. 5 Q.B. 306; 39 L.J. Q.B. 125.

(*z*) *Buckland* v. *Butterfield*, 4 Moore, 440; *Jenkins* v. *Gething*, 2 Jo. & H. 520; *Sleddon* v. *Cruikshank*, 16 M. & W. 71; 16 L.J. Ex. 61.

of a superstructure of wood, and the superstructure merely rests on this foundation, or is attached thereto by screws or movable pins or bolts, so as to be removable at pleasure without material or permanent injury to the freehold, the movable structure placed on such foundation by the tenant continues the property of the latter, and may be carried away by him at the expiration of his lease (*a*). A door which may be lifted from its hinges, and a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold (*b*); nor a mooring-pile, driven into land for the accommodation of the navigation of a canal or river (*c*); nor looms of a worsted mill fixed by nails (*d*). But locks, keys, and bars belong to the landlord; and so does a shutter and sliding bolt, put up for the security of the premises. In determining whether a chattel has become a fixture or not, the intention of the person affixing it to the soil is only material so far as it is apparent from external facts (*e*).

Agricultural tenant's fixtures removable by statute.—Buildings and constructions of a permanent character, erected upon the demised premises by the tenant and attached to the freehold, are irremovable by him at common law, unless they have been erected for trading purposes. By 14 & 15 Vict. c. 25, s. 3, it is enacted that if any tenant shall with the consent in writing of the landlord, at his own cost and expense, erect any buildings, engine, or machinery, for the purposes of trade or agriculture, such buildings shall be the property of the tenant, and shall be removable by him, one month's previous notice in writing being given of his intention, and the landlord or his agent being afforded an opportunity of purchasing the thing proposed to be removed, as therein mentioned.

If a tenant receives from his landlord timber for the purpose of erecting a shed, and uses the timber in the construction of it, he has no right to pull down the building and remove the timber, although he has added materials of his own, and confounded them, in the erection, with those furnished by the landlord (*f*).

By the Agricultural Holdings Act, 1883 (*g*), it is enacted that where after the commencement of this Act a tenant affixes to his

(*a*) *Grymes* v. *Bowereu*, 6 Bing. 437; 8 L.J. (O.S.) C.P. 140; *Rex* v. *Otley*, 1 B. & Ad. 161; 9 L.J. (O.S.) M.C. 11; *Wansbrough* v. *Maton*, 4 Ad. & E. 884; 5 L.J. K.B. 150; *Davis* v. *Jones*, 2 B. & Ald. 165; *Rex* v. *Londonthorpe*, 6 T.R. 377; *Wiltshear* v. *Cottrell*, 22 L.J. Q.B. 177; 1 E. & B. 674.

(*b*) *Wood* v. *Hewett*, 8 Q.B. 913; 15 L.J. Q.B. 247; *Hobson* v. *Gorringe*, *infra*.

(*c*) *Lancaster* v. *Eve*, 5 C.B. N.S. 717; 28 L.J. C.P. 235.

(*d*) *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146; *Astbury*, *Ex parte*, L.R. 4 Ch. 630; 38 L.J. Bankr. 9; *Longbottom* v. *Berry*, L.R. 5 Q.B. 123; 39 L.J. Q.B. 37.

(*e*) *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 66 L.J. Ch. 114.

(*f*) *Smith* v. *Ender*, 27 L.J. Ex. 83.

(*g*) 46 & 47 Vict. c. 61, s. 34.

holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of, and be removable by, the tenant within a reasonable time after the termination of the tenancy. Provided as follows:—1. Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding. 2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding. 3. Immediately after the removal of any fixture the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal. 4. The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it. 5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal). The provisions of the section apply to a fixture or building acquired by a tenant as well as to those affixed or erected by him (*h*).

Ornamental fixtures.—The ornamental fixtures now held removable by the tenant during the term, or within a reasonable time after its expiration (*i*), are chimney-glasses, pier-glasses, ornamental chimney-pieces, and stoves, tapestry and hangings nailed to the wall, in lieu of ornamental paper or panels (*k*), and ornamental cornices capable of being detached without injury to the building (*l*).

Domestic and trade fixtures.—Amongst the various domestic and trade fixtures held to be removable by the tenant are gas-pipes and gas fittings, and water-pipes attached to buildings by metal bands and nails, grates, ranges, ovens, coppers, bells, blinds, fixed tables, water-butts, cupboards, &c. (*m*), soap-boilers' furnaces, fat-vats,

(*h*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 4.

(*i*) *Climie* v. *Wood*, L.R. 4 Ex. 328; 38 L.J. Ex. 223.

(*k*) *Beck* v. *Rebow*, 1 P. Wms. 94. See *Leigh* v. *Taylor*, *ante*, p. 644.

(*l*) *Avery* v. *Cheslyn*, 3 Ad. & E. 75.

(*m*) *Bishop* v. *Elliott*, 11 Ex. 113; 24 L.J. Ex. 158, *ante*, p. 645.

coppers, dyeing and brewing vessels, cider-mills, baking-ovens, steam-engines, and salt-pans (*n*); also machinery, engines, vats, plant and utensils used in trade, however bulky or complex they may be in their construction. The tenant may take them to pieces, and remove them, and put them together again in the same form in some other place. And where a shed or building is a mere accessory to a trade fixture, such as a shed, or any temporary building, erected merely for the purpose of covering and protecting a steam-engine, or machinery, or trade utensils, from the effect of the weather, it may be removable, together with the trade fixture to which it belonged, on the ground that "omne accessorium sequitur suum principale." But a building is not removable merely because it has been erected for manufacturing or trading purposes, or for the purpose of covering and protecting machinery. If the building is of a substantial character, standing on brick or stone foundations let into the soil, and is constructed so as not to be removable without the entire destruction of the fabric, it cannot be disannexed from the freehold and taken away, although it may be built over a steam-engine, and may contain nothing but steam-machinery, spinning-jennies, drums and wheels, all of which may be removable, and to all of which it may in a certain sense be accessory (*o*).

Fixtures removable by local custom and usage.—Things annexed to the freehold are sometimes held removable in accordance with local custom and usage in particular districts, such as barns and granaries erected on stone pillars, or on pattens, or blocks of timber (*p*). If the pillars or pattens merely rest on the ground, and are not attached to foundations sinking into the soil, they are removable without any custom (*q*).

Abandonment of right to disannex and remove ornamental and trade fixtures.—If the tenant has entered into an express covenant to yield up, at the expiration of his term, "all erections and buildings that may be erected," or "all improvements that may be made," upon the demised premises, he cannot afterwards remove trade erections or buildings, or trade or ornamental or domestic fixtures (*r*). A covenant in a lease to yield up the demised premises to the lessor at the expiration of the lease, together with all

(*n*) 42 Ed. 3, fol. 6, pl. 19; 20 Hen. 7, fol. 13, pl. 24; *Poole's case*, 1 Salk. 368; *Lawton* v. *Lawton*, 3 Atk. 13; *Penton* v. *Robart*, 2 East, 88. As to glass houses, see *Mears* v. *Callender*, (1901) 2 Ch. 388; 70 L.J. Ch. 621.

(*o*) *Whitehead* v. *Bennett*, 27 L.J. Ch. 474.

(*p*) 11 Vin. Abr. 154; EXECUTORS, U. pl. 74; *Culling* v. *Tuffnell*, Bull. N.P. 34.

(*q*) See notes to *Elwes* v. *Maw*, 2 Smith's L.C. 183 (ed. 10).

(*r*) *Naylor* v. *Collinge*, 1 Taunt. 19; *Thresher* v. *East London Waterworks*, 2 B. & C. 608; 2 L.J. (O.S.) K.B. 100; *Martyr* v. *Bradley*, 2 M. & Sc. 25; 1 L.J. C.P. 147; *West* v. *Blakeway*, 3 Sc. N.R. 218; 10 L.J. C.P. 173; *Bishop* v. *Elliott*, *ante*, pp. 645, 647; see also *Dumergue* v. *Rumsey*, 33 L.J. Ex. 88; 2 H. & C. 777; *Sumner* v. *Bromilow*, 34 L.J. Q.B. 130.

fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease, and does not extend to fixtures which were not then in existence; but a covenant to yield up fixtures belonging, or that may belong, to the demised premises, extends to fixtures that are afterwards put up by the tenant (*s*).

Inability of tenant to remove fixtures after expiration of term.—Whenever an outgoing tenant is possessed of fixtures which he has a right to remove, he must exercise such right prior to the determination of his tenancy; he cannot, after a formal disclaimer of the title of his landlord, or after he has once quitted the demised premises and given up the key to the landlord, re-enter for the purpose of severing and removing fixtures. "After the term they become a gift in law to him in reversion, and are not removable," unless the tenant, after the expiration of the term, has remained in possession, with the permission of the landlord, and actually removes them during the continuance of his lawful possession, after the expiration of the term; if he holds over wrongfully, he loses his right to remove his fixtures; and if he quits possession, and the tenancy is determined, his right to his fixtures is extinguished, and they become the property of the reversioner (*t*). It has been held that a tenant's fixtures not removed during the continuance of the tenancy become on its expiration part of the freehold even though they are on the premises by the parol consent of the lessor (*u*). If the lease becomes forfeited, and the tenant, whilst he continues in possession after the forfeiture, and before judgment in ejectment has been obtained against him, removes his fixtures, he will be entitled to retain those removed within a reasonable time, as they are not forfeited to the landlord by the forfeiture of the lease (*x*). But if the landlord re-enters for the forfeiture the tenant's right to remove the fixtures is gone (*y*).

Right of purchasers, or mortgagees, to enter and remove fixtures.—The right of the assignee of the lessee can of course, in general, extend no further than the right of the lessee himself; but the tenant's right to remove fixtures is held to be so far connected with the land, that it may be considered as a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat

(*s*) *Hitchman* v. *Walton*, 4 M. & W. 414; 8 L.J. Ex. 31; *Metrop. Co. Ins. Soc.* v. *Brown*, 28 L.J. Ch. 581; 26 Beav. 454.

(*t*) *Leader* v. *Homewood*, 5 C.B. N.S. 546; 27 L.J. C.P. 316; *Ruffey* v. *Henderson*, 21 L.J. Q.B. 49; 17 Q.B. 574; *Heap* v. *Barton*, 12 C.B. 274; 21 L.J. C.P. 153.

(*u*) *Thomas* v. *Jennings*, 66 L.J. Q.B. 5.

(*x*) *Stansfeld* v. *Portsmouth* (*Mayor*), 4 C.B. N.S. 131; 27 L.J. C.P. 124; *Sumner* v. *Bromilow*, 34 L.J. Q.B. 130; but see *Storer* v. *Hunter*, 3 B. & C. 368; 3 L.J. (O.S.) K.B. 81.

(*y*) *Pugh* v. *Arton*, 38 L.J. Ch. 619; L.R. 8 Eq. 626.

his grant by a subsequent voluntary act of surrender; "for, as regards strangers who were not parties or privies to the surrender, the estate surrendered hath in law a continuance" (*z*); and, therefore, if a lessee who has mortgaged his fixtures surrenders his term and quits possession, the mortgagee may nevertheless enter and remove the fixtures (*a*). Trade fixtures affixed to mortgaged premises by the mortgagor in a quasi-permanent manner, before or even after the mortgage, pass to the mortgagee (*b*). An equitable mortgagee has the same rights in this respect as a legal mortgagee (*c*).

Abandonment of right of removal (*d*).—A covenant in a lease to yield up the demised premises, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease; but a covenant to yield up fixtures that may belong to the demised premises extends to fixtures that are afterwards put up by the tenant (*e*). Whenever the tenant has a right of removal, he must exercise such right prior to the determination of his tenancy; he cannot, after he has once quitted the demised premises, re-enter for the purpose of severing and removing fixtures (*f*). If the tenant holds over wrongfully, he loses his right to sever and remove fixtures (*g*); but, if a lease becomes forfeited, the tenant may, before the landlord re-enters, or before the forfeiture is established by the judgment of a court of law, but not afterwards (*h*), remove his fixtures, and cannot, it seems, be made responsible for so doing (*i*). If the landlord gives the lessee permission to leave the fixtures on the premises, and make the best terms he can for them with the incoming tenant, and the latter enters and takes possession of the fixtures, but refuses to pay for them, the lessee cannot enter to remove them, nor can he recover the value of them (*k*). When it is provided by the terms of a lease that the lessee, at the expiration

(*z*) Co. Litt. 338 b.

(*a*) *Lond. and Westminster Loan, &c. Co.* v. *Drake*, 6 C.B. N.S. 798; 28 L.J. C.P. 297.

(*b*) *Cullwick* v. *Swindell*, L.R. 3 Eq. 249; 36 L.J. Ch. 173; *Climie* v. *Wood*, L.R. 4 Ex. 328; 38 L.J. Ex. 223; see *Boyd* v. *Shorrock*, L.R. 5 Eq. 72; 37 L.J. Ch, 144; *Asbury, Ex parte*, L.R. 4 Ch. 630; 38 L.J. Bankr. 9; *Longbottom* v. *Berry*, L.R. 5 Q.B. 123; 39 L.J. Q.B. 37; *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146.

(*c*) *Tebb* v. *Hodge*, L.R. 5 C.P. 73; 39 L.J. C.P. 56.

(*d*) *Ante*, p. 648.

(*e*) *Hitchman* v. *Walton*, 4 M. & W. 414; 8 L.J. Ex. 31; *Naylor* v. *Collinge*, 1 Taunt. 19; *Thresher* v. *East London Waterworks*, 2 B. & C. 608; 2 L.J. (O.S.) K.B. 100; *Martyr* v. *Bradley*, 2 M. & Sc. 25; 1 L.J. C.P. 147; *West* v. *Blakeway*, 3 Sc. N.R. 218; 10 L.J. C.P. 173.

(*f*) *Lee* v. *Risdon*, 7 Taunt. 191; *Quincy, Ex parte*, 1 Atk. 477; *Dudley* v. *Warde*, Amb. 113; *Lyde* v. *Russell*, 1 B. & Ad. 394; 9 L.J. (O.S.) K.B. 26.

(*g*) *Leader* v. *Homewood*, 27 L.J. C.P. 316; 5 C.B. N.S. 546.

(*h*) *Heap* v. *Barton*, 12 C.B. 274; 21 L.J. C.P. 153; *Pugh* v. *Arton*, L.R. 8 Eq. 626; 38 L.J. Ch. 619.

(*i*) *Stansfeld* v. *Portsmouth (Mayor)*, 4 C.B. N.S. 131; 27 L.J. C.P. 124; *Storer* v. *Hunter*, 3 B. & C. 368; 3 L.J. (O.S.) K.B. 81.

(*k*) *Roffey* v. *Henderson*, 17 Q.B. 574; 21 L.J. Q.B. 49.

or other sooner determination of the term, is to have certain fixtures, and the lease becomes forfeited, the lessee has a reasonable time from the date of the forfeiture for the removal of his fixtures (*l*).

Waste committed by strangers upon land demised to tenant or lessee.—Every lessee of land, whether for life or years, is liable, under the statute of Gloucester, to an action for commissive or wilful waste done on the land in lease, by whomsoever it may be committed. The statute of Gloucester "prohibiteth farmers from doing waste; and yet, if they suffer a stranger to do waste, they shall be charged with it, for it is presumed in law that the farmer may withstand it, 'Et qui non obstat quod obstare potest, facere videtur.' In this case the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste, and so the loss, as reason requireth, in the end shall lie upon the wrongdoer" (*m*).

Licence to commit waste.—If a general or partial permission be given to the lessee by the lease to commit waste, he is so far tenant without impeachment of waste. Such permission vests the property of what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. Where land was demised for a term of years, with liberty to the lessee to dig half an acre of brick-earth to a certain depth annually, and the lessee covenanted that if he dug more he would pay an increased rent of 375*l.* per annum per acre, and a stranger dug and took away brick-earth, it was held that the lessee was entitled to recover from the stranger the full value of such brick-earth (*n*).

Right of reversioners to enter upon lands in possession of lessees to inspect waste.—The law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and if the lessee prevents the inspection, he is liable to an action for damages (*o*).

Injuries to lands and tenements from fire.—The involuntary and unintentional burning of a house, through the negligence of the tenant or his servants, amounts, in contemplation of law, to no more than permissive waste; and for this a tenant-at-will or from year to year is not, as we have seen, responsible to the reversioner (*p*). Every landlord who demises buildings to a tenant

(*l*) *Stansfeld* v. *Portsmouth* (*Mayor*), 4 C.B. N.S. 131; 27 L.J. C.P. 124.
(*m*) 2 Inst. 146.
(*n*) *Attersoll* v. *Stevens*, 1 Taunt. 183.
(*o*) *Hunt* v. *Dowman*, Cro. Jac, 478.
(*p*) *Ante*, p. 642. *Shrewsbury* (*Countess*) v. *Crompton*, 5 Co. 13 b; Cro. Eliz. 777; Tindal, C.J., in *McKenzie* v. *McLeod*, 4

must be taken to contemplate all the ordinary risks to which house property is exposed from fire and the negligence of servants intrusted with fire and candles; and if he wishes to be protected from these risks, he must either insure or take from his lessee a covenant to repair and maintain the premises. If he fails to do so, and the premises are destroyed by fire, without any gross or culpable negligence on the part of the tenant, the landlord will have no remedy for the loss. If the fire has been caused by such an amount of gross negligence as to give it the appearance of a wilful act, the party guilty of the misconduct, whether it be the tenant or a stranger to the demise, will be answerable for commissive waste.

Every tenant of a house is responsible for not taking care that the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning, and an explosion ensues, and injures the house, the tenant will be responsible for the injury. But if a thief enters the house in the absence of the tenant, and cuts and carries away a gas-pipe without the knowledge of the tenant, or against his will, the latter is not then responsible for the resulting damage. When the entry of gas into a house is under the control of the occupants of the house, the gas company supplying the gas is not bound, on receiving notice that no more gas will be required, to stop the supply from the outside by putting on an outer stop-cock, or cutting off the communication between the gas-pipes in the interior of the house and the main in the street (*q*). In supplying gas to a house, a gas company is bound to use every reasonable precaution to prevent injury during the operation of "tapping the main" (*r*).

Damages for waste.—In an action for waste, it is no objection to the landlord's claim to substantial damages, or to the judgment of the court, that the property has been improved in value by alterations made upon it, if those alterations have been made without the knowledge of the landlord, or in spite of his protest or objections. Thus, if a tenant convert a furze brake, in which game have bred, into arable or pasture land, by which its real value is much improved, but the landlord has objected to the improvement, preferring a furze brake with game to a corn-field without game, the landlord is entitled to substantial damages (*s*), and to judgment, whatever may be the damages recovered (*t*).

M. & Sc. 253; 3 L.J. C.P. 79; *Horsefall* v. *Mather*, Holt, N.P.C. 9. See as to penalties on servants negligently causing fire, Addison on Torts, 372 (ed. 7).

(*q*) *Holden* v. *Liverpool Gas Co.*, 3 C.B. 14; 15 L.J. C.P. 304.

(*r*) *Blenkiron* v. *Gt. Central Gas Consumers' Co.*, 2 F. & F. 438.

(*s*) Heath, J., *Harrow School* v. *Alderton*, 2 Bos. & P. 86.

(*t*) *Pindar* v. *Wadsworth*, 2 East, 161.

When the action is brought for a breach of duty by the defendant, in omitting or neglecting to restore or rebuild a house which the defendant has undertaken to maintain and keep up, and which has been accidentally burnt or destroyed, the measure of damages is not the cost of rebuilding the house. In such a case, the plaintiff can only recover the loss he has sustained by the actual deterioration of his property. And if the new house, when rebuilt, will be much more valuable to the plaintiff than the old house that was burnt or destroyed, the defendant is entitled to the benefit of the deduction of the increased value from the cost of the rebuilding (*u*). Where there is a covenant not to commit waste, the measure of damages for a breach is not necessarily the sum required to reinstate the property, but is the diminution in the value of the reversion, less a discount for immediate payment (*x*).

Damages recoverable from tenant obstructing the reversioner entering upon premises to inspect waste.—We have already seen that the law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and, therefore, if the lessee prevents the inspection, substantial damages may be recovered from him by reason of the infringement of the lessor's right, although no waste has actually been committed or damage done (*y*).

Injunction to restrain waste.—The courts will interfere by injunction to restrain lessees and mortgagees in possession from committing waste to the injury of the landlord or mortgagor; unless the wrongful act works a forfeiture of the estate, and the landlord has an immediate right of entry and fails to exercise it (*z*), or unless the parties have by their contract assessed the compensation in the shape of an increased rent or liquidated damages to be paid for the doing of the act (*a*), and not as a cumulative remedy (*b*).

Where a tenant from year to year received notice to quit, and then began to cut and damage the hedge-rows, and to take manure off the land, and remove straw, &c., contrary to the course of good husbandry, the court granted an injunction to stop the mischief (*c*). And where the tenant of a farm, having discovered valuable mineral deposits in a stream which ran from the Welsh

(*u*) *Yates* v. *Dunster*, 11 Exch. 17; 24 L.J. Exch. 226; *Lukin* v. *Godsall*, 2 Peake, 15.
(*x*) *Whitham* v. *Kershaw*, 16 Q.B.D. 613.
(*y*) *Hunt* v. *Dowman*, Cro. Jac. 478.
(*z*) *Lathropp* v. *Marsh*, 5 Ves. 259.
(*a*) *Woodward* v. *Gyles*, 2 Vern. 119; *Carnes* v. *Nesbitt*, 7 H. & N. 778; 30 L.J. Exch. 348; *Rolfe* v. *Peterson*, 2 Bro. P.C. 436.
(*b*) *London (City of)* v. *Pugh*, 4 Bro. P.C. 395.
(*c*) *Onslow* v. ——, 16 Ves. 173.

mountains through his land, set to work to gather the minerals, and sell them, the court granted a perpetual injunction to restrain him from so doing (*d*). And so it will on a bill brought by a mortgagor, where the mortgagee in possession commits waste by cutting down timber, and the money arising from the sale of the timber is not applied in sinking the interest and principal of the mortgage. And where a mortgagor in possession commits waste, the court will, on a bill by the mortgagee, grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance (*e*).

Effect of acquiescence in commission of waste.—It is a principle of equity, that when a person has stood by seeing an act done, and has consented to it, he cannot complain of that which he has himself expressly or impliedly authorised or permitted. Thus, where the plaintiff had demised a logwood-mill to the defendant, and the latter altered it to a cotton-mill of great value, and the plaintiff stood by and saw the cotton-mill erected at great expense, and made no objection, and afterwards approved of the defendant's planting about the mill, and the plaintiff then filed a bill for an injunction to restrain the defendant from using the mill as a cotton-mill, the court dismised the bill, on the ground that the plaintiff had by his conduct encouraged the defendant to make the alteration (*f*).

Right of property in trees and bushes.—According to the old authorities, the general property in trees is in the landlord, and that in bushes is in the tenant, although if he exceeds his right—as by grubbing up or destroying fences—he may be liable to an action for waste. The tenant has the general property in the cuttings of a hedge, whoever cuts it (*g*).

Defeasible leases.—The lessor may reserve to himself a right to determine the lease and resume possession of the demised premises at any time on giving notice of his intention to the lessee (*h*). If a lease is made defeasible at the option of either of the parties, it may be determined by the lessor by a simple demand of possession, or the tenant may quit the demised premises and release himself from his contract by tendering possession to the landlord; but, if the lease is made determinable at the expiration of three, six, or nine years, or any particular interval of time, reasonable notice of the intention to determine the contract must be given by the party

(*d*) *Thomas* v. *Jones*, 1 Y. & C. 510.
(*e*) *Farrant* v. *Lovel*, 3 Atk. 722.
(*f*) *Brydges* v. *Kilburne*, cited *Jackson* v. *Cator*, 5 Ves. 688; *Harrow School* v. *Alderton*, 2 Bos. & P. 86; *ante*, p. 652; *Rex* v. *Butterton*, 6 T.R. 555; *E. I. Co.* v. *Vincent*, 2 Atk. 82; *Parrott* v. *Palmer*, 3 Myl. & K. 632, 640.
(*g*) *Berriman* v. *Peacock*, 9 Bing. 384; 2 L.J. C.P. 23.
(*h*) *Doe* v. *Kennard*, 12 Q.B. 244; *Liddy* v. *Kennedy*, L.R. 5 H.L. 134.

who intends to avail himself of the power of defeasance (*i*). If the lease is made determinable at the expiration of a certain time, if the parties shall think fit, but must concur in determining the lease (*k*). If power to determine the lease after a certain time is reserved, without saying by whom it is to be exercised, the law gives it to the lessee (*l*). If an agreement is entered into for a yearly tenancy, with a proviso for determining it in the middle of the year, such a proviso does not prevent it from being a yearly tenancy. When the party is in, he is in of the whole estate for a year, liable to a defeasance on a particular event. So, where there is a lease for twenty-one years, determinable at the end of seven or fourteen years, the party, when he enters, is in of a term of twenty-one years, but a defeasible term, and which may determinate by matter *ex post facto* (*m*). When the lease is determinable by notice, the notice may be given at any time, if no particular period for giving it is specified (*n*); but it must be in strict conformity with the terms of the power of defeasance; and, when performance of all the covenants that have been entered into by the lessee is made a condition precedent to his right to determine the lease, these covenants must be strictly fulfilled (*o*).

Disclaimer and forfeiture.—If a tenant from year to year disclaims the title of his lessor; if he claims the land as his own, and refuses to pay rent on the ground that he is himself the owner, or if he attorns or delivers up possession to a stranger, or professes to sell or grant the property to another; if he cuts down timber, pulls down or alters dwelling-houses, or obliterates fences, boundaries, and land-marks, or opens and digs mines and quarries against the will of the landlord, the tenancy is determinable by the latter, and he has a right of re-entry upon the property, and may forthwith recover possession of the demised premises (*p*). Acts of this description on the part of a tenant from year to year work a forfeiture of his term and interest, and convert the possession into an adverse possession, so that the tenant may at once be proceeded against without any notice to quit and without any demand of possession (*q*). But, if the lessor dies, and adverse claimants to the property appear and demand the rent of the tenant, and the

(*i*) *Goodright* v. *Richardson*, 3 T.R. 462.

(*k*) *Fowell* v. *Franter*, 34 L.J. Ex. 6; 1 H. & C. 48.

(*l*) *Dann* v. *Spurrier*, 3 Bos. & P. 399.

(*m*) *Rex* v. *Herstmonceaux*, 7 B. & C. 555; 6 L.J. (O.S.) M.C. 35.

(*n*) *Bridges* v. *Potts*, 17 C.B. N.S. 314; 33 L.J. C.P. 338; *Soames* v. *Nicholson*, (1902) 1 K.B. 157; 71 L.J. K.B. 24.

(*o*) *Friar* v. *Grey*, 15 Q.B. 899; 5 Exch. 584.

(*p*) *Jones* v. *Mills*, 10 C.B. N.S. 788; 31 L.J. C.P. 66. See, however, now, as to relief against forfeiture, *infra*, p. 660.

(*q*) *Doe* v. *Frowd*, 1 M. & P. 480; 6 L.J. (O.S.) C.P. 114; *Doe* v. *Flynn*, 1 Cr. M. & R. 137; 3 L.J. Ex. 221; *Doe* v. *Pittman*, 2 N. & M. 673; *Vivian* v. *Moat*, 16 Ch.D. 730; 50 L.J. Ch. 331.

latter refuses to pay it until the conflicting claims have been ascertained and settled, the refusal is not such a disclaimer of the title of the real owner as will justify the latter in treating the tenant as a trespasser (*r*). "To constitute a disclaimer" (by words) "there must be a renunciation by the party of his character of tenant, either by setting up the title of a rival claimant, or by asserting a claim of ownership in himself" (*s*). A mere refusal to pay rent, or a declaration by the tenant that he will continue to hold possession, or an omission to acknowledge the landlord as such by requesting further information as to title, when the property has changed hands, does not render the tenancy an adverse tenancy and possession (*t*). All verbal disclaimers operating as a forfeiture of the tenant's interest in, and right of possession of, the demised premises, and dispensing with the necessity of a notice to quit, are restricted to tenancies from year to year. A lease for a definite term of years cannot be forfeited by mere words (*u*). And if, after a disclaimer by a tenant from year to year, the landlord puts in a distress for rent which became due subsequently to the disclaimer, such distress is a waiver of the disclaimer, and again clothes the tenant with a lawful possession (*x*). Forfeiture is also incurred by the breach of conditions annexed to the demise; for the lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they are not illegal or repugnant to the grant itself, and upon the breach of those conditions may avoid the lease (*y*). But the law does not favour forfeitures of estates; and strict proof of a breach of a condition or covenant working a forfeiture of a lease is always required (*z*); and now relief against forfeiture can be obtained under the Conveyancing Act, 1881. See *post*, p. 660.

Provisoes for re-entry.—It is frequently made a term or condition of the demise that the lease shall be forfeited and the lessor have a right to re-enter and re-possess himself of the demised premises for a breach of particular covenants contained in a lease. The right to take advantage of a proviso of this description is, of course, confined to the lessor and the assignee of the reversion or part of the reversion (*a*); and the lessee cannot be permitted to set up his own breach of contract as an avoidance of the lease; for

(*r*) *Doe* v. *Pasquali*, 1 Peake, 259; *Swinfen* v. *Bacon*, 6 H. & N. 846; 30 L.J. Ex. 368.

(*s*) *Doe* v. *Cooper*, 1 Sc. N.R. 41; 9 L.J. C.P. 229; *Hunt* v. *Allgood*, 30 L.J. C.P. 313; 10 C.B. N.S. 253.

(*t*) *Doe* v. *Cawdor*, 1 Cr. M. & R. 398; 3 L.J. Ex. 239; *Doe* v. *Stanion*, 1 M. & W. 695, 703; 5 L.J. Ex. 253.

(*u*) *Doe* v. *Wells*, 10 Ad. & E. 427; 8 L.J. Q.B. 265.

(*x*) *Doe* v. *Williams*, 7 C. & P. 322.

(*y*) Bac. Abr. Leases, T. 2.

(*z*) 1 Wms. Saund. 287, b., 288, i.; 1 Mad. ch. 36.

(*a*) 22 & 23 Vict. c. 35, s. 3.

no man is permitted to take advantage of his own wrong (*b*). If it is provided that, in case of non-payment of rent, it shall be lawful for the lessor "to enter upon the premises for the same until it be fully satisfied," the lessor will be entitled to enter and hold possession until the arrears of rent are satisfied; but, when they are satisfied, the lessee will be entitled to re-enter and hold under the lease as before (*c*). It would seem that a power of re-entry upon the lessee "wilfully failing or neglecting to perform" any covenant, does not apply to a breach of a negative covenant (*d*); but a power to re-enter if the lessee does not "observe perform and keep" the covenants, does apply to a breach of a negative covenant (*e*). Provisoes in leases for re-entry in case of non-payment of rent or non-performance of covenants are not "to be construed with the strictness of conditions at common law; but, being matters of contract between the parties, they should be construed like all other contracts" (*f*). Where the lessee was to hold in consideration of the rent "and conditions" contained in the lease, and it was stipulated and "conditioned" that the lessee should not assign or underlet, it was held that the lease was forfeited, and that the lessor had a right to re-enter, on an assignment being made by the lessee (*g*). An agreement to hire a messuage at a certain rent is an agreement to pay that rent; and, therefore, if a power of re-entry is reserved "in case of breach of any of the agreements" contained in the written instrument of demise, the lessor may re-enter for non-payment of rent (*h*). Where a lessee covenanted to pay rent and not to assign, and there was a proviso for re-entry if the rent was in arrear, or all or any of the covenants "hereinafter contained" on the part of the lessee should be broken, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee paying the rent, &c., should quietly enjoy, it was held that the lessor could not enter for breach of the covenant not to assign, as the proviso was restrained by the word "hereinafter" to subsequent covenants, and there were none such in the lease (*i*). Where there is a proviso for re-entry in case of non-performance of covenants, and the lease contains a general covenant to repair, and also a covenant to repair within a certain time after notice, the landlord may at once enter for breach of the general cove-

(*b*) *Reid* v. *Parsons*, 2 Chit. 248; *Doe* v. *Birch*, 1 M. & W. 402; 5 L.J. Ex. 185; *Jones* v. *Carter*, 15 M. & W. 718, 725.

(*c*) Co. Litt. 203; *Doe* v. *Bowditch*, 15 L.J. Q.B. 267; 8 Q.B. 973.

(*d*) *Hyde* v. *Warden*, 3 Ex.D. 72; 47 L.J. Ex. 121.

(*e*) *Evans* v. *Davis*, 10 Ch.D. 747; 48 L.J. Ch. 223.

(*f*) *Doe* v. *Elsam*, M. & M. 191; *Hayne* v. *Cummings*, 16 C.B. N.S. 421.

(*g*) *Doe* v. *Watt*, 8 B. & C. 308; 6 L.J. (O.S.) K.B. 185.

(*h*) *Doe* v. *Kneller*, 4 C. & P. 3.

(*i*) *Doe* v. *Godwin*, 4 M. & S. 265.

nant (*k*); but, if he gives notice under the second covenant, this is a waiver of the forfeiture incurred by breach of the general covenant, and he cannot recover possession until after the time limited by the notice has expired (*l*). A notice to repair "in accordance with the covenants," or "forthwith," will not, however, amount to a waiver of the forfeiture incurred by a breach of the general covenant (*m*). Where a right of re-entry for waste is reserved, the proviso is understood to mean such waste as is injurious to the reversion (*n*). Where there is a proviso for re-entry for breach of a covenant to insure and keep insured, it does not mean that the lessee shall keep any one particular policy on foot, but that he shall always keep the premises insured by some one policy or another; and the breach will be a continuing breach so long as they remain uninsured (*o*).

A power of re-entry, in case the lessee carries on any trade or business upon the demised premises, authorises the lessor to re-enter if a school is established (*p*). But, when particular trades or occupations are specified, no trade or business which does not clearly fall within the description contained in the lease will come within the proviso (*q*).

A proviso for re-entry may be reserved in case the tenant should become bankrupt or insolvent (*r*), or the term granted should be taken in execution by the sheriff (*s*); and, if the contingency provided for happens, the lessor will be entitled to take possession, and to enjoy the emblements (*t*). If a proviso for re-entry is insensible, it is of course nugatory; for the court cannot find a meaning for that which has no meaning (*u*). If the lessor has the custody of the lease, and has in any wise misrepresented the nature of the proviso, or of the covenants to be fulfilled, or has withholden any necessary information from the lessee, or done anything to entrap the latter into a forfeiture, the law will not permit the lessor to avail himself of such forfeiture; for that would be permitting him to take advantage of his own wrong (*x*). When a party is let into possession under an agreement for a future lease, which is to contain certain covenants and a proviso for re-entry in

(*k*) *Baylis* v. *Le Gros*, 4 C.B. N.S. 537.
(*l*) *Doe* v. *Meux*, 4 B. & C. 606; 4 L.J. (O.S.) K.B. 4.
(*m*) *Few* v. *Perkins*, L.R. 2 Ex. 92; 36 L.J. Ex. 54; *Roe* v. *Paine*, 2 Campb. 520.
(*n*) *Doe* v. *Bond*, 5 B. & C. 855; 5 L.J. (O.S.) K.B. 68.
(*o*) *Doe* v. *Peck*, 1 B. & Ad. 428; 9 L.J. (O.S.) K.B. 60.
(*p*) *Doe* v. *Keeling*, 1 M. & S. 95.
(*q*) *Jones* v. *Thorne*, 1 B. & C. 715; 1 L.J. (O.S.) K.B. 200.
(*r*) *Roe* v. *Galliers*, 2 T.R. 133; *Doe* v. *Ingleby*, 15 M. & W. 465. See *Smith* v. *Gronow*, (1891) 2 Q.B. 394; 60 L.J. Q.B. 776.
(*s*) *Rex* v. *Topping*, M'Clel. & Y. 544.
(*t*) *Davis* v. *Eyton*, 7 Bing. 154; 9 L.J. (O.S.) C.P. 44.
(*u*) *Doe* v. *Carew*, 2 Q.B. 317; 11 L.J. Q.B. 5.
(*x*) *Doe* v. *Rowe*, Ry. & Mood. 346.

case of the non-performance of those covenants, the tenant holds, as we have before seen, subject to all such of the terms of the intended lease as are applicable to a yearly tenancy; and if, before the lease is granted, the lessee does an act which would have worked a forfeiture of the lease had it been granted, the landlord will have a right to re-enter, and may forthwith recover possession (*y*).

Effect of re-entry on lessee's liability on his covenants.—The forfeiture of the lease does not extinguish the liability of the lessee in respect of breaches of covenant that had accrued at the time of the forfeiture, so that the lessor, by taking advantage of the forfeiture and re-entering, does not deprive himself of his remedies upon the covenants of the lease for any breach of those covenants up to the time of the re-entry (*z*). If the landlord does not think fit to avail himself of the forfeiture, the liability of the lessee upon the covenants of the lease remains unaffected by the forfeiture; but, if the landlord brings an action of ejectment, he cannot, in general, sue the lessee in respect of breaches of covenant that have accrued subsequently to the commencement of the action (*a*).

Waiver of forfeiture—Lessor's right of election.—The right of entry for forfeiture of a lease is governed by the general law that, where a man has got a right to elect to do a thing to the injury of another, his election, when once made, is final and conclusive, and he cannot afterwards alter his determination. If, therefore, a lease has been forfeited, and there is an election on the part of the landlord to enter and defeat the lease or not as he pleases, and he by word or act manifests his intention that the lease shall continue, he waives the forfeiture, and cannot afterwards annul the lease. If, knowing of a forfeiture, he nevertheless tells his tenant that he is still tenant, and that he shall hold him to the covenants and stipulations of his lease, the election is made, and the landlord cannot afterwards enter for the forfeiture (*b*). On the other hand, if he brings ejectment for the forfeiture, he unequivocally declares his election to determine the lease; and a subsequent distress is no waiver of the forfeiture (*c*). Acceptance of rent, or demand of rent, or the bringing of an action for rent, or distraining for rent, accruing due after a forfeiture, will be considered as strong evidence of the lessor's determination to continue the lease and waive the forfeiture, if it appears that, at the time the lessor received the

(*y*) *Doe* v. *Amey*, 12 Ad. & E. 476; *Doe* v. *Ekins*, Ry. & M. 29; *Hayne* v. *Cummings*, 16 C.B. N.S. 421.

(*z*) *Hartshorne* v. *Watson*, 5 Sc. 506; 7 L.J. C.P. 138.

(*a*) *Jones* v. *Carter*, 15 M. & W. 718.

(*b*) *Ward* v. *Day*, 33 L.J. Q.B. 13, 254; 5 B. & S. 359.

(*c*) *Grimwood* v. *Moss*, L.R. 7 C.P. 360; 41 L.J. C.P. 239.

rent, he had notice of the breach of the condition (*d*). A forfeiture for not repairing may be waived by the receipt of rent which became due after the right of entry accrued, but not by the receipt of rent becoming due before the expiration of a notice to repair. A forfeiture is suspended, but not waived, by allowing a tenant further time to repair (*e*). A waiver of one forfeiture does not prevent the lessor from availing himself of subsequent forfeitures (*f*); and a receipt of rent is no waiver of a continuing breach of a covenant to repair (*g*). Where a breach of covenant has continued upwards of twenty years with full knowledge of it on the part of the lessor, and no attempt has been made to take advantage of it, neither the lessor nor his assignee can avail himself of the breach to work a forfeiture (*h*). The mere fact of a landlord not objecting to assignees taking possession is not sufficient in itself to imply a recognition of the assignees where the lease contains a covenant not to assign without the landlord's assent (*i*).

Relief against forfeiture—Breach of covenants or conditions respecting insurance or payment of rent.—With respect to leases made before or after the commencement of the Conveyancing Act, 1881, and notwithstanding any stipulation to the contrary, relief will now be given against forfeiture (except in cases of non-payment of rent, or breach of covenant not to assign or underlet) (*k*), unless notice has been given requesting the lessee to remedy the breach and make compensation, and the lessee has failed to comply (*l*).

(*d*) Bac. Abr. Leases, tit. 2; *Ward* v. *Day*, *ante*, p. 659; *Denby* v. *Nicholl*, 4 C.B. N.S. 376; 27 L.J. C.P. 220; *Croft* v. *Lumley*, 27 L.J. Q.B. 321; 5 E. & B. 648; *Cotesworth* v. *Spokes*, 30 L.J. C.P. 220; 10 C.B. N.S. 103; *Pellatt* v. *Boosey*, 31 L.J. C.P. 281; *Shepherd* v. *Berger*, (1891) 1 Q.B. 597; 60 L.J. Q.B. 395.

(*e*) *Doe* v. *Meux*, 4 B. & C. 606; 4 L.J. (O.S.) K.B. 4; and see *Few* v. *Perkins*, L.R. 2 Ex. 92; 36 L.J. Ex. 54, *ante*, p. 658.

(*f*) *Doe* v. *Bliss*, 4 Taunt. 735; 23 & 24 Vict. c. 38, s. 6.

(*g*) *Doe* v. *Jones*, 5 Exch. 498; 19 L.J. Ex. 405.

(*h*) *Gibson* v. *Doeg*, 2 H. & N. 615; 27 L.J. Ex. 37; *Hepworth* v. *Pickles*, (1900) 1 Ch. 108; 69 L.J. Ch. 55.

(*i*) *Elphinstone* v. *Monkland Iron Co.*, 11 App.Cas. 332.

(*k*) And in a mining lease, except as to covenants to allow access to books, &c. Forfeiture in cases of bankruptcy or execution was excepted from relief by 44 & 45 Vict. c. 41, s. 14 (6); but now, by 55 & 56 Vict. c. 13, s. 2 (2), relief is allowed in these cases under certain restrictions. Notice is, therefore, a condition precedent to enforcing a forfeiture for bankruptcy or liquidation: *Horsey Estate* v. *Steiger*, (1899) 2 Q.B. 79; 68 L.J. Q.B. 743; *Jacob* v. *Down*, (1900) 2 Ch. 156; 69 L.J. Ch. 493; *Fryer* v. *Ewart*, (1902) A. C. 187; 71 L.J. Ch. 433. As to forfeiture for non-payment of rent, 23 & 24 Vict. c. 126, s. 1; *Howard* v. *Fanshawe*, (1895) 2 Ch. 581; 64 L.J. Ch. 666.

(*l*) 44 & 45 Vict. c. 41, s. 14; the lessee may apply for relief in an action by the lessor. See *Gentle* v. *Faulkner*, (1900) 2 Q.B. 267; 69 L.J. Q.B. 777. A mere tenancy under an agreement for a lease is not a lease within the meaning of this section. An agreement with a right for specific performance is a lease: 55 & 56 Vict. c. 13, s. 5. The section extends to breaches committed before the Act came into operation: *Quilter* v. *Mapleson*, 9 Q.B.D. 672; 52 L.J. Q.B. 44. As to relief to an underlessee, see *Burt* v. *Gray*, (1891) 2 Q.B. 98; 60 L.J. Q.B. 664; and 55 & 56 Vict. c. 13, s. 4, which gives the court power to grant it. See *Nind* v. *Nineteenth Century Building Society*, (1894) 2 Q.B. 226; 63 L.J. Q.B. 636; *Imray* v. *Oakshette*, (1897) 2 Q.B. 218; 60 L.J. Q.B. 544.

The lessee cannot, however, apply under the section for relief after the lessor has actually re-entered (*m*); nor is it necessary in all cases that the notice should require that the lessee should make compensation (*n*). The notice must specify in detail the particular breach so as to enable the lessee to remedy it before action brought, and a mere general notice of a breach of a specified covenant is insufficient (*o*). But where the notice refers to several breaches of covenant, it is not entirely invalidated because it turns out that some of the breaches cannot be relied upon (*p*). No relief would formerly be granted in the case of forfeiture for the breach of any covenant other than covenants to pay rent or insure, except in the case of accident, mistake, or fraud (*q*), or where the tenant has been misled by the conduct of the landlord amounting to a waiver (*r*).

Assignment after forfeiture.—A right of entry which has accrued on a forfeiture cannot be assigned; and the assignee of the reversion, therefore, cannot take advantage of any forfeiture incurred before the assignment; but he is entitled to the benefit of the covenant, and of the condition of re-entry, in respect of any subsequent or continuing breach (*s*).

Costs.—By the Conveyancing Act, 1892 (*t*), a lessor shall be entitled to recover from a lessee, in addition to damages (if any), all reasonable costs and expenses properly incurred by him in employing a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which he has waived at the request of the lessee, or from which the lessee has been relieved under the Conveyancing Acts.

Surrender—Deeds and agreements of surrender.—A surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, is void, unless it is made by deed (*ante*, p. 41). An estate for life or years, which cannot be created without deed, cannot be surrendered without deed (*u*).

(*m*) *Rogers* v. *Rice*, (1892) 2 Ch. 170; 61 L.J. Ch. 573.

(*n*) *Lock* v. *Pearce*, (1893) 2 Ch. 271; 62 L.J. Ch. 582.

(*o*) *Fletcher* v. *Nokes*, (1897) 1 Ch. 271; 66 L.J. Ch. 177; *Serle, In re*, (1898) 1 Ch. 652; 67 L.J. Ch. 344. As to claim for rent after notice, see *Penton* v. *Barnett*, (1898) 1 Q.B. 276; 67 L.J. Q.B. 11.

(*p*) *Pannell* v. *City of London Brewery Co.*, (1900) 1 Ch. 496; 69 L.J. Ch. 244.

(*q*) *Gregory* v. *Wilson*, 9 Hare, 689; 22 L.J. Ch. 159. As to mistake in respect of which the court will or will not grant relief, see *Barrow* v. *Isaacs*, (1891) 1 Q.B. 417; 60 L.J. Q.B. 179; *Eastern Telegraph Co.* v. *Dent*, (1899) 1 Q.B. 835; 68 L.J. Q.B. 564.

(*r*) *Hughes* v. *Met. Ry.*, 2 App.Cas. 439.

(*s*) *Crane* v. *Batten*, 23 L.T. 220.

(*t*) 55 & 56 Vict. c. 13. This Act abrogates the decision in *Skinners' Co.* v. *Knight*, (1891) 2 Q.B. 542; 60 L.J. Q.B. 629.

(*u*) Shep. Touch. 397; Defeasance; Co. Litt. 338, a.; 1 Wms. Saund. 236, a.; *Perkins* v. *Perkins*, Cro. Eliz. 269; *Lyon* v. *Reed*, 13 M. & W. 285, 310; 13 L.J. Ex. 377.

But, if the estate may be created, and has been created, without deed, it may be surrendered without deed (*x*). It is said that a surrender under seal immediately divests the estate out of the surrenderor and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant; and, though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent, yet that consent is implied. A gift imports a benefit; and an *assumpsit* to take a benefit may well be presumed; and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest the property (*y*). But this must be understood only of surrenders of particular estates which are manifestly beneficial to the surrenderee. If the benefit is equivocal there will be no implied assent or acceptance, and the surrender will be nugatory without the express concurrence of the surrenderee (*post*, p. 664). If the tenant holds under a parol demise for a term not exceeding three years, the term may be surrendered by an agreement in writing, signed by the surrenderor and the surrenderee, provided it is intended to have an immediate effect. There cannot be a surrender to take place *in futuro*. If anything is to be done by either or both of the parties before the estate of the termor is to be extinguished, the transaction amounts only to a covenant or agreement to surrender, and there is no actual surrender by the tenant, and no right of entry on the part of the landlord by the mere force of the contract (*z*). An insufficient notice to quit, therefore, accepted in writing under the landlord's signature, does not of itself amount to a surrender of the term if it is to operate *in futuro* (*a*). But an agreement between a landlord and a tenant holding a parol demise from year to year, that the tenancy should be determined, followed by the departure of the tenant, and an entry and taking of possession on the part of the landlord, becomes an actual surrender by act and operation of law (*b*). Where a dispute arose between a yearly tenant and the landlord, and the tenant said to the landlord, "I shall quit," and the latter said, "You may do so, and I shall be glad to get rid of you," and the tenant then removed her furniture and sent the keys of the house to the landlord, and the latter accepted them and took possession, it was held that

(*x*) *Farmer* v. *Rogers*, 2 Wils. 26.
(*y*) *Thompson* v. *Leach*, 2 Salk. 617.
(*z*) *Coupland* v. *Maynard*, 12 East, 134; *Weddall* v. *Capes*, 1 M. & W. 50; 5 L.J. Ex. 111; *Foquet* v. *Moor*, 7 Exch. 870; 22 L.J. Ex. 35.
(*a*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922; 4 L.J. (O.S.) K.B. 71; *Doe* v. *Milward*, 3 M. & W. 328, 332; 7 L.J. Ex. 57.
(*b*) *Dodd* v. *Acklom*, 7 Sc. N.R. 415, 423; 13 L.J. C.P. 11; 2 Smith's L.C. 814, 820 (ed. 10); *Furnivall* v. *Grove*, 30 L.J. C.P. 3; 8 C.B. N.S. 496.

there was a surrender of the lease by operation of law (*c*). But the mere delivery and acceptance of the key, without any entry on the demised premises and taking of possession by the landlord, would be no evidence of a surrender (*d*); and an abandonment of the demised premises by the tenant, and an entry of the landlord thereon for the purpose of repairing them, or airing or drying the rooms, or letting them, and not with a view of taking possession as owner, will not of course amount to a surrender (*e*).

Surrenders by act and operation of law by way of estoppel take place "where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. . . . Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman; and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and, as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. . . . The acts *in pais* which bind parties by way of estoppel are . . . all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed" (*f*). But, if the original lease is under seal, the acceptance by the lessee of a mere parol demise from the lessor will not amount to a surrender

(*c*) *Grimman* v. *Legge*, 8 B. & C. 324; 6 L.J. (O.S.) K.B. 321; *Phené* v. *Popplewell*, 12 C.B. N.S. 334; 31 L.J. C.P. 235; see also *Oastler* v. *Henderson*, 2 Q.B.D. 575; 46 L.J. Q.B. 607; *Panther Lead Co., In re*, (1896) 1 Ch. 978; 65 L.J. Ch. 499.

(*d*) *Cannan* v. *Hartley*, 19 L.J. C.P. 323.

(*e*) *Bessell* v. *Landsberg*, 7 Q.B. 638; 14 L.J. Q.B. 355; *Griffith* v. *Hodges*, 1 C. & P. 419.

(*f*) *Lyon* v. *Reed*, 13 M. & W. 285, 306; 13 L.J. Ex. 377; *Fenner* v. *Blake*, (1900) 1 Q.B. 426; 69 L.J. Q.B. 257; *Knight* v. *Williams*, (1901) 1 Ch. 257; 70 L.J. Ch. 92.

of such original lease (*g*); and, if the new lease is wholly or partially invalid, and does not pass an interest according to the contract and the intention of the parties, it will not operate as a surrender of the former lease (*h*). A mere agreement for an increased rent will not have the effect of creating a new tenancy (*i*).

Substitution of new tenant in place of original tenant.—When there is an open and notorious shifting of the actual possession of corporeal property, in execution of an agreement between the lessor and lessee and a third party, to substitute such third party as the lessee in the place of the original lessee, there is a surrender by operation of law of such original lease (*k*). But a mere agreement for the substitution of a new tenant, not followed up by any actual change of possession, or a mere change of possession unaccompanied by an agreement of substitution, does not amount to a surrender (*l*). Where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law; but the old tenant must give up possession to the new tenant at or about the time of the grant of the new lease to which he assents, since the change of possession is a necessary part of the consent (*m*). It must be shown that the incoming tenant has been expressly received and accepted by the landlord as his lessee, in the place and stead of the original lessee, by the mutual agreement of all parties (*n*); for the mere change of the possession is no evidence of the grant and acceptance of a new lease, the *primâ facie* presumption being that the incoming tenant has entered and taken possession as the under-tenant or assignee of the original lessee (*o*). The mere circumstance of the landlord's having accepted rent from an assignee or under-tenant in possession of the demised premises is no evidence of an acceptance of such assignee or under-tenant as his lessee in the place of the original lessee, the *primâ facie* presumption being that the rent was paid by the latter as the agent of the original lessee and on his behalf (*p*).

Surrender and acceptance of surrender by joint tenants.—Every

(*g*) Shep. Touch. 397.

(*h*) *Doe* v. *Poole*, 11 Q.B. 713; 17 L.J. Q.B. 143; *Doe* v. *Courtenay*, 11 Q.B. 702; 17 L.J. Q.B. 151.

(*i*) *Geeckie* v. *Monk*, 1 C. & K. 307; *Doe* v. *Geekie*, 5 Q.B. 841; 13 L.J. Q.B. 239; *Crowley* v. *Vitty*, 7 Exch. 319; 21 L.J. Ex. 135.

(*k*) *Davison* v. *Gent*, 1 H. & N. 744; 26 L.J. Ex. 122; *Nickells* or *Nicholls* v. *Atherstone*, 10 Q.B. 944; 16 L.J. Q.B. 371; *Reeve* v. *Bird*, 1 Cr. M. & R. 31; 3 L.J. Ex. 282; *Walls* v. *Atcheson*, 11 Moore, 379; *Woodcock* v. *Nuth*, 1 M. & Sc. 317; *Thomas* v. *Cook*, 2 B. & Ald. 119.

(*l*) *Taylor* v. *Chapman*, Peake's Add. Cas. 19; *Cocking* v. *Ward*, 1 C.B. 868; 15 L.J. C.P. 245; *Kelly* v. *Webster*, 12 C.B. 283; 21 L.J. C.P. 163.

(*m*) *Wallis* v. *Hands*, (1893) 2 Ch. 75; 62 L.J. Ch. 586.

(*n*) *Graham* v. *Whichelo*, 1 Cr. & M. 194; 2 L.J. Ex. 70; *M'Donnell* v. *Pope*, 9 Hare, 705; *Mathews* v. *Sawell*, 2 Moore, 262; 8 Taunt. 270.

(*o*) *Doe* v. *Williams*, 6 B. & C. 41; 9 D. & R. 30.

(*p*) *Copeland* v. *Gubbins*, 1 Stark. 96; *Doe* v. *Wood*, 15 L.J. Ex. 41.

act done by one joint-tenant which is for the benefit of his companions will bind them; but those acts which prejudice his companions in estate will not bind them; and, if the benefit be doubtful, two joint-tenants have no right to elect for the third. A surrender, therefore, or acceptance of a surrender, by one of several joint-tenants, will not, in general, bind the others (*q*). If, however, one of two joint-lessors lies by and allows the other to act for him, and acquiesces in the acts of his co-owner, and intrusts the whole management of the business in which they are jointly interested to him, he will be bound by his acts (*r*).

Non-extinguishment by surrender of derivative estates.—If a lessee from year to year grants an underlease of part of the premises demised to him, and then surrenders his term, the surrender will not destroy the estate and interest of the underlease, if the latter has not concurred in and been a party to the surrender (*s*).

Effect of surrender on existing breaches of covenant.—The mere surrender of the lease does not relieve the lessee from his liability in respect of breaches of covenant that have accrued prior to the surrender. The lessor, therefore, after a surrender, remains a specialty creditor for all arrears of rent, which become due before the surrender, upon the lessee's covenants for the payment of rent (*t*).

Notice to quit, when necessary.—"When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term" (*u*). If, therefore, a lease is granted for a term of years, or for one year only, no notice to quit is necessary at the end of the term (*x*); but, if the tenancy is from year to year, a half-year's notice must be given on either side in order to determine the tenancy, and this notice may be given in the first as well as in any subsequent year of the tenancy (*y*). If a man holds under an agreement for a lease, or under a lease void by reason of its not having been made by deed, for the full term intended to have been granted, an ejectment may be brought against him at the expiration of such term without any notice to quit (*z*). In the

(*q*) *Right* v. *Cuthell*, 5 East, 491, 498.

(*r*) *Dodd* v. *Acklom*, 7 Sc. N.R. 415; 13 L.J. C.P. 11.

(*s*) Co. Litt. 338, b; 4 Geo. 2, c. 28, s. 6; *Pleasant* v. *Benson*, 14 East, 237; *Cousins* v. *Phillips*, 3 H. & C. 892; 35 L.J. Ex. 84; *G. W. Ry.* v. *Smith*, 3 App. Cas. 165; 47 L.J. Ch. 97.

(*t*) *Att.-Gen.* v. *Cox*, 3 H.L.C. 240.

(*u*) *Right* v. *Darby*, 1 T.R. 162; *Messenger* v. *Armstrong*, *ib.* 54.

(*x*) *Cobb* v. *Stokes*, 8 East, 358.

(*y*) *Doe* v. *Smaridge*, 7 Q.B. 957; 14 L.J. Q.B. 327; *Doe* v. *Nainby*, 16 L.J. Q.B. 303; *Doe* v. *Geekie*, 5 Q.B. 841; 13 L.J. Q.B. 239. As to what is a reasonable notice to determine a yearly hiring of sporting rights, see *Lowe* v. *Adams*, (1901) 2 Ch. 598; 70 L.J. Ch. 783.

(*z*) *Doe* v. *Stratton*, 1 M. & P. 183; 6 L.J. (O.S.) C.P. 50; *Tress* v. *Savage*, 4 E. & B. 36; 23 L.J. Q.B. 339.

case of a tenancy at will no notice to quit is necessary; but there must be a formal demand of possession, or notice of the determination of the will, on the part of the landlord, before any action of ejectment can be brought (*a*). The tenant at will, too, in order to discharge himself from his liability for rent, or for a reasonable compensation for the use and enjoyment of the demised premises, must give notice to the landlord of the fact of his abandonment of the possession, and of his election to rescind the contract and put an end to the tenancy. If the occupation is the occupation of a servant or agent holding possession of the premises on account and on behalf of his master or principal, the possession of the occupier is the possession of the owner himself, and the latter may at any time remove the tenant, and resume possession of the property without any notice to quit (*b*). If the tenancy and possession are adverse, or if the occupier holds over after the expiration of a lease, or after a forfeiture, or after an agreement for a lease or a contract of sale has gone off and been abandoned, or after the tenancy has been determined by a dissolution of partnership, and continues in possession without the permission and against the will of the owner, no notice to quit is necessary; but the owner may at once proceed against the wrongdoer by action of ejectment for the recovery of the demised premises, or he may enter and take possession if the tenant leaves the demised premises vacant (*c*).

If the lessor is only tenant-at-will, or has made a prior lease of the lands, or mortgaged them so as to give the mortgagee a right of entry and to deprive himself of the power of granting a lease for the term specified, the tenant may be turned out without any previous notice to quit from the party who has title (*d*). But, if the lessor at the time of making of the lease had full right and title to grant the demised premises to the lessee for the term, any subsequent grant, mortgage, sale, or lease, cannot affect the tenant's right of possession, or in any way dispense with the ordinary notice to quit.

Mode of giving notice.—A notice to quit may be given orally by the lessor, or by his agent (*e*), unless there has been an express agreement or stipulation for a notice in writing (*f*). The notice must be given by or on behalf of the person in whom the term is vested (*g*). A mere receiver of rents has no implied authority to

(*a*) *Right* v. *Beard*, 13 East, 210; *Denn* v. *Rawlins*, 10 East, 261; *Doe* v. *Cox*, 11 Q.B. 122; 17 L.J. Q.B. 3.

(*b*) *Doe* v. *Derry*, 9 C. & P. 494; *Mayhew* v. *Suttle*, 4 E. & B. 347; 24 L.J. Q.B. 54; *White* v. *Bailey*, 30 L.J. C.P. 253; 10 C.B. N.S. 227.

(*c*) *Doe* v. *Sayer*, 3 Campb. 8; *Doe* v. *Miles*, 1 Stark. 181; *Doe* v. *Bluck*, 8 C. & P. 464.

(*d*) *Keech* v. *Hall*, 1 Doug. 21.

(*e*) *Timmins* v. *Rawlinson*, 3 Burr. 1603; *Doe* v. *Crick*, 5 Esp. 196.

(*f*) *Legg* v. *Benion*, Willes, 43.

(*g*) *Seaward* v. *Drew*, 67 L.J. Q.B. 322.

give a notice to quit; but an agent or receiver who is intrusted with the general management of landed property, and has a general authority to let lands from year to year, has also authority to determine such tenancies by a notice to quit (*h*). And he may give the notice in his own name, as it is not necessary that his agency and the authority of his principals should appear on the face of the document (*i*). The steward of a corporation, who is intrusted with the letting of the corporate estates, may give a notice to quit, and needs no authority under seal from the corporation for the purpose (*k*). If there are several joint-lessors or joint-owners of the property, a notice to quit, given or signed by one or more of them, on behalf of all, is sufficient (*l*); and the subsequent assent of such joint-owners to a notice previously given by one or more of them, on behalf of all, is equivalent to a precedent authority (*m*). But, if it is expressly provided by the agreement of the parties that a written notice shall be given by all of them, under their respective hands, the notice must be signed by all, and a ratification given afterwards will not do (*n*). The notice may also be given by an agent on their behalf; but such notice, in order to be valid and effectual, must be given in the names of the joint-owners, the principals, and not in the name of the agent, unless the agent has a general authority to let their lands (*o*); and the agent ought to have authority to give the notice at the time it begins to operate; for, if the tenant could not safely have acted upon the notice at the time it was given, no subsequent recognition of it by the landlord will make it valid (*p*). If one or more of several joint-owners dissent from the notice, such of them as have joined in giving the notice to quit are entitled to enter into and hold possession of the demised premises, and receive the rents and profits of the land, jointly with the tenant or lessee of the others who have refused to join in such notice (*q*).

Form and effect of notice.—Alternative and peremptory notices.—A notice to quit "all the property you hold of me," addressed to the tenant, is a sufficient description of the demised premises; and any general description applicable to the whole of the property will suffice (*r*). But a landlord cannot give a notice to quit which is intended to apply to a part only of premises which have been

(*h*) *Doe* v. *Mizen*, 2 M. & Rob. 56.

(*i*) *Jones* v. *Phipps*, L.R. 3 Q.B. 567; 37 L.J. Q.B. 198.

(*k*) *Roe* v. *Pierce*, 2 Campb. 96.

(*l*) *Doe* v. *Hulme*, 2 Man. & R. 433; 6 L.J. (O.S.) K.B. 344; *Doe* v. *Summersett*, 1 B. & Ad. 135; 8 L.J. (O.S.) K.B. 369; *Alford* v. *Vickery*, Car. & M. 280.

(*m*) Abbott, C.J., *Goodtitle* v. *Woodward*, 3 B. & Ald. 689, 692.

(*n*) *Right* v. *Cuthell*, 5 East, 497.

(*o*) *Jones* v. *Phipps*, L.R. 3 Q.B. 567; 37 L.J. Q.B. 198.

(*p*) *Doe* v. *Walters*, 10 B. & C. 626; 8 L.J. (O.S.) K.B. 297; *Doe* v. *Goldwin*, 2 Q.B. 146; 10 L.J. Q.B. 275; *Goodtitle* v. *Woodward*, *supra*.

(*q*) *Doe* v. *Chaplin*, 3 Taunt. 120.

(*r*) *Doe* v. *Church*, 3 Campb. 71.

demised together at one entire rent (*s*), except under the Agricultural Holdings Act, 1883 (*t*), where a tenancy from year to year may be determined by notice as to part of the holding if for the purpose of making certain improvements. A mere misdescription, however, of the premises, or a mistake in the Christian name of the tenant, does not invalidate the notice, provided the tenant has not been misled or prejudiced by such misdescription or mistake. If the notice applies to a year that is past, but was clearly intended to apply to the coming year, and the tenant must have known what time was meant, he is bound by the notice (*u*). If the notice is not a peremptory notice to quit, but is drawn up in the alternative, and seems to have been intended either to put an end to the lease or obtain an increased rent, the tenant may elect to remain in possession, paying an increased rent; and, such an option having been accorded to him, he cannot, if he chooses to occupy, be treated as a trespasser and wrongdoer and turned out of possession. If, however, the notice is a notice to quit or pay double the annual value under the statutes imposing penalties on tenants for holding over after a notice to quit, the alternative notice so given will be construed as a peremptory notice to quit, accompanied by a warning to the tenant of the penal consequences of disobedience, and not as an offer on the part of the landlord of a new bargain and a new lease at an increased rent (*x*). A notice to determine a tenancy, although imperfectly expressed, is a good and valid notice if accepted as such at the time by the landlord (*y*). Where a tenant wrote to his landlord, from whom he had taken a house on a lease determinable at the end of seven or fourteen years, "I have just been looking at my lease, and I see that my first seven years will be determined on 25th December, 1894. . . . I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt," it was held, that the letter constituted a good and sufficient notice to determine the lease (*z*). Where a notice to quit on a day terminating the tenancy went on to say, "And I hereby further give you notice that, should you retain possession of the premises after the day before mentioned, the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly in advance," it was held that the notice was not rendered invalid by the addition (*a*).

(*s*) *Doe* v. *Archer*, 14 East, 245.
(*t*) 46 & 47 Vict. c. 61, s. 41.
(*u*) *Doe* v. *Roe*, 4 Esp. 185; *Doe* v. *Wilkinson*, 12 Ad. & E. 743; 4 P. & D. 323; *Doe* v. *Spiller*, 6 Esp. 70; *Doe* v. *Kightley*, 7 T. R. 63.
(*x*) *Doe* v. *Jackson*, 1 Doug. 175.
(*y*) *General Assurance Co.* v. *Worsley*, 64 L.J. Q.B. 253.
(*z*) *Bury* v. *Thompson*, (1895) 1 Q.B. 696; 64 L.J. Q.B. 500.
(*a*) *Ahearn* v. *Bellman*, 4 Ex.D. 201; 48 L.J. Ex. 681.

Length of notice.—We have already seen that, in the case of a tenancy from year to year, six calendar months' notice to quit is required to be given prior to the expiration of the current year of hiring, in order to determine the tenancy between the parties (*b*). But, whenever the tenancy commences and ends at any of the usual feasts, the customary half-year intervening between two half-yearly feasts constitutes a half-year's notice, although the intermediate time be not exactly six calendar months (*c*). And where the tenancy commenced on a feast day, and notice was given on the 26th of March to quit on the 29th September, it was held bad, although there were more than 183 days intervening (*d*). Although rent may be payable under the lease on the usual feast days, yet the length of notice required by the terms of the lease may be six calendar months, in which case a notice given on the 29th September to quit on the 25th March would be bad, as there are not six calendar months intervening. Under the Agricultural Holdings Act, 1883 (*e*), where a half-year's notice expiring with the year of the tenancy is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall, by virtue of the Act, be necessary for the same, unless the landlord and tenant of the holding by writing under their hands agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient (*f*). Where by agreement a yearly tenancy is determinable on six months' notice the Act does not apply (*g*).

Time of quitting specified in notice.—If the time at which the tenant is to quit is specified in the notice, the time should correspond with the termination of the term of hiring, unless the notice is given in the exercise of a power to determine the tenancy expressly reserved in the lease or agreement (*h*); for, if the term expires at one period, and the notice is to quit at another, such notice is bad, and the lessor cannot safely act upon it (*i*). A tenant, under an agreement to quit at a quarter's notice, cannot be expelled at the expiration of any quarter that the lessor may choose to select, but the notice must be a quarter's notice to quit at the expiration of the current year (*k*). If the hiring is from half-year to half-year, determinable by six months' notice to quit, the tenancy may be determined by notice at the expiration of any half-

(*b*) *Ante*, p. 665; but see *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L.J. Ch. 165.

(*c*) *Howard* v. *Wemsley*, 6 Esp. 53; *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L.J. Ch. 165.

(*d*) *Morgan* v. *Davies*, 3 C.P.D. 260; see also *Wilkinson* v. *Calvert*, 3 C.P.D. 360; 47 L.J. C.P. 679.

(*e*) 46 & 47 Vict. c. 61, s. 33.

(*f*) Sect. 33.

(*g*) *Wilkinson* v. *Calvert*, 3 C.P.D. 360; 47 L.J. C.P. 679; *Barlow* v. *Teal*, 15 Q.B.D. 501; 54 L.J. Q.B. 564.

(*h*) *Bridges* v. *Potts*, 33 L.J. C.P. 338; 17 C.B. N.S. 314; *Soames* v. *Nicholson*, (1902) 1 K.B. 157; 71 L.J. K.B. 24.

(*i*) *Doe* v. *Lea*, 11 East, 312.

(*k*) *Doe* v. *Donovan*, 1 Taunt. 555.

year (*l*). If it is a quarterly, a monthly, or a weekly hiring, the notice must be a notice to quit at the expiration of the current quarter, month, or week; if it breaks into the middle of the quarter, month, or week, it is not a good notice to quit. If the hiring is from month to month, and the rent is made payable weekly, a notice to quit at the expiration of the current month must be given, and not a notice expiring at any one of the weeks without reference to the termination of the month. The length of the notice, however, may be varied by local custom and usage, and by the agreement of the parties (*m*). When the hiring is for one single quarter, month, or week, no notice at all is requisite (*n*).

A notice "to quit at the end of the first year of your tenancy which expires half a year after the date of this notice," will be sufficient, and so also will a notice "to quit at the expiration of the current year of your tenancy," provided such notice was given half a year prior to the expiration of the current year of hiring (*o*). A notice to quit on the anniversary of the day "at," or "on," or "from," or "on and from" which the tenancy commenced is good (*p*). Sometimes the notice is given in the alternative, in order to hit one of two periods on which the term is believed to end, and it has been held that such a notice is a perfectly good notice, and possesses all the certainty that is reasonably requisite for the information of the tenant (*q*). A notice to a weekly tenant whose tenancy commenced on Wednesday, to quit on Friday, provided his tenancy commenced on Friday, or otherwise at the end of his tenancy next after one week from the date thereof, was held to be a good notice to determine the tenancy at the expiration of a week from the subsequent Wednesday (*r*).

Application of notice to current term of hiring.—The notice is always understood to apply to the year in which it is given, whether it expressly refers to the "current year" or not; and it will not operate as a notice to quit for the succeeding year, unless it appears plainly to have been the intention of the lessor that the notice, if invalid for the first year, should apply to the next year of holding (*s*). Where a notice dated the 27th, and served on the 28th, of September, required a tenant to quit "at Lady Day next, or at the end of your current year," and it appeared that the then current year of hiring ended on Michaelmas

(*l*) *Doe* v. *Grafton*, 18 Q.B. 496; 21 L.J. Q.B. 276.

(*m*) *King* v. *Eversfield*, (1897) 2 Q.B. 475; 66 L.J. Q.B. 809.

(*n*) *Doe* v. *Bayley*, 5 C. & P. 67; *Doe* v. *Raffan*, 6 Esp. 4; *Doe* v. *Hazell*, 1 Esp. 94; *Kemp* v. *Derrett*, 3 Campb. 510; *Huffell* v. *Armistead*, 7 C. & P. 56.

(*o*) *Doe* v. *Butler*, 2 Esp. 589.

(*p*) *Sidebotham* v. *Holland*, (1895) 1 Q.B. 378; 64 L.J. Q.B. 200.

(*q*) *Doe* v. *Wrightman*, 4 Esp. 6.

(*r*) *Doe* v. *Scott*, 4 Moo. & P. 20; 8 L.J. (O.S.) C.P. 110.

(*s*) *Mills* v. *Goff*, 14 M. & W. 72; 14 L.J. Ex. 249.

Day (the 29th of September), two days after the day of the date, and one day after the service of the notice to quit, it was held that it could not be presumed that the notice was intended to apply to the year in which it was given, and of which two days only remained, but that it must be taken to apply to the next year (*t*). So, where the term of hiring commenced and ended on the 2nd of February, and the lessor, on the 22nd of October, 1833, three months and ten days only before the expiration of the year, gave the tenant notice to quit "at the expiration of half a year from the delivery of this notice, or at such other time as your *present* year's holding shall expire after the expiration of half a year from the delivery of this notice," it was held that the notice, though bad for February, 1834, the succeeding February, was a good notice for February, 1835 (*u*).

The commencement of the current year of the tenancy is generally regulated by the commencement of the original holding. Where premises were demised by an agreement dated the "13th of August, 1838," for the term of "one year and six months certain," at a yearly rent payable quarterly, "three calendar months' notice to be given on either side previous to the termination of the tenancy," and the tenant entered and held possession beyond the year and six months, and on the 7th May, 1840, the lessor gave the tenant notice to quit on the 13th August next, the notice was held to be good, as the year of hiring was to be calculated from that day, and not from the termination of the year and six months (*x*). And, where a tenant entered into possession, under an agreement for a lease for a term of five years and a half, and the lease was never granted, but the tenant continued to occupy, and, when the five years and a half were nearly expired, negotiations were entered into for a further lease at an increased rent, to commence on the expiration of the term of five years and a half, and this second lease was never executed, but the defendant continued in the occupation of the premises, paying the increased rent, it was held that the current year of the tenancy must be calculated from the original entry of the tenant upon the premises (*y*). Where, on the other hand, a lessee of a term granted an underlease for fourteen years and a half from the 25th of December, and the term consequently expired on the 24th of June, and the underlessee continued in possession, paying rent, it was held that the sub-

(*t*) *Doe* v. *Culliford*, 4 D. & R. 248; *Wride* v. *Dyer*, (1900) 1 Q.B. 23; 69 L.J. Q.B. 17, commenting on *Doe* v. *Morphett*, 7 Q.B. 577; 14 L.J. Q.B. 345.

(*u*) *Doe* v. *Smith*, 5 Ad. & E. 350; 5 L.J. K.B. 216.

(*x*) *Doe* v. *Dobell*, 1 Q.B. 806; 10 L.J. Q.B. 242; *Doe* v. *Samuel*, 5 Esp. 173.

(*y*) *Berrey* v. *Lindley*, 4 Sc. N.R. 61; 11 L.J. C.P. 27; and see *Kelly* v. *Patterson*, L.R. 9 C.P. 681; 43 L.J. C.P. 320.

sequent tenancy commenced from the termination of the preceding underlease, and that a notice given on the 24th of December to quit on the 24th of June was a valid notice (z).

Calculation of current year from one of usual feast days.—The term of hiring is generally, by the express or implied agreement of the parties, calculated from some one or other of the quarterly feasts; and, if the tenant enters in the middle of a customary quarter, and afterwards pays his rent for that half-quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter-day (*a*). But, if he pays his rent at the end of the quarter or half-year from the time of his coming in, the tenancy will commence from the day of his entry (*b*). If the notice be given to quit at Michaelmas generally, it is good for either Old or New Michaelmas. *Primâ facie* it would be for New Michaelmas; but, if the holding was from Old Michaelmas, this notice would do for that also (*c*). Where a notice was given on the 27th of September, "to quit at the expiration of the term for which you hold," evidence was permitted to be given of a general custom of the country to let from Lady Day, and of the fact of the rent being due at Michaelmas and Lady Day, and it was left to the jury to presume, in the absence of evidence to the contrary, that the tenancy, like other tenancies in that part of the country, was a tenancy from Lady Day to Lady Day (*d*). It has been held that, since the existence of the new style sanctioned by Act of Parliament, a lease by deed of lands "to be holden from the feast of St. Michael" must be taken to mean New Michaelmas, and that extrinsic evidence is not admissible to show that it meant a holding from Old Michaelmas (*e*). But, although the oral expressions and agreements of the parties are inadmissible to alter or contradict the written contract, yet all the surrounding circumstances may be regarded; and, if it can be shown that the rent has always been paid at Old Michaelmas, or that by the custom of the country lands are always let at Old Michaelmas, the holding would be deemed to be from the latter period (*f*).

Admissions by tenant of commencement of term.—The mere service upon the tenant of a notice to quit at a particular time is not *primâ facie* evidence of the termination of the term at the time mentioned

(*z*) *Doe* v. *Lines*, 11 Q.B. 402; 17 L.J. Q.B. 108; *Walker* v. *Gode*, 6 H. & N. 594; 30 L.J. Ex. 172.

(*a*) *Doe* v. *Johnson*, 6 Esp. 10; *Doe* v. *Stapleton*, 3 C. & P. 275.

(*b*) *Doe* v. *Matthews*, 11 C.B. 675.

(*c*) *Doe* v. *Perrin*, 9 C. & P. 468; *Doe* v. *Vince*, 2 Campb. 256.

(*d*) *Doe* v. *Lamb*, Adams, Eject. 272 (ed. 4).

(*e*) *Doe* v. *Lea*, 11 East, 312; *Smith* v. *Walton*, 1 M. & Sc. 380; 2 L.J. C.P. 85.

(*f*) *Furley* v. *Wood*, 1 Esp. 198; *Doe* v. *Benson*, 4 B. & Ald. 588; *Den* v. *Hopkinson*, 3 D. & R. 507; 2 L.J. (O.S.) K.B. 11.

in such notice (*g*). But, if the tenant is expressly told that he must leave at the expiration of six months, or if a written notice is served personally on the lessee, and the latter reads it, and makes no objection to it, this is *primâ facie* evidence to go to a jury that the time of quitting is correctly stated in the notice. If he cannot read, or does not read the notice in the presence of the person who serves it upon him, it must go for nothing (*h*). An admission by the tenant of a holding corresponding with the time mentioned in the notice may be rebutted by direct evidence of a different holding (*i*). If the period of the commencement of the term is uncertain, and the lessor applies to the lessee to ascertain the time of the commencement of his lease, the lessee is bound by the information he gives, and cannot be permitted afterwards to set up a different holding for the purpose of defeating proceedings that have been taken by the landlord upon the faith of such statement (*k*).

Different periods of entry.—When the demised premises are entered upon at different periods, the notice to quit ought to refer to the time of the tenant's entry upon the principal subject-matter of the demise. Thus, if buildings and lands are let together, to be entered upon at different times, and the buildings constitute the principal subject-matter of demise, the notice to quit should refer to the tenant's entry upon the buildings, and not the land; and it is a question of fact which is the principal and which the accessorial subject of demise (*l*). Though part of a farm is to be entered upon and quitted at different periods, *i.e.*, the pasture at Old Lady Day, the arable land at Old Candlemas, and the meadow at Old May Day, yet that is a letting from Lady Day to Lady Day; for it is no more than the custom of most counties would have directed without any special words for that purpose in any taking from Old Lady Day, viz., that the arable land shall be entered upon at Candlemas to prepare it for the Lent corn, and the meadows not till May Day, when in the northern counties they are usually heyned for hay (*m*).

Where a tenant entered into possession of a farm, under an agreement "to enter on the tillage land at Candlemas, and on the house and all other the premises on Lady Day following, and to quit the farm according to the times of entry as aforesaid," and the rent was reserved at Michaelmas and Lady Day, it was held that a

(*g*) *Doe* v. *Calvert*, 2 Campb. 388.
(*h*) *Thomas* v. *Thomas*, 2 Campb. 647; *Doe* v. *Forster*, 13 East, 405; *Doe* v. *Woombwell*, 2 Campb. 559.
(*i*) *Oakapple* v. *Copous*, 4 T. R. 361; *Brown* v. *Burtinshaw*, 7 D. & R. 610.
(*k*) *Doe* v. *Lambly*, 2 Esp. 635.
(*l*) *Doe* v. *Howard*, 11 East, 498; *Doe* v. *Hughes*, 7 M. & W. 141; 10 L.J. Ex. 185; *Doe* v. *Rhodes*, 11 M. & W. 600; 12 L.J. Ex. 382.
(*m*) *Doe* v. *Snowdon*, 2 W. Bl. 1224.

notice to quit, delivered half a year before Lady Day, but less than half a year before Candlemas, was held good, the taking being in substance from Lady Day, with a privilege for the incoming tenant to enter on the arable land at Candlemas for the sake of ploughing, &c. (*n*). And, where the lessee of a dwelling-house, buildings, and bleaching manufactories, pasture and meadow land, entered into possession under an agreement for a lease, by which it was stipulated that the term of hiring should commence, as to the meadow ground from the 25th of December last, as to the pasture from the 25th of March next, and as to the houses, out-houses, and other buildings and all the rest of the premises from the 1st of May, and the first half-year's rent was made payable on the day of Pentecost, and the other at Martinmas, it was held that, the substantial subject of demise being the house and buildings for the purpose of the manufacture, the time limited for taking possession thereof was the substantial time of entry, to which a notice to quit ought to refer, and not the 25th of December, the time limited for the taking possession of the meadow land, which was merely auxiliary to the principal subject of demise (*o*).

Service of notice to quit.—If the notice to quit is served upon the actual occupiers of the demised premises, proof of such service is sufficient to sustain an action of ejectment (*p*). Where the lessee puts another into possession of the demised premises, the party so let into possession is presumed to be the assignee of the lessee, and a notice to quit served upon such occupier will sustain an ejectment against the lessee (*q*). If the party in occupation of the house is the mere servant of the lessee, the notice should be a notice to the lessee to quit, and not a notice to the servant (*r*). A delivery of the notice to the wife or servant of the lessee, at the dwelling-house of the latter, is a sufficient service (*s*). But a servant to whom it is delivered should be expressly told that it is a notice to quit, and should be requested, either orally, or by means of a written direction, to deliver it to the tenant (*t*). If there is a personal service of the notice upon the tenant himself, no written direction upon the notice is necessary (*u*); and, if the notice is directed to the tenant by a wrong Christian name and he neglects to repudiate it, he is deemed to have waived the misdirection (*x*).

(*n*) *Doe* v. *Spence*, 6 East, 120.
(*o*) *Doe* v. *Watkins*, 7 East, 556.
(*p*) *Roe* v. *Street*, 2 Ad. & E. 331; 4 L.J. K.B. 67. As to notice under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), see s. 28; *Van Gratten* v. *Trevenen*, 71 L.J. K.B. 544.
(*q*) *Doe* v. *Williams*, 6 B. & C. 41; 9 D. & R. 30.
(*r*) *Doe* v. *Woodman*, 8 East, 228.
(*s*) *Jones* v. *Marsh*, 4 T. R. 464; *Doe* v. *Dunbar*, 1 M. & M. 11; *Alford* v. *Vickery*, 1 Car. & M. 283; *Tanham* v. *Nicholson*, L.R. 5 H.L. 561.
(*t*) *Doe* v. *Lucas*, 5 Esp. 152; *Smith* v. *Clark*, 9 Dowl. 202.
(*u*) *Doe* v. *Wrightman*, 4 Esp. 5.
(*x*) *Doe* v. *Spiller*, 6 Esp. 70.

If two or more persons hold possession of the demised premises as joint-tenants or tenants-in-common, notice to one of them is sufficient notice to all to determine the tenancy (*y*).

Service of notice through post-office.—If a notice to quit properly addressed to the landlord or his authorised agent has been put into the post-office, and is delivered within the usual business hours, on the 25th of March, that will be a good notice for the 29th of September following, although the landlord does not actually receive it until the 26th (*z*).

Acceptance of informal notice—Proof of notice.—If a tenant gives his landlord an insufficient notice to quit, and the landlord at first assents, but ultimately refuses to accept the notice, and the tenant quits according to his notice, the tenancy is not determined (*a*). A written notice to quit may be proved by the production of a copy, although no notice has been given to produce the original (*b*).

Waiver of notice to quit.—If the tenant remains in possession after the expiration of a good notice to quit, his possession then becomes an adverse tenancy, and the landlord may either bring an action of ejectment against him, or proceed in the county court, or before justices of the peace, for the recovery of the possession of the demised premises. But, if he permits the tenant to remain in possession after the expiration of the notice, and demands and accepts rent subsequently to the notice, this amounts to a waiver of the notice (*c*). The same result follows, if the lessor distrains for rent which he claims to be due in respect of the tenant's occupation subsequently to the expiration of the notice (*d*). But, if a banker or agent of the lessor, without any special authority from the latter, receives rent from the tenant, the act of such unauthorised agent does not amount to a waiver of the notice (*e*). The money, moreover, must be paid and accepted as rent, and not by way of satisfaction of the lessor's claim for double rent or double value, under the statutes for holding over. The giving of a second notice to quit before or after the expiration of the first notice does not necessarily amount to a waiver of the latter (*f*). Nor does a collateral promise by the lessor not to act upon the notice in the case of the happening of a certain event amount to a waiver of the notice (*g*). If a tenant retains possession and receives the produce

(*y*) *Doe* v. *Crick*, 5 Esp. 196.
(*z*) *Papillon* v. *Brunton*, 5 H. & N. 518; 29 L.J. Ex. 265.
(*a*) *Bessell* v. *Landsberg*, 7 Q.B. 638; 14 L.J. Q.B. 355.
(*b*) *Doe* v. *Somerton*, 7 Q.B. 58; 14 L.J. Q.B. 210.
(*c*) *Goodright* v. *Cordwent*, 6 T.R. 219; *Doe* v. *Batten*, Cowp. 243; *Blyth* v. *Dennett*, 13 C.B. 178; 22 L.J. C.P. 79.
(*d*) *Zouch* v. *Willingale*, 1 H. Bl. 311.
(*e*) *Doe* v. *Calvert*, 2 Campb. 387.
(*f*) *Doe* v. *Humphreys*, 2 East, 237; *Doe* v. *Steel*, 3 Campb. 116.
(*g*) *Whiteacre* v. *Symonds*, 10 East, 13.

and profits of the demised premises after the expiration of a notice to quit given by him, this will, in general, as against the tenant, amount to a waiver of the notice (*h*). A waiver of a notice to quit coupled with a continued occupation after the expiration of the notice creates a new tenancy taking effect at the expiration of the old one (*i*).

Proof and effect of holding over.—There is no holding over by a tenant from the mere fact of his not sending the keys of a house to the landlord. It is enough if the tenant vacates the house and gives the landlord the means and opportunity of taking possession when he pleases; for possession is to be given on the land, and the landlord must come and take it. But, if the tenant continues to use and occupy the premises after the term has ceased, he will be responsible for holding over. And the tenant is responsible, if his sub-tenant holds over (*k*). But one joint-tenant is not responsible for a holding over by the other (*l*). Mere holding over does not create a new tenancy; nor is it in itself any evidence of an agreement to renew the previous tenancy (*m*). There must be a payment and acceptance of rent which accrued subsequently to the expiration of the lease; and then the tenant holds as tenant from year to year upon all such of the terms of the original lease as are applicable to a yearly tenancy (*n*). If, therefore, the lease contained a proviso for re-entry in case of non-payment of rent, the proviso is impliedly annexed to the yearly tenancy (*o*). But, if there is any evidence to show that the holding after the expiration of the lease was upon new and different terms, the legal presumption is rebutted (*p*), and the nature of the holding becomes a question of fact. Whether any particular covenant is applicable to a yearly tenancy is in some cases a question of fact (*q*). In other cases it will be a question of law. When a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainder-man paying the same rent, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in

(*h*) *Jones* v. *Shears*, 4 Ad. & E. 832; 5 L.J. K.B. 153.

(*i*) *Tayleur* v. *Wildin*, L.R. 3 Ex. 203; 37 L.J. Ex. 173; see *Holme* v. *Brunskill*, 3 Q.B.D. 495; 47 L.J. Q.B. 610.

(*k*) *Henderson* v. *Squire*, L.R. 4 Q.B. 170; 38 L.J. Q.B. 73; *Caldecott* v. *Smythies*, 7 C. & P. 808.

(*l*) *Tancred* v. *Christy*, 12 M. & W. 316.

(*m*) *Gray* v. *Bompas*, 11 C.B. N.S. 520; *Jenner* v. *Clegg*, 1 Moo. & R. 213.

(*n*) *Torriano* v. *Young*, 6 C. & P. 11; *Thomas* v. *Packer*, 1 H. & N. 671; 26 L.J. Ex. 207; *Bishop* v. *Howard*, 3 D. & R. 298; *Buckworth* v. *Simpson*, 1 Cr. M. & R. 843; 4 L.J. Ex. 104; *Arden* v. *Sullivan*, 14 Q.B. 839; 19 L.J. Q.B. 271; *Beale* v. *Sanders*, 3 Bing. N.C. 850; 6 L.J. C.P. 283.

(*o*) Williams, J., *Doe* v. *Amey*, 12 Ad. & E. 480; *Hutton* v. *Warren*, 1 M. & W. 466; 5 L.J. Ex. 234.

(*p*) *Thetford* (*Mayor*) v. *Tyler*, 8 Q.B. 95; 15 L.J. Q.B. 33.

(*q*) *Hyatt* v. *Griffiths*, 17 Q.B. 505; *Oakley* v. *Monck*, L.R. 1 Ex. 159; 35 L.J. Ex. 87.

the former tenancy, which is not known to him in fact, and is not according to the custom of the country (*r*).

Double yearly value for holding over.—Any tenant wilfully holding over and retaining possession of the demised premises after the determination of his term, and after possession has been demanded and notice in writing has been given him by the lessor, is liable to pay to the person kept out of possession double the yearly value of the lands, &c. detained (*s*). An action for the recovery of this penalty may be brought by the landlord, and the landlord alone, either before or after he has recovered possession of the land by an action of ejectment (*t*). But it has been held that the Act of 4 Geo. 2 applies only to the case of a wilful and contumacious holding over by the tenant after a valid notice to quit, and not to a holding over under a *bonâ fide* claim of title or right, though erroneous (*u*). If at the time of her marriage a woman is tenant of certain premises, and has received notice to quit, the husband after the marriage incurs the obligation of giving up possession of the premises, and may render himself liable to an action for double value for holding over; for if the wife incurs the penalty the husband will have to pay it as a debt, and he cannot get rid of the obligation by pleading ignorance (for it is his duty to make inquiry) nor by showing that his wife deceived him, or concealed the notice to quit (*x*). A weekly or quarterly tenant has been held not to come within the operation of the statute (*y*). In the case of a tenancy from year to year, the ordinary notice to quit at the end of the current year of hiring is a sufficient demand of possession to entitle the lessor to double yearly value (*z*). If the tenant holds under a lease for a term of years certain, a notice to quit at the expiration of such term is likewise a sufficient demand of possession, and such notice may be given previous to the expiration of such term, or at any time afterwards, so long as the tenant continues to hold as a tenant-at-will (*a*). If the landlord has done any act amounting to a waiver of his notice to quit, he cannot make such notice the foundation of an action for double value (*b*).

(*r*) *Oakley* v. *Monck*, *supra*.

(*s*) 4 Geo. 2, c. 28, s. 1; as to the computation of the yearly value, see *Robinson* v. *Learoyd*, 7 M. & W. 48; 10 L.J. Ex. 166.

(*t*) *Soulsby* v. *Neving*, 9 East, 310; *Harcourt* v. *Wyman*, 3 Exch. 817; 18 L.J. Ex. 453; *Swinfen* v. *Bacon*, 6 H. & N. 846; 30 L.J. Ex. 368. By Ord. XVIII. r. 2, claims for double rent may be joined without leave in actions for recovery of land.

(*u*) *Hirst* v. *Horn*, 6 M. & W. 395; *Page* v. *More*, 15 Q.B. 684; *Swinfen* v. *Bacon*, *supra*.

(*x*) *Lake* v. *Smith*, 1 Bos. & P. N.R. 179. He is probably now only liable to the extent limited by 45 & 46 Vict. c. 75, s. 14.

(*y*) *Lloyd* v. *Rosbee*, 2 Campb. 454; *Sullivan* v. *Bishop*, 2 C. & P. 359.

(*z*) *Wilkinson* v. *Colley*, 5 Burr. 2698; *Poole* v. *Warren*, 8 Ad. & E. 582; *Lake* v. *Smith*, 1 Bos. & P. N.R. 179.

(*a*) *Cutting* v. *Derby*, 2 W. Bl. 1075; *Messenger* v. *Armstrong*, 1 T.R. 53.

(*b*) *Ryal* v. *Rich*, 10 East, 47.

Double rent for holding over.—By 11 Geo. 2, c. 19, s. 18, it is enacted that, if any tenant gives notice to the lessor of his intention to quit at a particular time, and does not deliver up possession of the premises at the time mentioned, such tenant, his executors, &c. shall from thenceforth pay to the landlord or lessor double the rent which he would otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent. The tenant's notice to quit need not be in writing in order to support the lessor's claim to double rent, nor need the lease which the tenant has determined by his notice to quit be a lease in writing (*c*). But the notice must be a good notice to quit at some fixed time, and at a period when the tenant is able by notice to put an end to the tenancy. If the tenant merely gives notice that he will quit "as soon as he can possibly get another situation" (*d*), or gives notice to quit in the middle instead of at the termination of the current term of hiring, or a notice of too short a duration, and which does not therefore bind the lessor, the lease is not determined, and there cannot, consequently, be any holding over by the tenant (*e*). A tenant who holds over for one year after notice to quit, paying double rent, may quit at the end of such year without fresh notice (*f*).

Determination of tenancies by railway notices.—If lands held by tenants from year to year are required by railway companies for the making of a railway, the company may, in general, under the powers of their Act, either give the ordinary landlord's notice to quit ending with the current year of the tenancy, in which case no compensation would be payable in respect of any unexpired term, or six months' notice to be given at any time, in which case the tenant will be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. If, after having given a notice not ending with the expiration of the current year, the company inform the tenant that he may hold on till the end of the current year, and he does so, the situation of the parties is the same as if a regular landlord's notice had been originally given (*g*). If the tenant continues in possession after the expiration of the notice he holds simply as a tenant-at-sufferance, without any estate or interest at all in the premises, unless rent is received from him, or the premises are re-demised to him (*h*).

(*c*) *Timmins* v. *Rowlinson*, 3 Burr. 1608.

(*d*) *Farrance* v. *Elkington*, 2 Campb. 591.

(*e*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922; 4 L.J. (O.S.) K.B. 71.

(*f*) *Booth* v. *Macfarlane*, 1 B. & Ad. 904; 9 L.J. (O.S.) K.B. 161.

(*g*) *Reg.* v. *L. & Southampton Ry.*, 10 Ad. & E. 3; 8 L.J. Q.B. 220.

(*h*) *Nadin, Ex parte*, 17 L.J. Ch. 421.

Recovery of possession.—Possession of land cannot be gained by an act of trespass which has never been acquiesced in by the landowner. Every person who trespasses upon another man's land and remains there tortiously may be expelled by main force (*i*). But if he has once gained a lawful possession which is determined, and he then continues unlawfully to hold the land, the landowner is punishable for a forcible entry, if he enters with a strong hand to dispossess him (*k*). The tenant, however, cannot maintain an action for damages against the landlord for a trespass upon the realty in respect of the forcible entry; for there is no trespass by the latter in entering on property which is his own, and on which he has a legal right to enter. Therefore, if the tenant of a dwelling-house holds over wrongfully, and the landlord enters and pulls down the house, or stops up the chimney, or takes off the roof, and the tenant brings an action against the landlord for trespassing on the land, it is an answer that the house was the defendant's house, and therefore that he entered and pulled it down, &c. (*l*). It is now well-established law that at the determination of the term the landlord may legally enter and take possession of the demised premises, and, after civilly requesting the tenant to depart, may, in the case of his refusal, gently lay hands upon him and turn him out, subject only to the liability to be indicted for a forcible entry (*m*). If the landlord, having no right to enter, takes advantage of the temporary absence of the tenant to fasten up the door of his apartments and exclude him from re-entering, the tenant may recover damages against the landlord for breaking and entering, although the landlord has never actually entered the rooms (*n*).

Licence to eject.—Where it was provided that, in case of non-payment of rent or non-performance of covenants, it should be lawful for the lessor and his agents immediately to enter upon and take possession of the demised premises, and to expel the lessee and all persons claiming under him, without any legal process, as effectually as any sheriff might do in case the lessor had obtained judgment in ejectment for the recovery of possession and a writ had issued thereon to the sheriff in due form of law, and that the leave and licence of the lessee might be pleaded in any action brought by the latter for such entry and ouster, and the agreement

(*i*) *Browne* v. *Dawson*, 12 Ad. & E. 629; 10 L.J. Q.B. 7.

(*k*) *Rex* v. *Bathurst*, Say. 227; *Rex* v. *Wilson*, 8 T. R. 361.

(*l*) *Burling* v. *Read*, 11 Q.B. 904; 19 L.J. Q.B. 291; *Davison* v. *Wilson*, 17 L.J. Q.B. 196; 11 Q.B. 890; *Harvey* v. *Bridges*, 14 M. & W. 437; 14 L.J. Ex. 272; *Jones* v. *Foley*, (1891) 1 Q.B. 730; 60 L.J. Q.B. 464.

(*m*) *Davis* v. *Burrell*, 10 C.B. 822; *Harvey* v. *Bridges*, *supra*; *Jones* v. *Chapman*, 2 Exch. 803, 821; 18 L.J. Ex. 456; *Pollen* v. *Brewer*, 7 C.B. N.S. 371.

(*n*) *Lane* v. *Dixon*, 3 C.B. 776; 16 L.J. C.P. 129.

be used as conclusive evidence of such leave and licence; it was held that the lessor had a right, as between himself and the lessee, under this agreement, to eject the lessee by main force, and might plead such licence in bar of an action of trespass brought by the latter (*o*).

Recovery of land under provisoes for re-entry.—When the lessor has a right to re-enter in case of non-payment of rent, and brings an action, he must show that demand was made of the rent upon the demised premises, unless there is no one there on whom demand can be made, and that the demand has been made on the party liable to pay (*p*), and that the same or some part thereof has not been paid (*q*), unless the proviso is for re-entry without any demand of the rent (*r*). The demand must be of the precise sum due, and must be made on the day when the rent was due and payable by the terms of the lease, and at a convenient time (which ought to be an hour) before sunset (*s*). Where the proviso is for re-entry in case of non-payment of rent for the space of ten, fifteen, or any other number of days after it has become due, the demand must be made on the tenth or last day (*t*). Where rent was payable quarterly, and two quarters were in arrear and were demanded together, it was held that the lessor could not avail himself of the proviso for re-entry in case of non-payment for twenty-one days, as the first quarter ought to have been demanded on the twenty-first day after it had become due (*u*).

Where there is no sufficient distress and one half-year's rent is due and in arrear, and the lessor has a right to re-enter for non-payment thereof, proceedings may be taken under 15 & 16 Vict. c. 76, s. 210 (*x*). The operation of the statute appears to be confined to cases where the tenant was six months in arrear at the very time when the landlord had recourse to the statutory remedy (*y*). Proof of no sufficient distress at the time the right to re-enter accrued is *primâ facie* proof of there being no sufficient distress at the time of the service of process (*z*). If more than

(*o*) *Kavanagh* v. *Gudge*, 7 Sc. N.R. 1025; 13 L.J. C.P. 99.

(*p*) *Manser* v. *Dix*, 8 De G. M. & G. 703.

(*q*) Bro. Abr. Demande, 19; *Kidwelly* v. *Brand*, Plowd. 70, a, b.

(*r*) *Doe* v. *Masters*, 2 B. & C. 490; 2 L.J. (O.S.) K.B. 117.

(*s*) *Fabian* v. *Winston*, Cro. Eliz. 209; Co. Litt. 202, a; 1 Saund. 287, n. 16; *Doe* v. *Brydges*, 2 D. & R. 29; 1 L.J. (O.S.) K.B. 9; *Acocks* v. *Phillips*, 5 H. & N. 183.

(*t*) *Hill* v. *Grange*, Plowd. 172, a, 173; *Clun's case*, 10 Co. 129, a; *Wood and Chiver*, 4 Leon. 180; *Doe* v. *Wandlass*, 7 T.R. 117.

(*u*) *Doe* v. *Paul*, 3 C. & P. 613. As to recovery of possession by landlord of a company being wound up, see *General Share Co.* v. *Wetley Brick Co.*, 20 Ch.D. 260.

(*x*) *Doe* v. *Franks*, 2 C. & K. 678. See *Shepherd* v. *Berger*, (1891) 1 Q.B. 597; 60 L.J. Q.B. 395.

(*y*) *Cotesworth* v. *Spokes*, 30 L.J. C.P. 222; 10 C.B. N.S. 103; *Thomas* v. *Lulham*, (1895) 2 Q.B. 400; 64 L.J. Q.B. 720.

(*z*) *Doe* v. *Fuchau*, 15 East, 286.

half a year's rent is in arrear, the case is within the statute (*a*), when there is not sufficient distress on the premises to countervail all the arrears due (*b*). But the distress must be available; and therefore, if the tenant locks up the premises, so that the landlord cannot get at the goods which may happen to be upon them, he may proceed under the statute (*c*). The right of re-entry must be absolute and unqualified. If he has a right only to re-enter and hold until arrears of rent are satisfied, and not to avoid the lease altogether, he cannot avail himself of the statute (*d*). The tenant or his assignee or sub-lessee (*e*) may, at any time before trial (sect. 212), stay all further proceedings by paying or tendering to the lessor, or bringing into court, the rent and arrears with costs (*f*).

Recovery of possession of deserted demised premises.—Sect. 16 of 11 Geo. 2, c. 19, and the statute 57 Geo. 3, c. 52, give a summary remedy by proceedings before justices for recovery of demised premises, when the tenant has deserted them, and left them uncultivated or unoccupied, so that no sufficient distress can be had. And by 3 & 4 Vict. c. 84, police magistrates and police constables within the metropolitan police district are enabled to put the lessor into possession and determine the lease. But this power is not by any of the provisions of the last-named statute, or by 11 & 12 Vict. c. 43, s. 34, vested in the Lord Mayor or alderman sitting in the justice room at the Mansion House or Guildhall (*g*). The record of the proceedings need not show that any complaint or inquiry was made before the justices upon oath, nor state that the landlord had a right of re-entry (*h*). Where a bankrupt lessee of a dwelling-house went away, leaving a person in the house whose possession was merely colourable, it was held that the justices were warranted in finding that the lessee had deserted the premises (*i*). But where the tenant left his wife and children in the house, but took away his furniture and went away himself, it was held that there was no desertion; and the judges of assize, on appeal, ordered restitution of the demised premises with costs (*k*). Where the justices go the first time and find the premises deserted, then, unless some one appears and pays the rent, when they go the second time they are to deliver possession to the

(*a*) *Doe* v. *Alexander*, 2 M. & S. 525.
(*b*) *Cross* v. *Jordan*, 8 Exch. 149; 22 L.J. Ex. 70, overruling *Doe* v. *Roe*, 9 Dowl. 548.
(*c*) *Doe* v. *Dyson*, M. & M. 77.
(*d*) *Doe* v. *Bowditch*, 8 Q.B. 973; 15 L.J. Q.B. 267.
(*e*) *Doe* v. *Byron*, 1 C.B. 623; 14 L.J. C.P. 207.
(*f*) *Roe* v. *Davis*, 7 East, 363.
(*g*) *Edwards* v. *Hodges*, 15 C.B. 477; 24 L.J. M.C. 81.
(*h*) *Basten* v. *Carew*, 5 D. & R. 558; 3 L.J. (O.S.) K.B. 111.
(*i*) *Pilton, Ex parte*, 1 B. & Ald. 369.
(*k*) *Ashcroft* v. *Bourne*, 3 B. & Ad. 684; 1 L.J. K.B. 209.

lessor. The proceedings of the justices are examinable in a summary way by the judges (sect. 17).

Recovery of possession of houses and small tenements.—The statute 1 & 2 Vict. c. 74, enables justices of the peace to give possession to the landlord of houses and land held for a term not exceeding seven years, rent free or at a rent not exceeding 20*l.* per annum, upon which no fine is payable, provided the tenancy has been duly determined, and notice has been given as therein provided (*l*). If under this statute a tenancy is proved, and a determination of that tenancy, and a refusal to quit, it is not competent to the tenant to set up the title of any third party, or raise any question of title (*m*). If the interest of the tenant, where the value of the premises or the rent does not exceed 50*l.* by the year (*n*), has been duly determined, and the tenant refuses to deliver up possession, the landlord may, by proper proceedings in the county court, obtain a warrant of possession (*o*). The plaint must be brought in the district where the tenements are situate; and the court will have jurisdiction, even though a *bonâ fide* question of title is raised, where neither the annual value of the lands nor the rent payable in respect thereof exceed 50*l.* (*p*). If, however, the annual value or rent exceed that sum, the jurisdiction of the court will be ousted if a *bonâ fide* question of title is raised; and, even if neither rent nor value exceed 50*l.*, yet the defendant may have the action tried in a superior court if he can satisfy a judge that the title to lands of greater annual value than 50*l.* will be affected by the decision (*q*). A tenant is, in general, estopped from disputing his landlord's title; but he may show that it has expired; and, if there is some evidence to support the defence, and the rent or annual value of the premises exceed 50*l.*, the judge of the county court should refrain from trying the question (*r*).

Where on the hearing of a plaint it appeared that one of the matters seriously in dispute was whether the whole or part of a house had been demised, it was held that the inquiry involved a question of title, and that the county court had no jurisdiction in the matter (*s*). A decision of a county court judge, that the title is not in question, is by no means conclusive of the fact. The

(*l*) *Delaney* v. *Fox*, 1 C.B. N.S. 166; 26 L.J. C.P. 5.

(*m*) *Rees* v. *Davies*, 4 C.B.N.S. 56, 62.

(*n*) If the rent does not exceed 50*l.* the county court has jurisdiction, though the premises are of greater annual value: *Harrington* (*Earl*) v. *Ramsay*, 8 Exch. 879; 22 L.J. Ex. 326; 2 E. & B. 669; 22 L.J. Q.B. 460.

(*o*) 51 & 52 Vict. c. 43, s. 138. See *Friend* v. *Shaw*, 20 Q.B.D. 374; 57 L.J. Q.B. 225.

(*p*) 51 & 52 Vict. c. 43, s. 60.

(*q*) 51 & 52 Vict. c. 43, s. 59.

(*r*) *Mountnoy* v. *Collier*, 1 E. & B. 630; 22 L.J. Q.B. 124; *Marsh* v. *Dewes*, 17 Jur. 558; *Kerkin* v. *Kerkin*, 3 E. & B. 399; *Latham* v. *Spedding*, 17 Q.B. 440; 20 L.J. Q.B. 302.

(*s*) *Chew* v. *Holroyd*, 8 Exch. 249; 22 L.J. Ex. 95.

question may be brought before the superior courts on motion for a prohibition by affidavit; and, if the court directs that the party should declare, the question becomes one of evidence(*t*). Neither the tenant nor any one claiming through him, nor any one put into possession by him, can, during the demise, controvert the landlord's title in an action of ejectment; but he may show that the title has expired (*u*). But a third person not claiming possession to the land, who has brought goods on to the land by the licence of the tenant, is not estopped from disputing the lessor's title (*x*). If a tenancy is sought to be established through the medium of payment of rent to the plaintiff or to his agent, it must be shown that the rent was either paid by the defendant himself, or by some person through whom he claims, or by his authorised agent; for an unauthorised payment of rent by a stranger will not be binding on the defendant. Where a party distrained for rent, and the lessee paid the rent due under the distress without protest, it was held that he could not after that controvert the title of the plaintiff (*y*).

Rights of outgoing and incoming tenants—Away-going crops, allowances for tillage, manure, &c.—The rights of tenants to way-going crops, tillages, and value of improvements, &c., have been defined and extended by the Agricultural Holdings Act, 1883 (*z*), which provides for the obtaining by the tenant on quitting his holding (*a*) of such compensation from the landlord as fairly represents the value of the improvement to an incoming tenant. Compensation is to be given to tenants for improvements of different sorts (*b*), subject to certain restrictions and deductions (*c*). The consent of the landlord is necessary in the case of some improvements (*d*), and in others notice must have been given to him (*e*) in order to entitle the tenant to compensation, but these conditions may be dispensed with by agreement (*f*). The amount of compensation is to be settled by arbitration, due notice having been given to the landlord of the claim (*g*), and in certain cases

(*t*) *Thompson* v. *Ingham*, 14 Q.B. 710; 19 L.J. Q.B. 189.

(*u*) *Ante*, p. 610; *Doe* v. *Smythe*, 4 M. & S. 347; *Doe* v. *Mills*, 2 Ad. & E. 17; 4 L.J. K.B. 10; *Doe* v. *Baytup*, 3 Ad. & E. 190; 4 L.J. K.B. 263.

(*x*) *Tadman* v. *Henman*, (1893) 2 Q.B. 168.

(*y*) *Doe* v. *Mitchell*, 3 Moore, 229; *Hitchings* v. *Thompson*, 5 Exch. 50; 19 L.J. Ex. 146.

(*z*) 46 & 47 Vict. c. 61. The Act only applies to holdings which are agricultural or pastoral, or cultivated as a market garden, and does not apply to any holding let to a tenant during his continuance in any office or employment under the landlord, s. 54. The Act is amended by the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50); see also as to market gardens, 58 & 59 Vict. c. 27; *Mears* v. *Callender*, (1901) 2 Ch. 388; 70 L.J. Ch. 621.

(*a*) The determination of the tenancy takes place when the holding ends under the custom of the country: *Paul, In re*, 24 Q.B.D. 247; 59 L.J. Q.B. 30.

(*b*) 46 & 47 Vict. c. 61, s. 1, and Sched. I., and 63 & 64 Vict. c. 50, s. 1, Sched. I.

(*c*) 46 & 47 Vict. c. 61, s. 6.

(*d*) Sect. 3.

(*e*) Sect. 4.

(*f*) See sect. 5.

(*g*) Sects. 7—22; and 63 & 64 Vict. c. 50, s. 2, and Sched. II. As to meaning

there is an appeal to the county court (*h*). A tenant cannot contract himself out of the Act (*i*), but compensation under the Act is exclusive of any other compensation (*k*). The landlord paying compensation may obtain a charge upon the holding (*l*). The term "landlord" includes the executor of the landlord (*m*). The landlord of a holding or any person authorised by him has a right of entry for the purpose of viewing the state of the holding (*n*); and notwithstanding any provision in a contract of tenancy, making the tenant liable to pay a higher rent or damages in the event of any breach of covenant or condition, the landlord cannot recover any sum in excess of the damage actually suffered from such breach; but this does not apply to covenants against breaking up permanent pasture, lopping or injuring trees, grubbing underwood, or burning heather (*o*). In an arbitration under the Act, if an amount is awarded to the landlord in excess of the amount awarded to the tenant, such excess cannot be recovered by the landlord under the procedure provided by the Act (*p*).

All tenants who held by an uncertain tenure, and whose interest might at any time be determined by the will of the lord, were by the common law entitled to emblements and the crops and annual produce of the soil which had been sown or planted by them, and which had not come to maturity at the period of the determination of their interest (*q*). In all farming leases, the custom of the country, with respect to the mode of cultivation and the right to the away-going crop, is impliedly annexed to the terms of the lease, unless it is excluded by express provisions and stipulations (*r*). The general rule in the case of farm leases is that the tenant is bound to leave the land, when he quits, in the same state as he found it on taking possession. If he has taken the farm under a custom by which the outgoing tenant is bound to leave a certain quantity of growing wheat or other produce, or a certain quantity of hay and straw, or manure, on the demised premises, he must in his turn, when he quits the land, leave it in the same state and condition, and with the same privileges and advantages for the

of "determination tenancy" in sect. 7, see *Morley* v. *Carter*, (1898) 1 Q.B. 8; 66 L.J. Q.B. 843. See *Paul, In re, ante*, p. 683; and *Black* v. *Clay*, (1894) A.C. 368.

(*h*) 46 & 47 Vict. c. 61, s. 23.

(*i*) Sect. 55.

(*k*) Sect. 57. See *Newby* v. *Eckersley*, (1899) 1 Q.B. 465; 68 L.J. Q.B. 261; *Pearson, In re*, (1899) 2 Q.B. 618; 68 L.J. Q.B. 878.

(*l*) Sects. 29—32.

(*m*) *Gough* v. *Gough*, (1891) 2 Q.B. 665; 60 L.J. Q.B. 726.

(*n*) Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 5.

(*o*) Sect. 6.

(*p*) *Holmes and Formby, In re*, (1895) 1 Q.B. 174; 64 L.J. Q.B. 391. As to arbitration in matters outside the Act, see *Lloyd, In re*, (1899) 1 Q.B. 559; 68 L.J. Q.B. 376.

(*q*) Litt. ss. 68, 69.

(*r*) *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith's L.C. 528 (ed. 10).

benefit of his successor, that he himself enjoyed when he entered upon it.

By the custom of some counties, the outgoing tenant takes two-thirds of particular crops, leaving one-third to the incoming tenant (*s*). In some districts, all the hay and straw must be left to be consumed on the farm; whilst in others, the tenant is entitled to take it away with him. Sometimes the landlord or the incoming tenant has a right, and in some instances he is bound by custom, to take the away-going crops, and also the straw and hay, and sometimes the manure, from the outgoing tenant at a valuation; and, when such a custom exists, the tenant has a right, after the expiration of his lease, and after he has quitted the premises, to enter upon the land as occasion may require to tend the crop. If the landlord or the incoming tenant does not take the crop at a valuation, the tenant has, by general custom and usage, all such rights and privileges as are necessary to enable him to gather it in, and secure it, and sell it when arrived at maturity, such as free ingress and egress into and from the demised premises, the temporary use of the barns to thrash it out, and yard-room for the straw; and he has a right, moreover, to the possession of the field for a reasonable time for the carrying away as well as the cutting of his corn (*t*). If no custom exists giving the tenant a right to the away-going crop, the landlord is entitled thereto. The tenant, therefore, must in all cases make out and establish the custom (*u*). When no such custom exists, the natural consequence is that the tenant does not till or sow the ground at the close of his term of hiring; and a custom therefore appears to prevail, in all places where the outgoing tenant is not entitled to the away-going crop, for the incoming tenant or the landlord to enter to manure and till the land, and plant the spring corn, and prepare for the harvest, prior to the termination of the lease and the commencement of his own term and interest (*x*).

Whatever custom regulates the tenant's rights on entering, the same custom regulates his rights on leaving; and the custom may be given in evidence, although there is a lease under seal, or a written contract of demise between the parties. All customary allowances, also, as between the outgoing tenant and the landlord or incoming tenant, are impliedly annexed to the express terms of

(*s*) *Holding* v. *Pigott*, 5 Moo. & P. 427; 9 L.J. (O.S.) C.P. 124; *Griffiths* v. *Tombs*, 7 C. & P. 810.

(*t*) *Boraston* v. *Green*, 16 East, 81; *Beaty* v. *Gibbons*, *ib.* 118; *Strickland* v. *Maxwell*, 2 Cr. & M. 539; 3 L.J. Ex. 161; *Griffiths* v. *Puleston*, 13 M. & W. 358; 14 L.J. Ex. 33. As to the right of the grantee of growing crops after the landlord has resumed possession, see *Hayling* v. *Okey*, 8 Exch. 545; 22 L.J. Ex. 139.

(*u*) *Caldecott* v. *Smythies*, 7 C. & P. 808.

(*x*) Woodfall's L. & T. 801 (ed. 16).

the lease, such as allowances for expenses incurred in draining lands that required draining according to good husbandry, though the drainage was done without the landlord's knowledge or consent (*y*); also for manuring, tilling, fallowing, half-fallowing, and sowing the land, for seeds, and labour, foldage, and manure (*z*). The tenant's rights to growing crops and produce are in all cases strictly confined to annual crops, or the first year's produce of seeds and roots sown or planted by him during the last year of his tenancy, and do not extend to trees, shrubs, and plants of a perennial character (excepting the fruit-trees, plants, and shrubs of seedsmen and nursery gardeners, an exception introduced for the benefit of trade) (*a*). Thus a border of box, planted by a tenant in a garden demised to him, cannot be taken up and removed at the expiration of his term (*b*), nor a strawberry-bed (*c*), nor hedges, nor fruit-trees (*d*).

The person primarily liable to the outgoing tenant is the landlord (*e*), who, on the other hand, is entitled to be allowed the amount of rent due to him. But it constantly happens that the incoming tenant, who in the end, by his bargain with the landlord, is to take and pay for the tillages, in order to avoid circuity and the trouble and expense of two valuations, agrees with the outgoing tenant that the valuation shall be made directly from the latter to him. That, however, does not rest upon the custom, but is a mere conventional arrangement without which there would be no privity between the outgoing and the incoming tenant. There is, generally speaking, no formal agreement, but each appoints a valuer, and the valuers settle the amount to be paid; and in that case there is an implied contract that if rent is due from the outgoing tenant to the landlord, and such rent is paid by the incoming tenant, it may be set off against the value of the tillages (*f*).

Where the lease determines by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, the tenant, instead of claims to emblements, may continue to hold the farm or lands until the expiration of the then current year of his tenancy (*g*); and the succeeding landlord is entitled to receive of the tenant the proper proportion of the rent for the

(*y*) *Mousley* v. *Ludlam*, 21 L.J. Q.B. 64.

(*z*) *Dalby* v. *Hirst*, 3 Moore, 536; *Hutton* v. *Warren*, 1 M. & W. 466; 5 L.J. Ex. 234; *Wilkins* v. *Wood*, 12 Jur. 583; 17 L.J. Q.B. 319; *Faviell* v. *Gaskoin*, 7 Exch. 273; 21 L.J. Ex. 85.

(*a*) *Wardell* v. *Usher*, 3 Sc. N.R. 508; 10 L.J. C.P. 316.

(*b*) *Empson* v. *Soden*, 4 B. & Ad. 655.

(*c*) *Watherell* v. *Howells*, 1 Campb. 227.

(*d*) *Wyndham* v. *Way*, 4 Taunt. 316.

(*e*) *Bradburn* v. *Foley*, 3 C.P.D. 129; 47 L.J. C.P. 331. See *Mansel* v. *Norton*, 22 Ch.D. 769; 52 L.J. Ch. 357.

(*f*) *Stafford* v. *Gardner*, L.R. 7 C.P. 242.

(*g*) 14 & 15 Vict. c. 25, s. 1; if there are from the nature of the case no claims to emblements, the section will not apply: *Haines* v. *Welch*, *infra*.

period which may have elapsed from the lessor's death or cesser of the estate of such lessor to the time of the tenant's quitting, and may distrain for such proportion (*h*).

Sale of straw off land.—If by the terms of the lease the hay and straw are to be consumed by the tenant on the land, and the lessee sells the crop, and the purchaser removes it, the landlord may maintain an action against the purchaser for the value of the hay or straw, &c. so removed (*i*). It is no answer to such an action to show that the tenant has brought back an equivalent in the shape of manure (*k*). If the value of straw sold off is to be returned in manure, the manure value and not the market price of the straw sold would seem to be the proper criterion of expenditure upon the land (*l*). According to the custom of the country in some districts, the incoming tenant, in the absence of a special agreement, pays the outgoing tenant a consuming price, or two-thirds the market price for the straw; but, if the outgoing tenant is bound to consume all the manure on the farm, the allowance in respect of straw, as between him and the incoming tenant, would be only half the market price, called a fodder price. And, where there is no special agreement to the contrary, the tenant is often by custom entitled to go out as he came in (*m*). An outgoing tenant, therefore, who on coming in has paid for straw in accordance with the custom, is entitled to be paid for straw on going out; and a stipulation in a lease binding the tenant "to consume with stock on the farm all the hay, straw, and clover grown thereon, which manure shall be used on the said farm," is in nowise inconsistent with the tenant's customary right to receive payment for the unconsumed straw on his going out (*n*).

Non-payment of tithe rent-charge by outgoing tenant.—If any occupying tenant quits leaving unpaid any tithe rent-charge (14 & 15 Vict. c. 25, s. 4), and the tithe-owner gives notice of proceeding by distress for its recovery, the landlord or succeeding tenant may pay the tithe rent and any expenses incident thereto, and may recover the amount from the outgoing tenant or his legal representatives, in the same manner as if the same were a debt by simple contract due to the landlord or tenant making such payment (*o*).

(*h*) *Haines* v. *Welch*, L.R. 4 C.P. 91; 38 L.J. C.P. 118.

(*i*) 56 Geo. 3, c. 50, s. 11; repealed as to assignee of insolvent debtor, see St. L. R. Act, 1873; *Wilmot* v. *Rose*, 3 E. & B. 563; 23 L.J. Q.B. 281; see *Hawkins* v. *Walrond*, 1 C.P.D. 280; 45 L.J. C.P. 772.

(*k*) *Legh* v. *Lillie*, 6 H. & N. 171; 30 L.J. Ex. 25.

(*l*) *Lowndes* v. *Fountain*, 11 Exch. 486, 491; 25 L.J. Ex. 49.

(*m*) *Clarke* v. *Westrope*, 18 C.B. 774; 25 L.J. C.P. 287.

(*n*) *Muncey* v. *Dennis*, 1 H. & N. 220; 26 L.J. Ex. 66.

(*o*) See now Tithe Act, 1891 (54 Vict. c. 8).

Inclosures of waste land by tenants.—If the tenant during the demise has inclosed land from the adjoining waste, and used it in common with the demised premises, the title of the lessor will, as between him and the lessee, prevail over the whole whether the tenant made the inclosure with or without the assent of the lessor (*p*); and, in either case, the Statute of Limitations will not begin to run against the lessor until the termination of the lease (*q*).

Leases obtained by misrepresentation.—An estate or interest in land, once vested, cannot afterwards be divested on the ground that the deed creating the estate has been obtained by a fraudulent misrepresentation respecting some matter collateral to the contract. Where, therefore, a lessor had been induced to execute a lease by reason of a fraudulent representation on the part of the lessee as to the use to which he intended to apply the premises, it was held that the lease was not thereby avoided and the term gone, but the lessor must seek his remedy by injunction (*r*); but, where the lease is granted for the express purpose of carrying into effect an illegal act, the courts will not lend their aid for the enforcement of any of the provisions of the illegal contract (*s*).

The cancellation of a lease by mutual consent of the parties discharges the covenants and promises therein contained, but does not divest the estate created by the lease, or destroy the lessor's right of action for the rent founded on the privity of estate. Arrears of rent, therefore, which accrue due prior to the cancellation of a lease may be recovered by the landlord in an action founded on the privity of estate (*t*).

Assignment.—The doctrine of covenants running with the land is confined to covenants annexed to the land by the indenture of demise; and the assignment of a parol tenancy does not pass to the assignee a right of action upon a special stipulation between the original landlord and the lessee (*u*). If, however, the landlord has consented to the substitution of the assignee in the place of the original tenant, that will create a new contract between the landlord and the assignee upon which either may sue (*x*). The equitable assignee of a legal term is not liable to the lessor for rent, or for damages in respect of breaches of covenants, even though he may have been in possession (*y*).

(*p*) *Andrews* v. *Hailes*, 22 L.J. Q.B. 409; 2 E. & B. 349; *Kingsmill* v. *Millard*, 11 Exch. 313.

(*q*) *Whitmore* v. *Humphries*, L.R. 7 C.P. 1; 41 L.J. C.P. 43.

(*r*) *Ferret* v. *Hill*, 15 C.B. 226; 23 L.J. C.P. 185.

(*s*) *Ritchie* v. *Smith*, 6 C.B. 462; 18 L.J. C.P. 9; *Gas Light Company* v. *Turner*, 7 Sc. 779; 8 *ib.* 609.

(*t*) *Ward* v. *Lumley*, 5 H. & N. 94; 29 L.J. Ex. 322; *Bolton* v. *Carlisle* (*Bishop*), 2 H. Bl. 264; *Doe* v. *Bingham*, 4 B. & Ald. 677.

(*u*) *Elliott* v. *Johnson*, L.R. 2 Q.B. 120; 36 L.J. Q.B. 44.

(*x*) *Buckworth* v. *Simpson*, 1 Cr. M. & R. 834; 4 L.J. Ex. 104.

(*y*) *Cox* v. *Bishop*, 8 De G. M. & G. 815; 26 L.J. Ch. 389. See *Haywood* v.

Breach of contract to grant lease.—The rule which governs sales of real property, that, if the vendor fails to make a good title, the purchaser is only entitled to recover the amount of his deposit and the expenses to which he has been put, does not apply to the case of a lease granted by a lessor in excess of his leasing powers, and containing a covenant for quiet enjoyment; and, if the lease is repudiated by a person having a good title so to do, the lessee is entitled to recover the full value of the lease; and it makes no difference that the lease was a reversionary lease, and that it was repudiated before the lessee had entered into possession under it. In such a case it was held that the lessee was entitled to recover the value of the lease and the expense of the lease so repudiated, but not the expense of a lease of the demised premises which he took from the person really entitled to grant one after the repudiation of the first lease, nor to a 10*l.* per cent. compensation given by the jury, on a supposed analogy to the case of a compulsory sale to a railway company under an Act of Parliament (*z*). If a man contracts to grant a good and valid lease, without having any colour of title to the premises intended to be demised, the intended lessee is to be placed as far as money can do it in the same position as he would have been in if the contract had been fulfilled, and may recover all the damages he has sustained by reason of the non-performance of the contract, including the loss of the lease (*a*), but not damages and costs arising out of the re-sale of the lease to a third person, these being too remote (*b*).

Actions by landlords for use and occupation of premises.—If lands and houses have been occupied by a tenant under a lease void as to the duration of the term by the Statute of Frauds, the rent reserved in the lease will be the measure of damages resulting from the breach of the implied contract to pay for the actual use and occupation of the property (*c*). But, when no rent has been fixed upon or ascertained by the agreement of the parties, or the contract has been so far departed from that the stipulated rent forms no just criterion of value, the actual pecuniary value of the occupation will constitute the damage recoverable by the plaintiff. In case of an eviction from part of the premises, the jury must ascertain, independently of any agreement, what ought to be paid (*d*).

Brunswick Building Society, 8 Q.B.D. 403; 51 L.J. Q.B. 73; *Ramage* v. *Womack*, (1900) 1 Q.B. 116; 69 L.J. Q.B. 40; *Bagot Tyre Co.* v. *Clipper Tyre Co.*, (1902) 1 Ch. at p. 156; 71 L.J. Ch. at p. 161. As to effect of subsequent bankruptcy, see *Stein* v. *Pope*, (1902) 1 K.B. 595; 71 L.J. K.B. 322.

(*z*) *Lock* v. *Furze*, L.R. 1 C.P. 441; 35 L.J. C.P. 141.

(*a*) *Robinson* v. *Harman*, 1 Exch. 855; 18 L.J. Ex. 202. See, however, *Wigsell* v. *School for Indigent Blind*, 8 Q.B.D. 357; 51 L.J. Q.B. 330; see *ante*, p. 259.

(*b*) *Spedding* v. *Nevell*, L.R. 4 C.P. 212; 38 L.J. C.P. 133.

(*c*) *Ante*, p. 632 *et seq.*; *De Medina* v. *Polson*, Holt, 47.

(*d*) *Tomlinson* v. *Day*, 2 B. & B. 681.

Damages for breach of covenants for quiet enjoyment.—A lessee under a void lease who has been ejected by the successor of the lessor has a right, in an action against the executors of the lessor for breach of a covenant for quiet enjoyment contained in his lease, to recover the value of the term (*e*).

Damages for breach of covenant not to assign.—The measure of damages for a breach by an assignee of the lessee of a covenant not to assign without licence is such a sum as will, as far as money can, put the lessor in the same position as if he had still the original assignee's liability, instead of the liability of a subsequent assignee of inferior pecuniary ability, for breaches both past and future (*f*). Land and buildings were demised for a term of years, the lease containing a clause providing that the lessee should not be at liberty to sub-let without the consent in writing of the lessor, his executors, administrators, or assigns, but that such consent should not be unreasonably withheld; the lessee, without obtaining such consent, sub-let the premises to a person who intended (to the lessee's knowledge) to use them, and who did in fact use them, for the purposes of a dangerous business; the buildings were damaged by a fire which arose from the use of the premises for the business for which they were taken; the lessor brought an action claiming damages for the breach of the covenant not to sub-let; it was held by Hawkins, J., that the damage caused by the fire was not too remote, as it was the natural and probable result of the breach of covenant (*g*).

Damages for breach of covenant to repair.—In an action for breach of a covenant to repair, the proper measure of damages is the amount that it will take to put the premises into repair (*h*); but, in estimating the damages to be recovered, the age and general state and condition of the property at the time of the demise must, as we have already seen, be taken into consideration (*i*). If buildings fall to the ground by reason of the neglect of the covenantor to repair them, or if they are blown down by the wind, or burned by an accidental fire, the proper measure of damages is the amount that it will take to rebuild, deducting the difference in value between old materials and new, as the landlord is not entitled to be put in a better position than he was in before the fire took place, and cannot have the value of a new house when the one he

(*e*) *Williams* v. *Burrell*, 1 C.B. 428.

(*f*) *Williams* v. *Earle*, L.R. 3 Q.B. 739; 37 L.J. Q.B. 231.

(*g*) *Lepla* v. *Rogers*, (1893) 1 Q.B. 31.

(*h*) *Vivian* v. *Champion*, 2 Raym. 1125; *Davies* v. *Underwood*, 2 H. & N. 571; 27 L.J. Ex. 113; *Bell* v. *Hayden*, 9 Ir. C.L.R. 301. As to damages for breach of covenant to leave premises in repair, see *Joyner* v. *Weeks*, (1891) 2 Q.B. 31; 60 L.J. Q.B. 510; *Henderson* v. *Thorn*, (1893) 2 Q.B. 164; 62 L.J. Q.B. 586.

(*i*) *Ante*, pp. 635—639; *Burdett* v. *Withers*, 7 Ad. & E. 136; 6 L.J. K.B. 219; *Paine* v. *Hayne*, 16 M. & W. 541; 16 L.J. Ex. 130.

has lost was an old house (*k*). If there be both a covenant to repair and a covenant to insure against loss from fire for a specific sum, the liability of the covenantor in respect of the cost of rebuilding in case the premises are burned down is not limited to the amount of the sum covenanted to be insured (*l*). If the party suing upon the covenant is only tenant for life, with remainder in tail and a reversion in fee, he can only recover such damages as are commensurate with his life estate (*m*). Where a defendant held premises under a lease with a covenant to keep and yield them up in repair, and at the expiration of the lease the premises were dilapidated to an amount fixed by the jury at 22*l*., and the plaintiff had, before this time, made a verbal agreement with a third person to grant him a lease for a long term, and at once proceeded to pull down the premises, it was held that the plaintiff was, notwithstanding, entitled to recover substantial damages (*n*).

If a lessor has covenanted to repair a dwelling-house demised by him, and the building is destroyed by fire or becomes ruinous and uninhabitable, the lessee may rebuild, if the lessor neglects so to do within a reasonable period after request; and the measure of damages to be recovered by the lessee in such a case will be the costs and expenses of the rebuilding. We have already seen that covenants to pay rent and covenants to repair, contained in a lease, are independent covenants (*ante*, p. 627), and that the lessee is not exonerated from his liability to pay rent under his covenant so to do by reason of the non-performance of the lessor's covenant to repair. If, therefore, the lessor neglects to fulfil his covenant, and delays making the repairs, he is responsible in damages for expenses incurred by the lessee in procuring a suitable residence to reside in whilst he is prevented from having the use and enjoyment of the house during the period of delay or neglect to fulfil the covenant. But, if the lessor fulfils his covenant by repairing as soon as he reasonably can, he will not then be responsible for the rent of a house which the lessee may be obliged to take for a residence whilst the repairs are being executed (*o*). If an action is brought against an assignee of a lease for damages for a breach of covenant to repair, in respect of dilapidations that accrued during the time he was assignee, the measure of damage is the loss which the landlord would sustain by the non-repair if he went into the market to sell the reversion (*p*). If an under-lessee refuses to

(*k*) *Yates* v. *Dunster*, 11 Exch. 15; 24 L.J. Ex. 226.

(*l*) *Digby* v. *Atkinson*, 4 Campb. 275.

(*m*) *Evelyn* v. *Raddich*, Holt, 543; *Bedingfield* v. *Onslow*, 3 Lev. 209.

(*n*) *Rawlings* v. *Morgan*, 18 C.B. N.S. 776; 34 L.J. C.P. 185.

(*o*) *Green* v. *Eales*, 2 Q.B. 225; 11 L.J. Q.B. 63.

(*p*) Martin, B., *Smith* v. *Peat*, 9 Exch.

repair according to his agreement, and his immediate lessor (the mesne landlord), who is himself a lessee, and bound under pain of forfeiture to keep the premises in repair, enters and repairs them, the measure of damages is the sum necessarily expended in putting them into repair, and not the costs of an action brought by the original lessor against the mesne landlord for non-repair, unless the under-lease contains a covenant to indemnify (*q*), or to perform the covenants of the head lease (*r*). Where an under-lease is granted containing similar covenants to those in the lease as to repair, with notice to the under-lessee of the original lease, and the lessee sues the under-lessee for breach of such covenants, the liability of the lessee on the covenants in the original lease must be taken into account in assessing the damages (*s*).

Breach of covenants to consume hay and straw on farm.—If a tenant who has covenanted not to carry away hay or straw from the demised premises nevertheless sells it off the land, the proper measure of damages is not the value of the hay or straw, which is the property of the tenant, but the value of it to the land in the shape of manure, if it had been eaten and consumed by cattle and deposited on the soil. Where the landlord had agreed to purchase the outgoing tenant's straw at a valuation, and the tenant by the terms of the lease was to return the manure value of straw sold off, it was held that the landlord must pay a fodder price, which is one-half of the market price (*t*); and, where the tenant was not to sell straw off the land without returning the value of it in manure, it was held that the tenant was not bound to return the marketable value, but the manure value of the straw to the premises (*u*).

Damages for holding over.—If the tenant holds over, the landlord may, in some cases, as we have seen (*ante*, p. 677), recover double the yearly value, or he may recover the damages and costs he has incurred by not being able to give possession to the succeeding tenant (*x*), and also the costs incurred in ejecting the person in possession (*y*).

Mortgagor becoming tenant to mortgagee.—If the mortgage-deed contains a clause whereby the mortgagor attorns and becomes tenant to the mortgagee at a specified annual rent payable half-

(*q*) *Logan* v. *Hall*, 4 C.B. 598; 16 L.J. C.P. 252; *Smith* v. *Howell*, 6 Exch. 737; 20 L.J. Ex. 377; *Walker* v. *Hatton*, 10 M. & W. 249; 11 L.J. Ex. 361; *Colley* v. *Streeton*, 2 B. & C. 273; 2 L.J. (O.S.) K.B. 25; *Clow* v. *Brogden*, 2 Sc. N.R. 303.

(*r*) *Hornby* v. *Cardwell*, 8 Q.B.D. 329; 51 L.J. Q.B. 89.

(*s*) *Conquest* v. *Ebbetts*, (1896) A.C. 490; 65 L.J. Ch. 808.

(*t*) *Clarke* v. *Westrope*, 18 C.B. 774; 25 L.J. C.P. 774; *ante*, p. 687.

(*u*) *Lowndes* v. *Fountain*, 11 Ex. 486, 491; 25 L.J. Ex. 49; *ante*, p. 687.

(*x*) *Bramley* v. *Chesterton*, 2 C.B. N.S. 592; 27 L.J. C.P. 23.

(*y*) *Henderson* v. *Squire*, L.R. 4 Q.B. 170; 38 L.J. Q.B. 73.

yearly so long as the mortgage money remains secured upon the mortgaged premises, and the mortgagor continues in the occupation of the mortgaged premises and pays rent, the subsequent occupation taken in connexion with the clause of attornment constitutes the relation of landlord and tenant between the parties, and the mortgagee may distrain for the rent, although he never himself executed the mortgage deed (*z*). And this is so though there may have been a prior mortgage and attornment to another mortgagee (*a*). Such attornment clause must be *bonâ fide*, and not merely for the purpose of enabling the mortgagee to oust the creditors (*b*). The proceeds of a distress for rent under an attornment clause are applicable to the payment of principal as well as interest (*c*). When the mortgage deed contains a clause of this description, a right of entry should be reserved in default of payment of the rent, so as to enable the mortgagee, in case the rent remains unpaid, to enter upon the lands or bring an action of ejectment, without giving a notice to quit (*d*). If by the terms of the mortgage deed the mortgagor is to hold possession for any certain or determined period, there will then be a demise to him of the mortgaged estate for the term specified. If he is to hold until the happening of some uncertain event, he will have a conditional estate, and will be tenant to the mortgagee until the event has happened. If the mortgage deed contains a clause of attornment, or creates a tenancy as between the mortgagor and mortgagee, but does not create any definite or certain term of holding, the mortgagor will be tenant at will. The reservation of a yearly rent is not inconsistent with a tenancy at will (*ante*, p. 616). Therefore, a clause in a mortgage deed that the mortgagor shall become tenant to the mortgagee at a yearly rent does not necessarily create a yearly tenancy (*e*). If by the mortgage deed it is covenanted or agreed that the mortgagor shall hold as tenant at will to the mortgagee at an annual rent recoverable by distress, and the mortgagor demises the premises to a third party, the tenancy at will is not determined, and the mortgagee is not deprived of his right to distrain (*f*). Where it was provided that, in case of

(*z*) *West* v. *Fritche*, 3 Exch. 216; 18 L.J. Ex. 50; *Morton* v. *Woods*, L.R. 4 Q.B. 302; 38 L.J. Q.B. 81; *Trelfall, In re*, 16 Ch.D. 274; *Voisey, Ex parte*, 21 Ch.D. 442; 52 L.J. Ch. 121; *Scobie* v. *Collins*, (1895) 1 Q.B. 375; 64 L.J. Q.B. 10.

(*a*) See *Punnett, Ex parte*, 16 Ch.D. 226; 50 L.J. Ch. 212.

(*b*) *Jackson, Ex parte*, 14 Ch.D. 725.

(*c*) *Harrison, Ex parte*, 18 Ch.D. 127; 50 L.J. Ch. 832.

(*d*) *Doe* v. *Tom*, 4 Q.B. 615; 12 L.J. Q.B. 264; *Metropolitan Counties Assurance Co.* v. *Brown*, 4 H. & N. 434; 28 L.J. Ex. 340.

(*e*) *Doe* v. *Davies*, 7 Exch. 89; 21 L.J. Ex. 60; *Doe* v. *Goldwin*, 2 Q.B. 143; 10 L.J. Q.B. 275.

(*f*) *Pinhorn* v. *Souster*, 8 Exch. 763; 22 L.J. Ex. 266; *Brown* v. *Metropolitan Counties Assurance Soc.*, 28 L.J. Q.B. 236; *Kearsley* v. *Phillips*, 11 Q.B.D. 621; 52 L.J. Q.B. 581.

default in payment, the mortgagor should hold the premises as yearly tenant to the mortgagees from the date of the deed at a specified rent, and that they should have the same remedies for recovering the rent as if the same had been reserved upon a common lease, and, the mortgagor having made default, the mortgagees, after the lapse of more than a year from the default, distrained as for a year's rent in arrear, it was held that, not having given him any notice of their intention to treat him as tenant, they were not entitled to distrain (*g*).

When the mortgaged premises are in the possession and occupation of lessees or tenants holding under leases granted by the mortgagor prior to the making of the mortgage, the mortgagee, of course, takes the mortgaged premises subject to those leases. The mortgage in such a case operates as a grant of the reversion and with it of the rent; and the mortgagee is entitled, as assignee of the reversion, to the rent reserved on such leases, after he has given the lessees notice of the mortgage, and required them to pay their rents to him. Though attornment is no longer necessary to perfect the title of a mortgagee of the reversion to the rent reserved on the demise, yet notice of the grant or mortgage must be given to the tenants to enable the mortgagee to maintain an action against them for use and occupation, or to distrain for arrears of rent (*h*). When there is no clause in the mortgage deed giving to the mortgagor a right to the possession of the mortgaged premises, and creating a tenancy between the mortgagor and mortgagee, the mortgagee has a right to all the rents which have become due subsequently to the making of his mortgage, and which are unpaid at the time the occupying tenant from whom such rent is due receives notice of the mortgage. The tenant is not bound to pay the mortgagee without notice; and if, at the time he receives notice, he has paid the rent to the mortgagor, it is a good excuse for him (*i*); but payment of the rent to the mortgagor before it is due is no answer to a claim by the mortgagee for rent which has accrued due after the giving of the notice (*k*). When lands in the possession of tenants holding underleases have been mortgaged, the mortgagee, as assignee of the reversion, may sue on any of the covenants which are annexed to the reversion and run with the land; and he is also liable to be sued thereon. Hence it followed

(*g*) *Clowes* v. *Hughes*, L.R. 5 Ex. 160; 39 L.J. Ex. 62.

(*h*) 4 & 5 Ann. c. 16, ss. 9, 10; *Moss* v. *Gallimore*, 1 Doug. 279; 1 Smith's L.C. 497 (ed. 10); *Lumley* v. *Hodgson*, 16 East, 99; see *Allcock* v. *Moorhouse*, 9 Q.B.D. 366.

(*i*) Buller, J., *Birch* v. *Wright*, 1 T.R. 384, 385.

(*k*) *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *Cook* v. *Guerra*, L.R. 7 C.P. 132; 41 L.J. C.P. 89; *ante*, p. 621.

that, whenever a man had demised to a tenant at a rent, and then had mortgaged his reversion, the mortgagor could not bring an action of ejectment, nor an action for the rent in his own name, nor sue upon any covenants running with the land, whether the mortgagee had or had not given notice of the mortgage, for the tenant might avail himself of the defence that the lessor had assigned all his estate and interest in the demised premises (*l*). But, by the Judicature Act, 1873, (*m*), "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." And, if the mortgagee does not give notice to the tenant to pay the rent to himself, but permits the mortgagor to go on receiving the rent as before the mortgage was made, and does not think fit to interfere with the tenancy, the mortgagor is deemed in law to have authority from the mortgagee to distrain for the rent if it falls into arrear, the rent being the obvious and natural source for the mortgagor to obtain funds from, to enable him to pay the interest of the mortgage debt. He may distrain in the mortgagee's name as the mortgagee's bailiff; and, if he distrains in his own name, he may justify in the name of the mortgagee (*n*).

Leases by mortgagor and mortgagee after making of mortgage.—If no right of possession is reserved by the mortgage deed to the mortgagor, and no tenancy is created between him and the mortgagee, and the mortgagor remains in possession on sufferance after the making of the mortgage, and demises the mortgaged land to a tenant at a rent, the demise is absolutely void as against the mortgagee, but it is nevertheless valid, by estoppel, as between the mortgagor and his tenant until the mortgagee interferes, and the mortgagor is entitled to receive the rent for his own use, and to distrain for it in his own name, if it is not paid when due, so that a tenant who has come in under the mortgagor after the mortgage, and has neither paid rent to the mortgagee, nor been evicted by him, either actually or constructively, before the day of payment, cannot defend an action by the mortgagor for

(*l*) *Doe* v. *Edwards*, 5 B. & Ad. 1065; *Mountnoy* v. *Collier*, 1 E. & B. 636; 22 L.J. Q.B. 124.

(*m*) 36 & 37 Vict. c. 66, s. 25 (5). See *Fairclough* v. *Marshall*, 4 Ex.D. 37; 48 L.J. Ex. 146.

(*n*) *Trent* v. *Hunt*, 9 Exch. 14; 22 L.J. Ex. 320; *Snell* v. *Finch*, 32 L.J. C.P. 117; 13 C.B. N.S. 651.

that rent. Mere notice by the mortgagee to the tenant to pay the rent to the mortgagee is not an attornment to the latter, and is, without actual payment, no answer to the claim for rent (*o*). And, if the mortgagor assigns his interest, such as it is, his assignee has the same title by estoppel against the lessee, and, as assignee of the reversion by estoppel, may sue the tenant for waste in breach of the covenants in the lease (*p*). As between himself and the tenant the mortgagor may exercise all the ordinary rights of a landlord, unless the mortgagee interferes to prevent him; for the lessee cannot deny the title of his lessor at the time of granting the lease (*q*). But the tenant who comes in under such a demise may be treated by the mortgagee as a trespasser, and may be ejected without any notice to quit (*r*), unless the mortgagee is a party to, or has authorised the making of, the lease; or he may be converted into a tenant to the mortgagee by continuing to occupy the mortgaged premises by the sufferance and permission of the mortgagee, after he has received notice of the mortgage. The mortgagee cannot, by giving notice to the tenant, entitle himself to distrain for the rent that the tenant has contracted to pay to the mortgagor; nor can he sue for any arrears of such rent (*s*). But, if there is a clause in the mortgage deed creating a tenancy as between himself and the mortgagor at a specified rent, he may, of course, distrain on the mortgaged premises for that rent. And, if rent is due on a demise from the mortgagee to the mortgagor after the making of the mortgage, and the mortgagee threatens to distrain for such rent, or to evict the tenant, and the latter pays the rent to avoid the threatened distress or eviction, such payment is a good payment as against the mortgagor on the ground that the tenant has been compelled to pay for the mortgagor what the mortgagor ought himself to have paid (*t*).

By the Conveyancing Act, 1881, a mortgagor in possession and a mortgagee in possession have, as against incumbrancers, power to make agricultural or occupation leases (*u*) for twenty-one years, and building leases for ninety-nine years (*x*), if made

(*o*) *Hickman* v. *Machin*, 4 H. & N. 720; 28 L.J. Ex. 310.

(*p*) *Cuthbertson* v. *Irving*, 29 L.J. Ex. 485; 6 H. & N. 135.

(*q*) *Wheeler* v. *Branscombe*, 5 Q.B. 373; 13 L.J. Q.B. 83; *Wilton* v. *Dunn*, 17 Q.B. 294; 21 L.J. Q.B. 60.

(*r*) *Keech* v. *Hall*, 1 Doug. 21; *Thunder* v. *Belcher*, 3 East, 449.

(*s*) *Rogers* v. *Humphreys*, 4 Ad. & E. 299; 5 L.J. K.B. 65; *Wilton* v. *Dunn*, *supra*; *Turner* v. *Cameron's Coal Co.*, 5 Exch. 932; 20 L.J. Ex. 71.

(*t*) *Johnson* v. *Jones*, 9 Ad. & E. 809; 8 L.J. Q.B. 124. See *Underhay* v. *Read*, 20 Q.B.D. 209; 57 L.J. Q.B. 129; *Poole (Mayor)* v. *Whitt*, 15 M. & W. 571; 16 L.J. Ex. 229.

(*u*) Any letting or agreement to let in writing or not: see 44 & 45 Vict. c. 41, s. 18 (17).

(*x*) Leases are not to be made for a longer term or on any conditions except such as could be granted or imposed by the mortgagor with the concurrence of the incumbrancers without the Act: sect. 18 (15).

according to the provisions of the section (*y*). A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding (*z*). Where a lease is made by a mortgagor in possession under the powers of the Conveyancing Act, the mortgagee, on giving notice to the tenant and going into possession, is entitled by virtue of the Act to enforce the covenants and conditions in the lease in the same manner as if he had been a party to it, and such right cannot be affected by any collateral agreement between the mortgagor and the lessee (*a*).

Notice of the mortgage to the lessee creates a new tenancy between the tenant and the mortgagee, and enables the latter to sue for a reasonable satisfaction for the use and occupation of the property by the tenant subsequent to the receipt by him of the notice (*b*). If the mortgagee gives the tenant notice to pay his rent to him, and the tenant continues in possession after the receipt of the notice, he will not be deemed to hold as tenant to the mortgagee in the absence of any other circumstance from which an agreement for a tenancy can be inferred (*c*); but, as soon as rent has been accepted by the mortgagee, the tenancy will be converted into a yearly tenancy (*d*). A mortgagee who gives notice of the mortgage to a tenant let into possession by the mortgagor subsequently to the making of the mortgage, cannot maintain an action for mesne profits in respect of the occupation of the land by such tenant prior to the receipt of the notice; for the doctrine of relation applies only as between disseisor and disseisee, and an estate which was lawful at its commencement cannot be made tortious by a subsequent act (*e*). Neither can the mortgagee maintain an action against such tenant for the recovery of any satisfaction in respect of the use and occupation of the mortgaged property prior to the receipt of the notice; for there is no contract between the mortgagee and the tenant before notice of the mortgage (*f*).

Contracts for letting and hiring of furnished houses and lodgings.—Contracts for the letting and hiring of ready-furnished houses and

(*y*) 44 & 45 Vict. c. 41, s. 18. This section only applies when no contrary intention is expressed in writing: s. 18 (14). As to sporting rights, see *Browne* v. *Peto*, (1900) 2 Q.B. 653; 69 L.J. Q.B. 869.

(*z*) Sect. 18 (12). The section only applies to mortgages after the Act, but it may be agreed to apply it to those before the Act, so as not to prejudicially affect any right of a mortgagee not adopting the agreement.

(*a*) *Municipal Investment Building Soc.* v. *Smith*, 22 Q.B.D. 70; 58 L.J. Q.B. 81.

(*b*) *Waddilove* v. *Barnett*, 2 Bing. N.C. 543; 5 L.J. C.P. 145; *Carpenter* v. *Parker*, 3 C.B. N.S. 237; 27 L.J. C.P. 78.

(*c*) *Towerson* v. *Jackson*, (1891) 2 Q.B. 484; 61 L.J. Q.B. 36.

(*d*) *Doe* v. *Bucknell*, 8 C. & P. 566; *Brown* v. *Storey*, 1 Sc. N.R. 16; 9 L.J. C.P. 225.

(*e*) *Litchfield* v. *Ready*, 5 Exch. 944; 20 L.J. Ex. 15; Buller, J., *Birch* v. *Wright*, 1 T.R. 382.

(*f*) *Turner* v. *Cameron's Coal Co.*, 5 Exch. 932; 20 L.J. Ex. 71.

apartments are contracts of a mixed nature, partaking partly of the nature of a demise of realty, and partly of a contract for the letting and hiring of movable chattels (*post*, p. 745); and the lessor, therefore, in contracts of this description, is clothed with the duties and responsibilities resulting from contracts for the letting and hiring of chattels in addition to those which have been previously described as flowing from demises of realty simply.

Implied warranties on part of lessor of furnished apartments.—If a man furnishes a dwelling-house or an apartment in a house, and offers it to be let ready-furnished, he impliedly holds it out as fit for immediate habitation and use, and the contract for the letting and hiring of it is analogous to a contract for the letting and hiring of a ship rigged and manned and prepared for sea, or of a carriage horsed and equipped and made ready for a journey on land; and there is, consequently, an implied warranty on the part of the lessor that such ready-furnished house or lodging is reasonably fit for habitation and occupation by a tenant. If apartments have been taken on condition that they were reasonably fit for habitation and the furniture for use, and the furniture is unfit for use, or is encumbered with a nuisance of so serious a nature as to deprive the tenant of all beneficial enjoyment of it, the latter is entitled to throw up both house and furniture, and bring an action against the landlord for a breach of contract. Thus, where the beds of a ready-furnished house, let to a tenant at a rent of eight guineas per week, were so infested and overrun with bugs that they could not be slept in, it was held that the tenant was justified in leaving the house and resisting the landlord's demand for the rent (*g*). "In the case of a contract for the hire of a ready-furnished house," observes Lord Abinger, "the letting of the goods and chattels as well as the house implies that the party who lets the house so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house, according to its particular description, and suitable in every respect for his use" (*h*). In a contract for the letting of a furnished house or rooms there is no implied condition that the house shall continue fit for habitation during the term (*i*).

Rights and liabilities of lodging-house keepers and lodgers.—It has been held that a contract for board and lodging, where the lodging-

(*g*) *Smith* v. *Marrable*, 11 M. & W. 5; 12 L.J. Ex. 223; cited in *Sutton* v. *Temple*, 12 M. & W. 60; 13 L.J. Ex. 17; *Campbell* v. *Wenlock* (*Lord*), 4 F. & F. 716.

(*h*) *Sutton* v. *Temple*, *supra*; see also *Wilson* v. *Finch Hatton*, 2 Ex.D. 336; 46 L.J. Ex. 489.

(*i*) *Sarson* v. *Roberts*, (1895) 2 Q.B. 395; 65 L.J. Q.B. 37.

house keeper undertakes generally to provide food and shelter for man and beast, and does not agree to let any particular room, is not a contract for an interest in land (*k*). A tenant of lodgings is not always entitled to the exclusive possession of his rooms. He may sometimes have "a mere easement of sleeping in one room and eating and drinking in another;" and the landlord and his servants may have a right to enter at all times (*l*). When a man lets apartments in a house, he impliedly demises them with all their proper accompaniments, and warrants to the hirer the use of all such accessorial things as are necessary to enable him to enjoy the principal subject-matter of the demise in the manner intended (*m*). The lodging-house keeper, moreover, who remains in the general possession of the house, is bound to exercise all ordinary and reasonable care for the protection of the persons and property of his tenants and lodgers. He is bound, moreover, to exercise ordinary care and vigilance in the selection and appointment of the servants and domestics within the house, and to take all such precautions as a prudent householder may be expected to take to guard against robbery and fire; but he is not responsible for the safe keeping of the property of his lodgers (*n*), unless it has been delivered into his hands to be safely kept (*post*, p. 779). If, after having taken ordinary care in the selection of his servants, a theft is committed on the property of a lodger, in consequence of the front door having been incautiously left open by one of the servants who has been sent out on an errand by the guest, the lodging-house keeper is not responsible for the loss (*o*). Nor is he responsible for the loss of things stolen by his own servants from the lodgers (*p*). The lodger on the other hand may be sued for use and occupation (*ante*, p. 633); and, if he brings goods and chattels of his own upon the premises, they may be distrained for the rent of the lodgings as in the ordinary cases of demises of pure realty (*q*), unless they come within the protection of the Lodgers' Goods Protection Act, 1871 (*post*, p. 721). If the possession as well as the use of the furniture is granted to the lessee, the latter is bound to deliver up the furniture at the expiration of the term in good order and condition, deteriorated only by ordinary wear and tear and the reasonable use of it. If he received linen, plate, and household utensils clean and fit for use, and agreed "to leave them as he

(*k*) *Ante*, p. 22.

(*l*) Maule, J., *Lane* v. *Dixon*, 3 C.B. 784; 16 L.J. C.P. 129.

(*m*) *Underwood* v. *Burrows*, 7 C. & P. 28.

(*n*) *Holder* v. *Soulby*, 8 C.B. N.S. 254; 29 L.J. C.P. 246; *Calye's case*, 8 Co. Rep. 52, a.

(*o*) *Dansey* v. *Richardson*, 3 E. & B. 144; 23 L.J. Q.B. 217.

(*p*) *Holder* v. *Soulby*, *supra*.

(*q*) *Newman* v. *Anderton*, 2 Bos. & P. N.R. 227.

found them," he is bound to render the things back to the lessor in a clean state (*r*).

Destruction of buildings by fire.—Where a contract is entered into for the use of a furnished saloon for the giving of a concert, and the saloon is destroyed by fire before the time appointed for the concert, the parties to the contract are excused from peformance of it (*s*).

Proof of duration of term of hiring.—Lodgings and ready-furnished apartments are rarely the subject of a yearly hiring; and there is no presumption, from a general holding thereof, in favour of a hiring for a year, and from year to year, as in the case of a demise of land (*t*). The duration of the term corresponds, in general, with the time limited for the payment of the rent. If the rent is payable quarterly, the presumption is in favour of a hiring by the quarter; if, on the other hand, it is payable monthly or weekly, there is a hiring by the month or week. Where a tenant agreed to pay for the occupation of furnished apartments, "from March the 4th to September the 4th, the sum of 52*l.* 10*s.*," also "to occupy the rooms from the 4th of September to the 4th of December on the same terms, viz., 26*l.* 5*s.* for the three months, or to take them unfurnished at the *rate* of 84*l.* per annum," it was held that this was a lease for six months and for a further period of three months, and not a lease from year to year (*u*).

Notice to quit.—If the tenancy is for one single quarter, month, or week, no notice to quit is requisite, as the duration of the holding is fixed and determined; but if the hiring be from half-year to half-year, half a year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice, and if from week to week, a week's notice to quit is, in general, requisite by custom and usage (*x*). If there is no custom, a reasonable notice is requisite (*y*); and, if the lodger quits his apartments without giving such notice, he is liable to the payment of a quarter's, a month's, or a week's rent, according to the term of hiring; and the lodging-house keeper may recover such rent, although he has put a bill in the windows advertising the apartments to be let, or has lighted fires in and used the rooms (*z*). The length of the notice may be otherwise regulated by the express agreement of the parties, and also by the custom and usage of the

(*r*) *Stanley* v. *Agnew*, 12 M. & W. 827; 13 L.J. Ex. 197.

(*s*) *Taylor* v. *Caldwell*, 32 L.J. Q.B. 164; 3 B. & S. 826; *post*, p. 778.

(*t*) *Wilson* v. *Abbott*, 3 B. & C. 88; 2 L.J. (O.S.) K.B. 215.

(*u*) *Atherstone* v. *Bostock*, 2 Sc. N.R. 643; 10 L.J. C.P. 113.

(*x*) But the custom must be proved: *Huffell* v. *Armitstead*, 7 C. & P. 56.

(*y*) *Jones* v. *Mills*, 10 C.B. N.S. 788; 31 L.J. C.P. 66; *Bowen* v. *Anderson*, (1894) 1 Q.B. 164.

(*z*) *Redpath* v. *Roberts*, 3 Esp. 225; *Griffiths* v. *Hodges*, 1 C. & P. 419; *ante*, p. 663.

district. It must, however, in all cases, expire at the end of the current term of hiring. If a tenant remains in possession of lodgings after the termination of his term of hiring, or after the expiration of a notice to quit, the landlord may, as we have seen, assert his rights by force (*ante*, p. 679).

Letting and hiring places of stowage and deposit.—A contract for the letting and hiring of a vault, or store, or place of deposit in a warehouse, is a contract analogous to the letting and hiring of an apartment in a house for the occupation of a tenant or lodger. But the landlord only contracts that the place is fit for use so far as reasonable care can make it so; and therefore, where a tenant hired the ground-floor of a warehouse, the upper part of which was occupied by the landlord himself, and the water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains, and a hole was made in the box by rats, through which the water entered the warehouse and wetted the tenant's goods, but the landlord had exercised reasonable care in examining and seeing to the security of the gutters and box, it was held that he was not liable for the damage so caused (*a*).

Room or standing-places in factories.—An agreement for the use of room in a factory for the purpose of working machines will amount to a demise, if it is a letting of a defined portion of the room separated from the remaining portion, with exclusive possession by the person taking it; but will not amount to a demise if it is a mere letting of an on-stand for a machine (*b*).

Lodgings in common inns—Common innkeeper.—Every person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not (*c*). A London "coffee-house," where beds and provisions are furnished by the day, or for the night, or for a longer period, to all persons who may think fit to apply for them, is a common inn; and all persons who are willing and able to pay the customary hire are entitled to be received as guests at an inn, whether they are wayfarers or travellers, or merely residents in the locality (*d*). But, if a man merely opens a house for the sale of provisions and refreshments, and does not profess to furnish beds and lodging for the night, he is not a common innkeeper (*e*). And, if he professes to let only

(*a*) *Carstairs* v. *Taylor*, L.R. 6 Ex. 217; 40 L.J. Ex. 129.

(*b*) See *Selby* v. *Greaves*, L.R. 3 C.P. 594; 37 L.J. C.P. 251, where it was held there was a demise; and *Hardwick* v. *Austin*, 14 C.B. N.S. 429; 32 L.J. C.P. 252, where the contrary was held; see also 1 Edw. 7, c. 22, s. 149.

(*c*) Bac. Abr. Inns (B.); *Parker* v. *Flint*, 12 Mod. 255.

(*d*) *Thompson* v. *Lacy*, 3 B. & Ald. 283.

(*e*) *Doe* v. *Laming*, 4 Campb. 77.

private lodgings, and does not offer his house to the public as a house for all comers who are able and willing to pay for the accommodation offered, he cannot be said to keep a common inn.

Duties of innkeepers.—Every man who opens an inn and professes to exercise the business of a common innkeeper, is bound to afford such accommodation as he possesses to all travellers (*f*) who are ready to pay the customary hire, and are not drunk or disorderly, or labouring under contagious or infectious diseases. And, if he neglects so to do, he is liable in an action for damages and also to an indictment at common law (*g*); but if all his bedrooms be full he is not bound to receive a traveller who asks to be allowed to pass the night in the empty coffee room (*gg*). The innkeeper is bound, if he has room in his stables, to receive the horses of travellers intending to become guests; but he is not bound to receive horses from parties who merely intend to make use of his stables as livery stables, resorting elsewhere for lodging and entertainment; nor is he bound to receive the goods of a person who professes merely to make use of the inn as a place of deposit, and not to lodge there as a guest (*h*). Neither is he bound to provide for his guest the precise room that the latter may choose to select, nor to provide him with a bedroom, if he declares it to be his intention to sit up all night. All that he is required to do is to find reasonable accommodation for his guests; and, if he tenders such accommodation, and the guest refuses it, he may compel the latter to quit the inn, and seek for accommodation elsewhere (*i*). A traveller who goes to a common inn is not necessarily entitled to accommodation therein as long as he chooses to remain on payment of the inn charges and conducting himself properly, and if he forms an intention of staying in the inn and has no intention of going on to any other place, he ceases to be a traveller, and the innkeeper is entitled to terminate the relation of host and guest by reasonable notice (*k*). The question whether a traveller staying in a common inn has ceased to be a traveller is a question of fact, in determining which the length of his stay in point of time must be taken into consideration, but is not of itself conclusive.

The extent of the obligation of the innkeeper depends mainly upon the nature of his public profession. If he has only a stable for a horse he is not bound to receive a carriage. If he professes

(*f*) *Taylor* v. *Humphreys*, 30 L.J. M.C. 242; 10 C.B. N.S. 429; see *Copley* v. *Burton*, L.R. 5 C.P. 489; 39 L.J. M.C. 141.

(*g*) *Hawthorn* v. *Hammond*, 1 C. & K. 404; *Howell* v. *Jackson*, 6 C. & P. 725; *Rex* v. *Ivens*, 7 C. & P. 219.

(*gg*) *Browne* v. *Brandt*, (1902) 1 K.B. 696; 71 L.J. K.B. 367.

(*h*) *Smith* v. *Dearlove*, 6 C.B. 132; 17 L.J. C.P. 219; *Binns* v. *Pigot*, 9 C. & P. 209; but see *Day* v. *Bather*, 2 H. & C. 14; 32 L.J. Ex. 171.

(*i*) *Fell* v. *Knight*, 8 M. & W. 276; 10 L.J. Ex. 277.

(*k*) *Lamond* v. *Richard*, (1897) 1 Q.B. 541; 66 L.J. Q.B. 315.

only to receive ordinary luggage accompanying the person of a traveller, he is not bound to take in articles of extraordinary bulk, nor goods which do not accompany the person of the guest (*l*). An innkeeper is not an insurer of the goods of his guest, but is answerable for negligence (*m*). The innkeeper cannot discharge himself of the duty imposed upon him by the common law by express notice to his guests (*n*), or under pretence of sickness, want of understanding, or absence from home (*o*); but if an infant keeps a common inn, an action upon the custom of inns will not lie against him, for his privilege of infancy shall be preferred, and take place of the custom (*p*).

The liability of the innkeeper continues during the temporary absence of his guest (*q*).

Protection of guest from robbery and theft.—It is said that the innkeeper is not liable for the loss of his guest's goods by burglary or robbery with violence where he can show that the force which occasioned the loss was truly irresistible (*r*). But however this may be, it is certain that to the obligations which attach to innkeepers in common with all lodging-house keepers and lessors of furnished rooms and apartments for immediate occupation, the law has superadded the duty of protecting the goods of their guests from robbery (*s*). But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such a companion or servant (*t*). The innkeeper will not be liable, if the loss would probably not have happened had the guest used the care which a prudent man might reasonably have been expected to take under the circumstances (*u*). The question as to what constitutes negligence on the part of the landlord or of the guest depends on the particular circumstances of each case (*x*). The rule of law resulting from all the authorities is, that the goods remain under the charge

(*l*) *Broadwood* v. *Granara*, 10 Exch. 423; 24 L.J. Exch. 1.

(*m*) *Calye's case*, 1 Sm. L.C. 115 (ed. 10); *Dawson* v. *Chamney*, 5 Q.B. 164; 13 L.J. Q.B. 33. As to liability to person coming to the inn but not to deal there, see *Oxford* v. *Prior*, 14 W.R. 611; and as to a temporary caller for refreshment, see *Bennett* v. *Mellor*, 5 T.R. 173.

(*n*) *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L.J. Exch. 131; see, however, 26 & 27 Vict. c. 41, *post*, p. 705.

(*o*) Bac. Abr. Inns, C. 4.

(*p*) *Crosse* v. *Andrees*, Roll. Abr. 2; Carth. 161.

(*q*) *Day* v. *Bather*, 2 H. & C. 14; 32 L.J. Ex. 171.

(*r*) Jones on Bailment, 96 (ed. 4).

(*s*) *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L.J. Ex. 131; but see now 26 & 27 Vict. c. 41; as to the sufficiency of notice under the Act, see *Spice* v. *Bacon*, 3 Ex.D. 463; 46 L.J. Ex. 713.

(*t*) *Calye's case*, 8 Co. Rep. 32, a.

(*u*) *Oppenheim* v. *White Lion Hotel Co.*, L.R. 6 C.P. 515; 40 L.J. C.P. 231.

(*x*) *Kent* v. *Shuckard*, 2 B. & Ad. 803, bag containing money left in bedroom; *Richmond* v. *Smith*, 8 B. & C. 9; 6 L.J. (O.S.) K.B. 219, goods left in commercial room; *Armistead* v. *White*, 20 L.J. Q.B. 524; *S. C.* nom. *Armistead* v. *Wilde*, 17 Q.B. 261; *Burgess* v. *Clements*, 1 Stark. 251 (n.); 4 M. & S. 306; *Sandars* v. *Spencer*, Dyer, 266, a.

of the innkeeper and the protection of the inn, so as to make the innkeeper liable for a breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances (*y*).

If a guest come to a common innkeeper to harbour there, and he say that his house is full of guests, and do not admit him, &c., and the party say he will make shift among the other guests, and be there robbed of his goods, the innkeeper shall not be charged (*z*). The relationship of guest and innkeeper must, however, be completely established in order to render the innkeeper liable (*a*). And if a guest takes upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss (*b*). "I agree," observes Lord Ellenborough, "in what is stated in *Calye's case*, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but if the guest take the key, it is a very proper question for a jury, whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability, or whether he takes it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room" (*c*). "What would be prudent in a small hotel in a small town might be the extreme of imprudence in a large hotel in a large city, where, probably, three hundred bedrooms are occupied by people of all sorts" (*d*).

Whenever the goods and chattels of the guest have been actually delivered to the innkeeper or his servants the latter cannot, of course, discharge himself from the strict common-law responsibility by showing that the goods were stolen outside the inn, if he has himself placed them in the spot from whence they have been taken (*e*). And the innkeeper is liable, although sick at the time, and incapable of attending to his affairs, for he is bound to retain trusty servants to secure the goods of his guests when incapable of

(*y*) *Cashill* v. *Wright*, 6 E. & B. 891, 900.

(*z*) *White's case*, Dyer, 158, b.

(*a*) *Strauss* v. *County Hotel Co.*, 12 Q.B.D. 27; 53 L.J. Q.B. 25. See *Medawar* v. *Grand Hotel Co.*, (1891) 2 Q.B. 11; 60 L.J. Q.B. 209.

(*b*) *Farnworth* v. *Packwood*, 1 Stark, 249. But see *Bennett* v. *Mellor*, 5 T.R. 276, as to goods left on floor of inn.

(*c*) *Burgess* v. *Clements*, 4 M. & S. 310; 1 Stark. 252, n.; *Oppenheim* v. *White Lion Hotel Co.*, L.R. 6 C.P. 515; 40 L.J. C.P. 231.

(*d*) *Per* Montague Smith, J., *Oppenheim* v. *White Lion Hotel Co.*, *supra*.

(*e*) *Jones* v. *Tyler*, 1 Ad. & E. 522; 3 L.J. K.B. 166 (gig stolen from outside an inn).

doing so himself (*f*). The plaintiff, who had an office in Liverpool, resided outside the city and came in and out every day by train; on his way home in the evening he called at the defendant's hotel, which was between his office and the railway station, for the purpose of dining only, and he was supplied with dinner in the dining-room of the hotel, a large room structurally forming part of the hotel and reached by the same entrance as the rest of the hotel, but capable of accommodating and wont to accommodate a large number of persons in addition to those who were staying in the house; it was held that there was evidence that the relationship of guest and innkeeper existed between the plaintiff and the defendant so as to make the defendant liable to the plaintiff for the value of his overcoat lost in the hotel (*g*). The extended responsibility of the innkeeper, which makes him an insurer of the goods against loss by robbery, does not extend to losses occasioned by an accidental fire (14 Geo. 3, c. 78, s. 86), nor to damage or injury to the goods which is the result of accident. The innkeeper is not responsible for injuries which the horses of guests inflict upon each other in the stables of the inn, provided he has taken all due care to prevent the introduction into the stables of vicious and kicking horses (*h*).

Limitation by statute of liability of innkeepers.—By 26 & 27 Vict. c. 41, s. 1, it is enacted, that no innkeeper shall be liable to make good to any guest any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of *thirty pounds;* except where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ, or where such goods or property shall have been deposited expressly for safe custody with such innkeeper (*i*). If any innkeeper refuses to receive for safe custody any goods or property of his guest, or if any guest, through any default of such innkeeper, is unable to deposit such goods or property as are mentioned in the Act, the innkeeper will not be entitled to the benefit of the Act in respect of such goods or property (s. 2). In the case of a deposit for safe custody, the innkeeper may require, as a condition of his liability, that the goods or property be deposited in a box or other receptacle, fastened and sealed by the person depositing the same (s. 1) (*k*).

(*f*) *Cross* v. *Andrews*, Cro. Eliz. 622.

(*g*) *Orchard* v. *Bush*, (1898) 2 Q.B. 284; 67 L.J. Q.B. 650.

(*h*) *Dawson* v. *Chamney*, 5 Q.B. 164; 13 L.J. Q.B. 33, explained and qualified by *Morgan* v. *Ravey*, 30 L.J. Exch. 134; 6 H. & N. 265.

(*i*) *Medawar* v. *Grand Hotel Co.*, (1891) 2 Q.B. 11; 60 L.J. Q.B. 209.

(*k*) *Medawar* v. *Grand Hotel Co.*, *supra*.

Every innkeeper is required to cause at least one copy (*l*) of the first section of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he is entitled to the benefit of the Act in respect of such goods or property only as shall be brought to his inn while such copy shall be exhibited (s. 3). By the interpretation clause (s. 4) it is declared, "that the word 'inn' shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests, and the word 'innkeeper' shall mean the keeper of any such place."

Who are guests and travellers.—He who seeks to charge another as an innkeeper for the loss of goods must show that he was a traveller and guest at the inn. If a man who has been a guest gives up his room and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the innkeeper takes charge of them, the latter is clothed only with the ordinary duties and responsibilities of a bailee, for a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep (*m*). It has been said, however, that a man may become "a guest by leaving his horse as much as if he had stayed himself, because the horse must be fed, by which the innkeeper has gain, otherwise than if he had left a trunk or a dead thing" (*n*). "If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is afterwards robbed, yet shall not the host be charged (as an innkeeper), for this guest was no traveller" (*o*).

The length of time that a man may remain at an inn does not affect his character as a traveller. Thus, if A. comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transeuns* according to the writ in the register (*p*). But if a man takes apartments in an inn for a term, by the week, month, or year, for example, or if he resides in an inn under a special contract for his bed and board, he is not in contemplation of law sojourning at the inn as a traveller but rather in the character of a lodger at a private boarding-house. If, therefore, he is robbed in the house, he cannot charge the landlord as an innkeeper (*q*). Holt, C.J., is reported to have held, "that if

(*l*) Such copy should be a correct copy: see *Spice* v. *Bacon*, 2 Ex.D. 463; 46 L.J. Ex. 713.

(*m*) *Gelley* v. *Clerk*, Cro. Jac. 188; *Smith* v. *Dearlove*, 6 C.B. 132; 17 L.J. C.P. 219.

(*n*) *York* v. *Grindstone*, 1 Salk. 388; *Bather* v. *Day*, 32 L.J. Exch. 171; 2 H. & C. 14.

(*o*) Bac. Abr. Inns, C. 5.

(*p*) Bac. Abr. Inns, C. 5.

(*q*) Warburton, J., *Watbroke* v. *Grif-*

one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such he is not under the innkeeper's protection; but if he eat and drink there it is otherwise, or if he pay for his diet there, though he do not take it there" (*r*).

Innkeepers' lien.—An innkeeper has a lien upon goods belonging to the guest, and brought by him to the inn, for his charges for board and lodging supplied to the guest (*s*); and it has been held that the lien attaches even when the goods do not belong to the guest, if the innkeeper receives them in the belief that they do so belong; and when the goods are such as the innkeeper was not bound to receive (*t*); and also when the goods are deposited with him by his guest (*u*). The lien upon the goods of a commercial traveller who is a guest extends to all goods which a commercial traveller would in the ordinary course carry about with him to the inns at which he puts up as part of the regular apparatus of his calling, though they be in fact the property of the firm for whom he travels. If the goods are received as part of the commercial traveller's baggage, it makes no difference whether they were brought with him originally or were afterwards sent to him at the inn (*v*). An innkeeper does not waive his lien by accepting security for the charges incurred, unless there is something in the nature of the security or in the circumstances under which it was given which is inconsistent with the continuance of the lien (*w*). But he cannot detain the person of his guest, or take off his clothing, in order to obtain payment of his bill (*x*). If he sells the goods his lien is destroyed (*y*). He has a right to sell goods left at his inn after six weeks, where the person depositing is his debtor, subject to certain provisions (*z*). The defendants, husband and wife, stayed at the plaintiffs' hotel; the wife had with her a quantity of luggage, which was her separate property; credit was given to the husband, who made payments on account; the balance of the plaintiffs' bill not being paid, the plaintiffs detained the wife's luggage in the alleged exercise of their right of lien. It was held that the plaintiffs were entitled to a lien upon the goods, notwithstanding that they were the separate property of the wife (*a*).

The innkeeper holds the chattels detained by him in the nature

fith, Moore, 877; *Grimston* v. *An Innkeeper*, Hetley, 49.

(*r*) *Parker* v. *Flint*, 12 Mod. 255.

(*s*) *Thompson* v. *Lacy*, 3 B. & Ald. 283.

(*t*) *Threfall* v. *Borwick*, L.R. 10 Q.B. 210; 44 L.J. Q.B. 87.

(*u*) *Mulliner* v. *Florence*, 3 Q.B.D. 484; 47 L.J. Q.B. 700.

(*v*) *Robins* v. *Gray*, (1895) 2 Q.B. 501; 65 L.J. Q.B. 44.

(*w*) *Angus* v. *McLachlan*, 23 Ch.D. 330; 52 L.J. Ch. 587; see *post*, p. 837.

(*x*) *Sunbolf* v. *Alford*, 3 M. & W. 248; 7 L.J. Ex. 60.

(*y*) *Mulliner* v. *Florence*, *supra*.

(*z*) 41 & 42 Vict. c. 38.

(*a*) *Gordon* v. *Silber*, 25 Q.B.D. 491; 59 L.J. Q.B. 507.

of a pledge, so that if he once permits his guest to take them away, and so relinquishes his pledge, he cannot afterwards retake them. Therefore, if the innkeeper allows his guest to remove his horses after a debt has been incurred for keeping them, and they are afterwards brought to the inn and a new debt contracted, the innkeeper can detain them for the latter portion of the debt, but not for the former (*b*). And it is said that if several horses are brought to an inn by the guest, each is a pledge for its own keep, but not for the keep of the others; so that if the hosteller permit him to take away all but one, he cannot retain that one until the expense of the whole is paid (*c*). If the guest takes the chattel away without the hosteller's consent, the latter may take it on a fresh pursuit as a distress rescued, if he follow promptly, but not otherwise (*d*). However long horses may remain at an inn, the relative duties and obligations of innkeeper and guest continue until some fresh contract or arrangement is made (*e*). Where an innkeeper is holding goods of his guest under his lien he is not bound to take greater care of them than if he were an ordinary bailee of them (*f*). The lien upon a traveller's goods terminates at the same time as the right of the traveller to be lodged in the inn as a traveller (*g*).

Gratuitous loans of realty.—The gratuitously permitting a person to use a shed, by himself or his servant, for a particular purpose, is a mere revocable licence, and has no analogy to a bailment of personal property; and the only duty imposed on such person is that there shall not be negligence in the use of the shed; and he is not responsible for the negligence of his servant not within the scope of his employment (*h*).

Sub-section I.

DISTRESS FOR RENT.

Distress for rent in arrear.—By the common law, as we have seen, *ante*, p. 631, landlords to whom rent is due, and who are

(*b*) *Jones* v. *Thurloe*, 8 Mod. 173; *Jones* v. *Pearle*, 1 Str. 556, 557.
(*c*) *Moss* v. *Townsend*, 1 Bulstr. 207.
(*d*) *Rosse* v. *Bramsteed*, 2 Roll. 438.
(*e*) *Allen* v. *Smith*, 12 C.B. N.S. 638; 31 L.J. C.P. 306.
(*f*) *Angus* v. *McLachlan*, 23 Ch.D. 330; 52 L.J. Ch. 587.
(*g*) *Lamond* v. *Richard*, (1897) 1 Q.B. 541; 66 L.J. Q.B. 315.
(*h*) *Williams* v. *Jones*, 33 L.J. Ex. 297; 3 H. & C. 256.

clothed with the immediate reversion of the premises out of which the rent issues, have the power of entering in person, or by deputy, upon the demised premises (*i*), and seizing the moveables and personal property thereon, with certain exceptions, and holding them as a pledge for the payment of the rent, and they have now by statute the power of selling the things distrained.

It is essential to the lawful exercise of the power of distress, that there be a tenancy (*j*) for a term, or at will, at an ascertained rent (*k*), and that the distrainor be the person entitled to the reversion of the premises distrained upon, on the determination of the existing tenancy. If he has made a lease without having any right or title to grant a lease, or if, after the making of the lease, he has sold and transferred his estate or interest to some third party (*l*), or, being himself only a lessee, he has assigned his lease, or if, after granting an underlease, he has forfeited his estate by some breach of covenant or otherwise, and the superior landlord has entered, and the tenant has attorned to the latter, he has no right or power to distrain (*m*). It has been held, that a tenant from year to year underletting from year to year, has a reversion which enables him to distrain for rent reserved upon such underlease (*n*). However, although the distrainor be not entitled to the immediate reversion, the distrainee may be estopped from denying that he is entitled to it (*o*).

If the lease has been put an end to by a surrender of the term, or by a notice to quit, and the tenant, notwithstanding the termination of the demise, continues to hold, with the permission of the landlord, as tenant-at-will, or adversely and against the will of the lord as a wrongdoer, the lessor has no power at common law to distrain the goods and chattels of the tenant for rent in respect of such occupation (*p*). Neither can he distrain, except under the statute of Anne (*post*, p. 714), for rent that accrued due before the determination of the lease. But any slight evidence of a renewal of the tenancy, and of an agreement to hold upon the former terms, would be sufficient to justify the landlord in distraining for

(*i*) See *Selby* v. *Greaves*, L.R. 3 C.P. 594; 37 L.J. C.P. 251.

(*j*) See *Clowes* v. *Hughes*, L.R. 5 Ex. 160; 39 L.J. Ex. 62, in which case the distress was made by a mortgagee upon the mortgaged lands under an agreement contained in the mortgage deed: *Kearsley* v. *Phillips*, 11 Q.B.D. 621; 52 L.J. Q.B. 581.

(*k*) *Anderson* v. *Mid. Ry.*, 30 L.J. Q.B. 94; 3 E. & E. 614; *Howe* v. *Scarrott*, 28 L.J. Ex. 325; 4 H. & N. 723; *Jolly* v. *Arbuthnot*, 28 L.J. Ch. 547; 4 De G. & J. 224.

(*l*) *Parmenter* v. *Webber*, 8 Taunt. 593; 2 Moore, 656; *Preece* v. *Corrie*, 2 M. & P. 64; 6 L.J. (O.S.) C.P. 205; *Smith* v. *Mapleback*, 1 T.R. 441.

(*m*) *Burne* v. *Richardson*, 4 Taunt. 720; *Hopcroft* v. *Keys*, 2 M. & Sc. 760; 9 Bing. 613; *Langford* v. *Selmes*, 3 K. & J. 229.

(*n*) *Curtis* v. *Wheeler*, M. & M. 493.

(*o*) *Morton* v. *Woods*, L.R. 4 Q.B. 293; 38 L.J. Q.B. 81.

(*p*) *Jenner* v. *Clegg*, 1 M. & Rob. 213; *Alford* v. *Vickery*, 1 Car. & Marsh. 283; *Phené* v. *Popplewell*, 12 C.B. N.S. 334; 31 L.J. C.P. 235.

the old rent (*q*). A distress affirms the tenancy up to the day when the rent became due (*r*).

If the tenant becomes bankrupt or files a petition for liquidation by arrangement, the landlord or other person to whom any rent is due may still distrain, but if the distress be levied after the commencement of the bankruptcy, it is not available for more than six months' rent accrued due prior to the date of the order of adjudication (*s*). *A fortiori* therefore, if the trustee in bankruptcy declines to take the lease, the lessor is not, in case the bankrupt tenant continues to hold the property, deprived by the bankruptcy of his right to distrain (*t*). Nor is he so deprived, if the creditors determine to accept a composition under s. 18 of the Bankruptcy Act, 1883, and the bankrupt tenant remains in possession (*u*). If a lessee, having granted an underlease, becomes bankrupt, such bankrupt lessee is not deprived by the bankruptcy of his right to distrain, unless the assignees have taken to the lease and discharged the bankrupt from the rent payable to the superior landlord (*v*). The power of distress is always subservient to prerogative process issued by the crown, such as an extent; and the sheriff may consequently take goods that have been distrained out of the hands of the landlord or his bailiff, and sell them for the benefit of the crown (*x*).

By the Agricultural Holdings Act, 1883 (*y*), it shall not be lawful for any landlord entitled to the rent of any holding to which the Act applies to distrain for rent which became due in respect of that holding more than one year before the making of such distress, unless such rent has, in the ordinary course of dealing between the landlord and tenant, been allowed to be deferred until the expiration of a quarter or half-year after the date at which it legally became due, in which case, for the purposes of the section, the rent shall be deemed to have first become due at the expiration of such quarter or half-year as aforesaid. In such a case the landlord may distrain for rent then legally due, but not yet payable according to

(*q*) *Zouch* v. *Willingale*, 1 H. Bl. 311; *Beavan* v. *Delahay*, 1 H. Bl. 8.

(*r*) *Cotesworth* v. *Spokes*, 10 C.B. N.S. 103; 30 L.J. C.P. 220. See *Shepherd* v. *Berger*, (1891) 1 Q.B. 597; 60 L.J. Q.B. 395.

(*s*) 46 & 47 Vict. c. 52, s. 42; 53 & 54 Vict. c. 71, s. 28; *Hart Dyke, Ex parte*, 22 Ch.D. 410; 52 L.J. Ch. 570; *Birm. & Staff. Gas Light Co., Ex parte*, L.R. 11 Eq. 615; 40 L.J. Bankr. 52; see *Hill, Ex parte*, 6 Ch.D. 63; *Harrison, Ex parte*, 13 Q.B.D. 753; 53 L.J. Ch. 977; and *Lundy Granite Co., In re*, L.R. 6 Ch. 462; 40 L.J. Ch. 588; *Howell, In re*, (1895) 1 Q.B. 844; 64 L.J. Q.B. 454.

(*t*) *Briggs* v. *Sowry*, 8 M. & W. 729; 11 L.J. Ex. 193; *Newton* v. *Scott*, 10 M. & W. 471; 12 L.J. Ex. 488; *Phillips* v. *Shervill*, 6 Q.B. 944; 14 L.J. Q.B. 144; see 46 & 47 Vict. c. 52, s. 55.

(*u*) *Birm. Gas Light Co., Ex parte*, L.R. 11 Eq. 204; 40 L.J. Bankr. 1.

(*v*) *Peskett* v. *Somers*, coram Wilde, C.J., Sittings after Hil. Term. 1850; but see 46 & 47 Vict. c. 52, s. 55.

(*x*) *Rex* v. *Cotton*, Parker, 112; and see 32 & 33 Vict. c. 14, s. 31, as to a distress at suit of the crown on property of bankrupt for duties, &c., under that Act.

(*y*) 46 & 47 Vict. c. 61, s. 44.

the ordinary course of dealing, and also for rent which has become legally due more than a year previously, but has become payable according to the ordinary course of dealing less than a year previously, and he may do this even although the total amount distrained for exceeds one year's rent (*z*).

No right to distrain where no certain ascertained rent.—If lands and houses have been demised together at one entire rent, and the lease is void as to part of the subject-matter of the demise and good for the residue, the lessor cannot distrain for the rent, as there is no distinct and ascertained rent fixed in respect of the part for which the lease is good (*a*). But where a new agreement is come to, providing for a specified reduction of rent, or for an ascertained and settled compensation in respect of the part held under the prior demise, such agreement may operate as a re-demise at an ascertained rent, recoverable by distress (*b*).

Where an oral agreement was entered into between the proprietor of a marl-pit and brick-mine, and a potter and brickmaker, upon the terms that the latter should pay 8*d.* per solid yard for all the marl that he got out of the marl-pit, and 1*s.* 8*d.* per thousand for all the bricks that he made from the brick-mine, by quarterly payments at the usual quarter-days, and the brickmaker took possession of the pit and mine, and dug marl and burnt bricks, and made several quarterly payments, it was held that this was a demise from year to year at a rent capable of being ascertained with certainty, and that the lessor, therefore, was entitled to distrain (*c*).

If a tenant has entered into possession under an agreement which does not operate as a present demise at a fixed rent, but merely as an executory contract for a future lease afterwards to be granted, and the landlord neglects to grant the lease, and the tenant continues to occupy without paying any rent or making any absolute and unconditional admission of any specific sum being due as rent in respect of such occupation, the landlord has no right to distrain (*d*). But whenever there is an agreement for a tenancy at a fixed rent, though it be a tenancy-at-will only (*e*), or whenever by payment of rent, or otherwise, any tenancy at a fixed rent can be implied, the landlord may distrain for all rent subsequently accruing due (*f*). And if the tenant, after he has taken possession, "promises to pay a rent certain, or settles it in account,

(*z*) *Ball, Ex parte, Bew, In re*, 18 Q.B.D. 642; 56 L.J. Q.B. 270.

(*a*) *Gardiner* v. *Williamson*, 2 B. & Ad. 339; 9 L.J. (O.S.) K.B. 233; *Neale* v. *Mackenzie*, 1 M. & W. 763; 6 L.J. Ex. 263.

(*b*) *Watson* v. *Waud*, 8 Exch. 335; 22 L.J. Ex. 161.

(*c*) *Daniel* v. *Gracie*, 6 Q.B. 145; 13 L.J. Q.B. 309; *Pollitt* v. *Forrest*, 11 Q.B. 949; 16 L.J. Q.B. 424.

(*d*) *Hegan* v. *Johnson*, 2 Taunt. 148.

(*e*) *Anderson* v. *Mid. Ry.*, 30 L.J. Q.B. 94; 3 E. & E. 614.

(*f*) *M'Leish* v. *Tate*, Cowp. 781.

the landlord will then have a right to distrain" (*g*). So, if a man, on being let into possession under an agreement for purchase, signs an agreement admitting that he is tenant at a certain rent, he may be distrained upon (*h*).

By the 14 & 15 Vict. c. 25, s. 1, it is provided, that where the lease of any farm or lands shall determine by the death or cesser of the estate of a landlord entitled for life or for some uncertain interest, instead of a claim to emblements, the tenant shall continue to hold till the expiration of the then current year, and shall then quit as if his lease had expired by effluxion of time, and the succeeding landlord shall be entitled "*to recover* and receive of the tenant" a fair proportion of the rent for the period since the lessor's death. The above Act applies to all tenancies in respect of which there exists a valid claim to emblements, and confers a right to distrain for the rent as well as to recover it by action (*i*).

Conditions precedent to the right to distrain.—The right to distrain may be made conditional, or may be postponed by the contract of the parties (*j*). Whenever a covenant or promise to pay rent is conditional and dependent, and the lessor is ready and willing to fulfil the condition on his part, but the lessee prevents him, the lessor will have his power of distress.

Agreements not to distrain.—The right to distrain may be waived, abandoned, or postponed by the express contract or agreement of the landlord, for it is not an inseparable incident to a rent service (*k*). If, therefore, a landlord has agreed with the owner of cattle not to distrain them if they are put into a particular close, and they are afterwards distrained there by the landlord, in violation of his agreement, an action for a trespass in taking the cattle is maintainable against him (*l*).

Acceptance of bill or note by way of payment.—A landlord is not deprived of his right to distrain by taking a bill, or note, or other security for the rent, unless it be proved that the landlord, at the time he accepted the security, bound himself not to distrain (*m*), or unless it be proved that the note was paid at maturity (*n*). The mere fact that a bill of exchange is given by a tenant to his land-

(*g*) *Knight* v. *Bennett*, 11 Moore, 222; 4 L.J. (O.S.) C.P. 95; *Cox* v. *Bent*, 2 M. & P. 281; 7 L.J. (O.S.) C.P. 68.

(*h*) *Yeoman* v. *Ellison*, L.R. 2 C.P. 681; 36 L.J. C.P. 326; see *Morton* v. *Woods*, L.R. 4 Q.B. 293; 38 L.J. C.P. 81; *ante*, p. 709.

(*i*) *Haines* v. *Welch*, L.R. 4 C.P. 91; 38 L.J. C.P. 118; see 33 & 34 Vict. c. 35, "The Apportionment Act, 1870."

(*j*) *Giles* v. *Spencer*, 3 C.B. N.S. 253; 26 L.J. C.P. 237; *Regnart* v. *Porter*, 5 M. & P. 370; 9 L.J. (O.S.) C.P. 168; *Mocheten* v. *Wallace*, 7 Ad. & E. 54, n.

(*k*) *Giles* v. *Spencer*, 3 C.B. N.S. 244; 26 L.J. C.P. 237.

(*l*) *Horsford* v. *Webster*, 1 C. M. & R. 696; 4 L.J. Ex. 100; *Welsh* v. *Rose*, 6 Bing. 638; 8 L.J. (O.S.) C.P. 246.

(*m*) *Davis* v. *Gyde*, 2 Ad. & E. 626; 4 L.J. (O.S.) K.B. 84; see *Bramwell* v. *Eglinton*, 33 L.J. Q.B. 130; 5 B. & S. 39.

(*n*) *Harris* v. *Shipway*, Bull, N.P. 182, a.

lord in respect of rent due is some evidence of an agreement by the landlord to suspend his right of distress until the bill should have matured (*o*). If the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and pays over the amount of the note to the landlord, and the note is subsequently dishonoured, the landlord may return the money to the bailiff or treat it as an advance or loan from him, and distrain again for the unpaid rent (*p*).

Distress for rent payable in advance (*q*)—*Rent when due*—*Several demises.*—Rent may be made payable in advance, so as to entitle the landlord to distrain for it at the commencement instead of at the end of each quarter (*r*). When there is a reservation of an annual rent, or a covenant or agreement by a tenant to pay so much a year, a stipulation for the determination of the tenancy at the expiration of any one quarter of a year, by a six or three months' notice, will not raise a presumption that the rent was to be paid quarterly (*s*). Where a landlord agreed to let a house at a yearly rent of 50*l.*, and likewise the stable and loft at a further rental of 25*l.* per annum, to be paid on the usual quarter-days, it was held that this was a demise of two different sets of premises at separate rents, payable at different periods; that the 50*l.* rent was payable yearly, and the 25*l.* rent payable quarterly (*t*). Where a contract was entered into for the letting and hiring of a house for a year certain, at a rent payable quarterly, "or half-quarterly if required," and the tenant entered into possession, and paid his rent quarterly for the first year of the tenancy, at the expiration of which period the lessor, without any previous demand or notice to the tenant, distrained for half a quarter's rent then alleged to be due, it was held that the lessor had no right so to do without giving a previous intimation and notice to the tenant of his election to take the rent half-quarterly (*u*). If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they have been impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*v*).

(*o*) *Palmer* v. *Bramley*, (1895) 2 Q.B. 405; 65 L.J. Q.B. 42.

(*p*) *Parrott* v. *Anderson*, 7 Exch. 93; 21 L.J. Exch. 291.

(*q*) See *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *post*, p. 716.

(*r*) *Lee* v. *Smith*, 9 Exch. 665; 23 L.J. Ex. 198; *London & Westminster Loan Co.* v. *L. & N. W. Ry.*, (1893) 2 Q.B. 49; 62 L.J. Q.B. 370.

(*s*) *Collett* v. *Curling*, 10 Q.B. 785; 16 L.J. Q.B. 390.

(*t*) *Coomber* v. *Howard*, 1 C.B. 440.

(*u*) *Mallam* v. *Arden*, 3 M. & Sc. 795; 3 L.J. C.P. 48.

(*v*) 1 Inst. 47b, 161a; Gilbert on Distress, 61.

Distress after termination of term of hiring.—At common law the landlord could not, it seems, have distrained after the expiration of the term for rent that accrued due before the termination thereof, as his reversion was then gone, the entire estate being revested in him in possession (*x*); but by 8 Anne, c. 14, ss. 6, 7, it is enacted, that it shall be lawful for him to distrain for arrears of rent due upon any lease ended or determined after the determination of the lease in the same manner as he might have done if such lease had not been ended or determined; provided such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears became due (*y*). *Primâ facie*, therefore, the executors or other personal representatives of a tenant could not be distrained upon. But the Court of Queen's Bench has held a distress to be good during the possession of the executors, when the tenancy was not determined by the death of the tenant (*z*). Where, however, there is no possession by any one who can be said to be the representative of the tenant, and the tenancy is determined by the death of the tenant, the statute of Anne does not apply, and there is no power to distrain (*a*). Where a tenant went away, leaving behind him a cow and a few pigs, without asking permission to leave them, or saying when he was going to take them away, and the succeeding tenant entered and took possession, it was held that the lessor had no right to distrain the things so left, as the tenant was not then in the possession and occupation of the premises (*b*). And where a tenant, in order to prevent a distress, fraudulently removed his goods on the day on which his tenancy came to an end, it was held that the landlord could not follow and distrain the goods because the tenant's interest in the premises had come to an end, and he was no longer in possession (*c*). The customary right of the tenant to an away-going crop always operates as a prolongation of the term as to the land on which the crop grows for the period allowed by the custom for getting in and gathering the crop; all the rights and properties belonging to the original contract are continued during the period in question, and among them the landlord's right to distrain; and, therefore, where a part of the tenant's corn remained in a barn on the demised premises beyond the period

(*x*) *Williams* v. *Stiven*, 9 Q.B. 14; 15 L.J. Q.B. 321.

(*y*) This right of the landlord is not affected by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11; *Mackenzie, In re*, (1899) 2 Q.B. 566; 68 L.J. Q.B. 1003.

(*z*) *Braithwaite* v. *Cooksey*, 1 H. Bl. 465.

(*a*) *Turner* v. *Barnes*, 31 L.J. Q.B. 170; 2 B. & S. 435; see 33 & 34 Vict. c. 35.

(*b*) *Taylerson* v. *Peters*, 7 Ad. & E. 110; 2 N. & P. 622.

(*c*) *Gray* v. *Stait*, 11 Q.B.D. 668; 52 L.J. Q.B. 412.

of six calendar months, but within the term allowed by custom for the outgoing tenant to get in and dispose of his crop, it was held that the corn might be distrained by the landlord (*d*). Where a new tenancy has been created as to part of the property comprised in a lease of which notice to quit has been given, a landlord, after the expiration of such notice, is not entitled to distrain on such new tenancy for arrears of rent due in respect of the old tenancy (*e*).

If, by the tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract are also continued, and among them the landlord's right to distrain. It has often been determined that if there be a lease, and after the determination of it, the tenant holds over, with the consent of the landlord, he must hold upon the terms, and is liable to all the conditions and covenants, of the lease (*f*). If, after the determination of a tenancy by the expiration of a notice to quit the tenant holds over, and the landlord distrains for rent, the landlord thereby waives the notice, and affirms and continues the tenancy (*g*).

Distress by agents—Joint tenants—Tenants in common, &c.—A mere receiver of rents (not being a receiver appointed by the Court of Chancery) has no power to distrain, although he may be authorized to collect and receive the rents for his own benefit (*h*). And when an agent or bailiff receives a special authority from the lessor to levy a distress upon the demised premises, the authority should be given and acted upon in the name of the lessor or reversioner. But if the agent distrains in his own name, and gives a notice in writing, stating the rent to be due to himself, he may, nevertheless, justify in the name and as the bailiff of the lessor. A person beneficially interested in the demised premises may use the name of the owner of the legal estate to levy a distress. The cestui que trust, therefore, may distrain in the name of the trustee, and a mortgagor, in certain cases, in the name of the mortgagee (*i*). A receiver appointed by the Court of Chancery has a power of distress, and need not previously apply to the court for a particular order for that purpose (*j*). One joint-owner or joint-reversioner may distrain alone, but he must, it seems, avow and justify the taking

(*d*) *Beavan* v. *Delahay*, 1 H. Bl. 9; *Lewis* v. *Harris*, *ib.* 7, n. (*a*); *Nuttall* v. *Staunton*, 4 B. & C. 51; 3 L.J. (O.S.) K.B. 135.

(*e*) *Wilkinson* v. *Peel*, (1895) 1 Q.B. 516; 64 L.J. Q.B. 178.

(*f*) *Beavan* v. *Delahay*, *supra*; *ante*, p. 710.

(*g*) *Zouch* v. *Willingale*, 1 H. Bl. 311.

(*h*) *Ward* v. *Shew*, 9 Bing. 608; 2 L.J. C.P. 58.

(*i*) *Trent* v. *Hunt*, 9 Exch. 14; 22 L.J. Exch. 320; *Snell* v. *Finch*, 32 L.J. C.P. 177; 13 C.B. N.S. 651.

(*j*) *Brandon* v. *Brandon*, 5 Madd. 473; *Bennett* v. *Robins*, 5 C. & P. 379.

of the distress in his own right, and as bailiff to the other (*k*). He may also sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent (*l*). The same rule prevails in the case of co-parceners and co-heirs in gavelkind, any one of whom may avow and justify the distress in his own right, and make conusance as the bailiff of the others without averring or showing any express authority from them to distrain (*m*). If one of several joint tenants of the reversion to which the rent is incident conveys away all his estate and interest in the demised premises, the right to distrain for the rent is extinguished, for there can be no apportionment of the rent by the severance of the reversion (*n*). The payment of rent in advance to a landlord mortgagor, unless by agreement the tenant is bound to do it, is not valid as against mortgagees, who may consequently distrain for it (*o*).

Tenants in common who have several estates, and are severally entitled to the rent and the reversion of the demised premises, should make several distresses. They may, of course, authorize a bailiff to distrain on behalf of all, or one tenant in common may distrain on his own account, and as the bailiff and agent of others, but they must avow and justify the taking of the distress separately in respect of their several shares (*p*). And one tenant in common may distrain for his own share of the rent, although the rent has been reserved in one sum payable to all generally, and not in several sums payable to each; and therefore, where a lessee holding under two tenants in common, at a yearly rent of 18*l*., payable quarterly, received notice from one of them to pay to him a moiety of the rent as soon as it became due, and the lessee, notwithstanding such notice, paid the whole rent to the other tenant in common, it was held that the one who had thus given the notice might distrain upon the land for his moiety of the rent (*q*). Where fifty acres of arable land were demised by four persons (whose original title did not appear) at one entire rent of 94*l*. per annum, to be divided and paid to the four lessors separately in equal portions, it was held that as between themselves and the lessee they must be taken to be tenants in common of the reversion, and

(*k*) *Pullen* v. *Palmer*, 5 Mod. 78, 150; 3 Salk. 207.

(*l*) *Robinson* v. *Hoffman*, 4 Bing. 562; 6 L.J. (O.S.) C.P. 113.

(*m*) *Leigh* v. *Shepherd*, 5 Moore, 297; 2 B. & B. 465.

(*n*) *Staveley* v. *Allcock*, 16 Q.B. 636; 20 L.J. Q.B. 321.

(*o*) *De Nicholls* v. *Saunders*, L.R. 5 C.P. 589; 39 L.J. C.P. 297; *Cook* v. *Guerra*, L.R. 7 C.P. 132; 41 L.J. C.P. 89. By 51 & 52 Vict. c. 21, s. 7, any bailiffs distraining on any holding to which that Act applies must be authorised by a county court judge, who has power at any time to cancel their certificates: 58 & 59 Vict. c. 24, s. 1; *Hogarth* v. *Jennings*, (1892) 1 Q.B. 907; 61 L.J. Q.B. 601.

(*p*) Litt. sects. 314—317.

(*q*) *Harrison* v. *Barnby*, 5 T.R. 246.

that one of the four was entitled to distrain for a fourth part of the rent independently of the rest (*r*).

Distress by executors and administrators.—By 3 & 4 Wm. 4, c. 42, ss. 37, 38, the executors and administrators of a lessor or landlord may distrain upon lands demised for any term or at will for arrearages of rent due to such lessor or landlord in his lifetime.

Tender of rent before distress renders the distress wrongful *ab initio*. If, therefore, after a broker has received a warrant of distress, but, before it is executed, the rent is tendered, the right to distrain is gone (*s*).

Time, mode and place of distraining.—The tenant has the whole day on which the rent becomes due to pay such rent, and a distress therefore cannot be made until the day after the day appointed for the payment of the rent (*t*). A landlord or his bailiff cannot lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling-house or building (*u*), or even enter by a window which is shut but not fastened (*x*), in order to make a distress, but he may enter by a door which is shut but not fastened, for that is the ordinary method of entry, and a person who leaves his door unfastened implies a licence to any one who has business to enter the premises, and so he may draw a staple or undo fastenings which are ordinarily opened from the outside of the house (*y*), or enter by an open window (*z*), or by further opening a window which is partly opened (*a*). A distress, moreover, cannot be made after sunset, or before sunrise (*b*); nor upon land which does not form part or parcel of the demise, and from which the rent reserved does not issue, unless the goods of the tenant have been removed thereto from the demised premises within sight of the lord coming to distrain, or unless they have been fraudulently removed thereto by the tenant to avoid the distress. If, therefore, a tenant enjoys an easement over, or a right to use, the land of a third person, and has, in the *bonâ fide* exercise of such right, placed his goods and chattels on the land of such third person, the lessor has no right to distrain them there (*c*). For the same reason a landlord could not, by the common law, distrain the beasts and cattle of a tenant feeding upon a common, and which had been placed there by the tenant in the *bonâ fide* exercise of a right of

(*r*) *Whitley* v. *Roberts*, McL. & Y. 107.
(*s*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L.J. Exch. 224.
(*t*) 21 Hen. 6, 40; *Duppa* v. *Mayo*, 1 Saund. 287.
(*u*) *Brown* v. *Glenn*, 16 Q.B. 254; 20 L.J. Q.B. 205.
(*x*) *Nash* v. *Lucas*, L.R. 2 Q.B. 590.
(*y*) *Ryan* v. *Shilcock*, 7 Exch. 72; 21 L.J. Exch. 55.
(*z*) *Nixon* v. *Freeman*, 5 H. & N. 647; 29 L.J. Ex. 271.
(*a*) *Crabtree* v. *Robinson*, 15 Q.B.D. 312; 54 L.J. Q.B. 544.
(*b*) Co. Litt. 142 a.; Gilbert on Distress, 50; *Tutton* v. *Darke*, 5 H. & N. 654; 29 L.J. Exch. 271.
(*c*) *Buszard* v. *Capel*, 8 B. & C. 141; 6 L.J. (O.S.) K.B. 267; in error, 6 Bing. 150.

common vested in him in his own right, or as appurtenant to the land demised to him by the lessor. But this has been altered by 11 Geo. 2, c. 19, s. 8, which empowers landlords to take and seize, as a distress for arrears of rent, any cattle or stock of their tenants feeding or depasturing upon any common appendant or appurtenant. By the terms of the lease a right to distrain upon other lands may be given (*d*).

Things not distrainable.—Tenants' fixtures annexed to the freehold by nails and permanent fastenings, such as furnaces, chimney-pieces, kitchen-ranges, stoves, coppers, grates, blinds, &c., are not distrainable, as they cannot be removed and restored without sustaining some injury (*e*). But if they are attached to the freehold by bolts and screws, so as to be moveable, they may be distrained and taken. Therefore cotton-spinning machines fixed to a wooden floor by screws, or soldered to a stone flooring, but fastened so as to be readily removeable, are distrainable (*f*). A millstone in a mill, and an anvil in a smith's shop, however, cannot be distrained for rent, although the anvil be removed out of the stock, or the millstone out of the socket to be picked, for the anvil is accounted part of the forge, and the millstone part of the mill, though when taken it is not actually affixed to the freehold (*g*). Tram-plates and sleepers of a railway merely laid upon the ground, although they have become indented in the soil by user, are distrainable (*h*); but if they have been packed in ballast, so that they cannot be removed without making holes in the ballast, they are not (*i*).

By 52 Hen. 3, stat. 4, it is provided that no man of religion, nor other person, shall be distrained by his beasts that profit his land, nor by his sheep, by the king's or other bailiffs, so long as they can find other distress, or other chattels sufficient for the levying of the distress. Beasts of the plough are by common law exempt from distress; but to render other animals exempt on the ground that they profit the land, within the above statute, it is not enough to show that they are occasionally used in manuring the soil: it must be proved that they have been broken to harness, and are regularly employed in ploughing, harrowing, or drawing carts or waggons upon the farm, in the ordinary cultivation of the land. Heifers and steers, therefore, and young colts not broken to harness, are not "beasts that profit the land" within the meaning of

(*d*) *Daniel* v. *Stepney*, L.R. 9 Ex. 185; 41 L.J. Ex. 208.

(*e*) Co. Litt. 47 b.; *Pitt* v. *Shew*, 4 B. & Ald. 207; *Darby* v. *Harris*, 1 Q.B. 898; *Dalton* v. *Whittem*, 3 Q.B. 961; 12 L.J. Q.B. 55.

(*f*) *Hellawell* v. *Eastwood*, 6 Exch. 309; 20 L.J. Exch. 154; see *Longbottom* v. *Berry*, L.R. 5 Q.B. 123; 39 L.J. Q.B. 37; *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146.

(*g*) Bro. Abr. Distress, pl. 23.

(*h*) *Beaufort* (*Duke*) v. *Bates*, 3 De G. F. & J. 381; 31 L.J. Ch. 481.

(*i*) *Turner* v. *Cameron*, L.R. 5 Q.B. 306; 39 L.J. Q.B. 125.

the statute. Sheep, also, are exempt from distress at common law, independently of the statute, so long as there are other distrainable chattels and animals, not being beasts of the plough, sufficient to satisfy the rent (*j*).

Implements of husbandry are also exempt from distress, and so are the tools and instruments of a man's trade or profession, such as the books of the scholar, the axe of the carpenter, the anvil of the smith, the stocking-loom of the weaver, the threshing-machine of the farmer, and the spade and axe of the labourer, so long as they are in actual use, or there are other goods on the demised premises sufficient to satisfy the rent without them (*k*). Wearing apparel, also, in actual use about the person of the wearer, is not distrainable, whether it be the wearing apparel of the tenant himself or of a guest in his house (*l*). And by 51 & 52 Vict. c. 21, s. 4, any goods or chattels of the tenant which would be protected from seizure under sect. 96 of the County Courts Act, 1846, are exempt from distress, provided that the interest of the tenant has not expired and that distress is made not earlier than seven days after demand for possession; a court of summary jurisdiction, on complaint that such goods or chattels have been seized, may summarily direct that they be restored, or, if they have been sold, that the value shall be repaid (*m*).

Perishable articles, growing crops, fruit, money, &c., have always been considered to be unfit to be taken and detained as a pledge for rent, inasmuch as they are liable to rapid deterioration, and cannot be restored to the tenant in as good plight as they were in when taken, within the period allowed by law for their redemption. Therefore fruit, milk, the flesh of animals recently slaughtered (*n*), and other things of a perishable nature, could not be distrained; but as 2 W. & M. c. 5, s. 3, directs the distress to be sold within five days unless replevied, perhaps the ancient rule of the common law with respect to the perishable nature of the distress no longer extends, in the case of a distress for rent, to anything which is not liable to deterioration within the period prescribed by the statute for the sale of it. As the things distrained were regarded at common law in the light of a pledge, to be returned to the tenant when the rent was paid, it was held that money could not be distrained unless in a bag, because the iden-

(*j*) *Keen* v. *Priest*, 4 H. & N. 236; 28 L.J. Ex. 157.

(*k*) *Simpson* v. *Hartopp*, Willes, 512; *Wood* v. *Clarke*, 1 Cr. & J. 484; 9 L.J. (O.S.) Ex. 187; *Harvey* v. *Pocock*, 11 M. & W. 740; 12 L.J. Ex. 434; Co. Litt. 47 a.; *Nargatt* v. *Nias*, 28 L.J. Q.B. 143; 1 E. & E. 439.

(*l*) Bac. Abr. Inns, B.

(*m*) 58 & 59 Vict. c. 24, s. 4; *Davis* v. *Harris*, 69 L.J. Q.B. 232.

(*n*) *Morley* v. *Pincombe*, 2 Exch. 101; 18 L.J. Ex. 272.

tical pieces could not be known and restored; and that grain or flour could not be taken out of a sack, or hay from a barn, because it could not well be ascertained whether the identical quantity taken had been returned. Corn in the sheaf was not distrainable unless found in a cart. Growing corn, grass, fruits, hops, roots, and growing produce, also, were not distrainable, as the crop was attached to the freehold, and could not be taken up and returned to the tenant, in case he chose to redeem the pledge, in the same state and condition as it was in when removed (*o*). But the 2 W. & M. sess. 1, c. 5, s. 3, and 11 Geo. 2, c. 19, ss. 8 and 9, now enable the lessor to distrain loose corn and corn in the sheaf, straw and hay, growing corn, grass, hops, roots, fruit, pulse, and growing produce generally. These Acts, however, do not extend to trees, shrubs, and plants growing in nursery gardens, nor to money (*p*).

Property of strangers on demised premises in their own possession.—The landlord has no right to distrain the carriage and horses of a stranger, but if they are left upon the premises, in the possession or use, or under the care of the tenant or his servants, then they are distrainable (*q*). The goods and chattels and wearing apparel of a guest in the tenant's house, in the actual possession and use of such guest, cannot be distrained for rent, whether the house in which the guest is lodged is a private dwelling-house or a common inn; nor the goods and chattels of third persons placed upon the demised premises, in the possession and under the care of the tenant, in the ordinary course of trade; nor the goods and chattels, horses and carriages of travellers, deposited in hostelries and public stables, or in a market or fair where things are taken to be bought or sold; nor goods delivered to a carrier to be carried for hire. The horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c., in the hostelry, nor the materials in the weaver's shop for the making of cloth, or cloth or garments at a tailor's, nor sacks of corn nor meal in a mill, nor in a market, for it is in custody (protection) of law (*r*).

Property of strangers placed on the demised premises, if placed there with the leave and licence of the landlord, is not distrainable. If, for example, the landlord's permission to place cattle on the demised premises has been sought for and obtained, and the beasts are placed thereon with his authority, he is held impliedly to have undertaken not to exercise his power of distress as against them (*s*).

(*o*) 1 Roll. Abr. 667; Bradby on Distress, 213; Gilbert on Distress, 32.

(*p*) *Clark* v. *Gaskarth*, 2 Moore, 491.

(*q*) *Muspratt* v. *Gregory*, 3 M. & W. 677; 7 L.J. Ex. 385; *Rede* v. *Burley*, Cro. Eliz. 596.

(*r*) 7 Hen. 7, 1 b; Bro. Abr. Distress, pl. 57, 71; 1 Roll. Abr. 688, pl. 12; Co. Litt. 47 a; *Gisbourn* v. *Hurst*, 1 Salk. 249.

(*s*) *Joyce* v. *Fowkes*, 2 Vern. 129; *Horsford* v. *Webster*, 1 Cr. M. & R. 696; 4

By 34 & 35 Vict. c. 79, if the goods of a lodger (*t*) are taken as a distress by the superior landlord, the lodger may make and serve upon the landlord or his bailiff a declaration that such is the fact, accompanied by a correct inventory of the goods, and a tender of the rent, if any, which the lodger then owes to the tenant; and if after service of such declaration and inventory the landlord proceeds with the distress, he will be guilty of an illegal distress, and liable to an action at law at the suit of the lodger. The declaration must, however, be made afresh each time that a distress is levied on the lodger's goods (*u*), but it need not state that the declarant is a lodger, or that no rent is due if such is in fact the case (*x*). The lodger may also apply to a magistrate for an order for the restoration of the goods. By 35 & 36 Vict. c. 50, the rolling stock of a railway company at any works to which there is a railway siding, which rolling stock is not the property of the tenant of such works, is exempt from distress, if marked with the name or brand, &c., of the actual owner. And by the Agricultural Holdings Act, 1883 (*y*), where live stock belonging to another person has been taken in by the tenant of a holding, to which the Act applies, to be fed at a fair price (*z*), to be paid for such feeding by the owner of the stock to the tenant, such stock shall not be distrained by the landlord where there is other sufficient distress to be found, and if distrained by reason of there being no other sufficient distress there shall not be recovered by such distress a sum exceeding the amount agreed to be paid for the feeding, or if any part of such price has been paid, exceeding the amount remaining unpaid. The owner of the stock may in such a case redeem it by paying to the distrainor, at any time before sale, the agreed price of the feeding, and such payment will be in full discharge against the tenant for the amount due to him for the feeding.

Agricultural machinery which has been *bonâ fide* hired by the tenant from some other person whose property it is, and live stock belonging to a stranger but on the premises of the tenant for breeding purposes, are also protected from distress by the Act (*a*).

Materials placed on demised premises to be manufactured or worked upon.—The goods and chattels of third persons placed on the

L.J. Ex. 100; *Giles* v. *Spencer*, 3 C.B. N.S. 253; 26 L.J. C.P. 237.

(*t*) As to the meaning of the word "lodger," see *Heawood* v. *Bone*, 13 Q.B.D. 179. See *ante*, p. 698.

(*u*) *Thwaites* v. *Wilding*, 12 Q.B.D. 4; 53 L.J. Q.B. 1.

(*x*) *Harris, Ex parte*, 16 Q.B.D. 130; 55 L.J. M.C. 24.

(*y*) 46 & 47 Vict. c. 61, s. 45.

(*z*) See *London and Yorkshire Bank* v. *Belton*, 15 Q.B.D. 457; 54 L.J. Q.B. 568; *Masters* v. *Green*, 20 Q.B.D. 807.

(*a*) The county court or a court of summary jurisdiction has cognizance of any dispute under the Act. See ss. 46—49, and 51 & 52 Vict. c. 21.

demised premises for trading or manufacturing purposes are, by the policy of the law, exempt from distress; such as the yarn of a stocking manufacturer, placed in the house of the tenant, a stocking weaver, to be woven into stockings, but not the frame or machinery of the manufacturer, delivered to the weaver to enable him to weave the yarn (*b*); also the silk of a velvet manufacturer, delivered to a tenant, a silk weaver, and taken home by him to be made into velvet at his own house (*c*); bullocks sent to a slaughterer or carcass butcher, to be slaughtered and cut up in the way of his trade, and sent back in joints to the owner to be sold or consumed (*d*); corn sent to a miller to be ground; clothes sent to a tailor's; casks sent to a cooper's, or boats to a boat builder, to be repaired; goods sent to a weigher to be weighed, or to an auctioneer, commission agent, factor, warehouseman, granary keeper, wharfinger, or other agent, to be sold or exported, or otherwise to be dealt with in the course of trade (*e*). But in order that they may be exempt from distress, the goods must have been delivered by the third party to the tenant of the demised premises, to be worked up in the way of his trade; and therefore, where a ship was being built on demised premises for a third party, who had paid all the instalments due for it, and when it was nearly completed it was seized under a distress by the landlord, it was held not to be privileged from distress (*f*). Goods in the possession of a pawnbroker as security for money advanced cannot be distrained (*g*). The privilege of goods delivered to an auctioneer is confined to goods on his premises, and does not extend to goods sold on the premises of the owner (*h*).

Property of guests at a common inn cannot be distrained for the rent of the inn, for it would be a sore detriment to travellers and wayfarers who are obliged by necessity to resort to common inns, if their goods and effects were liable to be seized and sold in case of non-payment of the rent of the inn (*i*).

Chattels in custody of law not distrainable.—Goods and chattels which have been actually seized under a *fi. fa.* or taken under an attachment, and are in the possession of a sheriff's officer or bailiff,

(*b*) *Wood* v. *Clarke*, 1 Cr. & J. 484; 9 L.J. (O.S.) Ex. 187.

(*c*) *Gibson* v. *Ireson*, 3 Q.B. 39.

(*d*) *Brown* v. *Shevill*, 2 Ad. & E. 138; 4 L.J. K.B. 50.

(*e*) Bac. Abr. Distress, B.; *Williams* v. *Holmes*, 8 Exch. 861; 22 L.J. Ex. 283; *Adams* v. *Grane*, 1 Cr. & M. 380; 2 L.J. Ex. 105; *Brown* v. *Arundell*, 10 C.B. 54; *Gilman* v. *Elton*, 6 Moore, 243; *Thompson* v. *Mashiter*, 8 Moore, 254; 1 L.J. (O.S.) C.P. 104; *Matthias* v. *Mesnard*, 2 C. & P. 353; *Miles* v. *Furber*, L.R. 8 Q.B. 77; 42 L.J. Q.B. 41; *Joule* v. *Jackson*, 7 M. & W. 450; 10 L.J. Ex. 142.

(*f*) *Clarke* v. *Millwall Dock Co.*, 17 Q.B.D. 494; 55 L.J. Q.B. 378.

(*g*) *Swire* v. *Leach*, 34 L.J. C.P. 150; 18 C.B. N.S. 479.

(*h*) *Lyons* v. *Elliott*, 1 Q.B.D. 210; 45 L.J. Q.B. 159.

(*i*) Bro. Abr. Distress, pl. 57, 71; 1 Roll. Abr. 68, pl. 12.

cannot be distrained for rent, as they are in the custody of the law (*k*); but if the landlord is beforehand with the sheriff, and puts in a distress before the sheriff's officer has got possession, the sheriff cannot then seize them. The landlord is entitled to distrain for six years' arrears of rent (*l*), and if he gets possession before the sheriff he is entitled to retain and sell, and satisfy the whole six years' arrears if they be due.

If growing crops have been taken in execution and sold by the sheriff, such crops, as long as they remain on the demised premises, are liable to be distrained for rent accruing due subsequently to the execution and sale (14 & 15 Vict. c. 25, s. 2), in default of sufficient distress of the goods and chattels of the tenant; and if the execution is fraudulent (*m*), or the sheriff's officer, after the seizure of the goods, relinquishes the possession, and leaves no one in possession of them, then they may be distrained and taken (*n*).

The landlord is entitled, in some cases, to a year's rent, and in other cases to four weeks' arrears of rent, before goods taken in execution by the sheriff or the officers of the county court can be removed from the premises (*o*).

Statutory exemption from distress in favour of foreign ambassadors, and public companies in liquidation.—It is enacted by 7 Anne, c. 12, s. 3, on grounds of public policy, that process of distress against the goods of any ambassador, or other public minister of a foreign state, or of his domestic servants, shall be void.

By 25 & 26 Vict. c. 89, s. 163, it is enacted that where any company is being wound up by the court, or subject to the supervision of the court (of Chancery), any attachment, distress, execution, &c., put in force against the estate and effects of the company after the commencement of the winding-up, shall be void to all intents (*p*). And section 87 provides that after a winding-up order, no suit, action, or other proceeding shall be commenced or proceeded with against the company without the leave of the court. However, if a company, being equitable owner of a lease, continues in occupation after a winding-up order, the landlord is not prevented either by s. 87 or by s. 163 of the above Act from distraining upon the goods of the company for rent accrued since the winding-up (*q*), and he may also distrain where the company is undertenant

(*k*) *Wharton* v. *Naylor*, 12 Q.B. 673; 17 L.J. Q.B. 278.

(*l*) *Humfrey* v. *Gery*, 7 C.B. 567.

(*m*) *Smith* v. *Russell*, 3 Taunt. 400; *St. John's College* v. *Murcott*, 7 T.R. 263.

(*n*) *Blades* v. *Arundale*, 1 M. & S. 713.

(*o*) As to this, and as to Distress by Bailiffs of the County Court, see Addison on Torts, 719 (ed. 7).

(*p*) See *Progress Assurance Co., In re*, L.R. 9 Eq. 370; 39 L.J. Ch. 504.

(*q*) *Lundy Granite Co., In re*, L.R. 6 Ch. 462; 40 L.J. Ch. 588; whether the leave of the court is necessary, *quære*; *S. C.* See *Oak Pits Co., In re*, 21 Ch.D. 322; 51 L.J. Ch. 768; *Lancashire Cotton*

to a lessee, notwithstanding that he holds a collateral security for rent from the company (*r*); but, it seems, he cannot distrain where he has a right to prove in the bankruptcy in respect of a collateral security (*s*).

Things distrainable.—Chattels of traders left on demised premises in possession of tenant.—With the exception of fixtures, perishable articles, and things used in trade or placed on the demised premises for trading or manufacturing purposes, or standing there in the custody or possession of the owner, as previously mentioned (*ante*, pp. 720, 721), all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable for the rent due from such premises. If a trade can be carried on with profit and advantage, without the things used in the trade being left on the demised premises in the custody and possession of the tenant, they are not there *ex necessitate*, and are consequently distrainable (*t*). If a carriage which has been sent to a coach-maker to be repaired is left on the premises after the repairs have been completed, for purposes foreign to the trade of a coach-maker, it is distrainable, unless the coach-maker exercise some other trade thereon, and the carriage is left with him for the purpose of being dealt with by him in the exercise of such trade; if he exercises the trade of a commission agent for the sale of coaches and carriages, as well as the trade of a coach-maker, and the carriage is left with him to be sold, it would then come within the principle of the exemption (*u*). It has been held that a carriage standing at livery is distrainable (*v*). Whenever a chattel, such as a threshing-machine, or a loom, found upon the demised premises, has been lent or let by the owner to the tenant, it is distrainable, if not in actual use at the time of the levying the distress (*x*). Goods warehoused in the ordinary course of business at a furniture depository are privileged from distress (*y*).

Distress of chattels mortgaged by tenant.—Where a tenant from whom rent was due assigned all his goods and chattels by a registered bill of sale by way of mortgage, and was left in possession

Co., *In re*, 35 Ch.D. 656; 56 L.J. Ch. 761.

(*r*) *Clemence*, *Ex parte*, 23 Ch.D. 154; 52 L.J. Ch. 472. See, however, *New City Constitutional Club*, *In re*, 34 Ch.D. 646; 56 L.J. Ch. 332; *Harpur Cycle Fittings Co.*, *In re*, (1900) 2 Ch. 731; 69 L.J. Ch. 841.

(*s*) *Harpur Cycle Fittings Co.*, *In re*, *supra*.

(*t*) *Muspratt* v. *Gregory*, 3 M. & W. 677; 7 L.J. Ex. 385; *Joule* v. *Jackson*, 7 M. & W. 450; 10 L.J. Ex. 142.

(*u*) *Findon* v. *M'Laren*, 6 Q.B. 891; 14 L.J. Q.B. 183.

(*v*) *Francis* v. *Wyatt*, 3 Burr. 1498; 1 W. Bl. 483; *Parsons* v. *Gingell*, 4 C.B. 545.

(*x*) *Fenton* v. *Logan*, 3 M. & Sc. 82; 2 L.J. C.P. 102; *Gorton* v. *Falkner*, 4 T.R. 565.

(*y*) *Miles* v. *Furber*, L.R. 8 Q.B. 77; 42 L.J. Q.B. 41.

of the mortgaged chattels, and the landlord distrained them for rent, and caused them to be appraised, and removed to an auction-room to be sold, and the mortgagee, before the sale, and whilst the goods were in the custody of the law, gave notice to the landlord of the mortgage, and required the landlord to deliver to him, the mortgagee, any goods that might remain after the landlord had sold enough to satisfy the distress and costs, and the landlord promised so to do, and part of the goods remained unsold, and the landlord carried them back to the demised premises and returned them to the custody and possession of his tenant, from whom he took them, taking no heed of the notice given him by the mortgagee, or of his promise to return the goods to the latter; it was held that the landlord was not liable to an action at the suit of the mortgagee, as it did not appear that he had been guilty of any tortious act, or that the mortgagee had sustained any damage in respect of the removal of those goods which had been taken away from and returned to the mortgagor, in whose possession the mortgagee had left them, and which were as much subject to the provisions of the bill of sale after their return as they had been before they were taken away (*z*). If, after the tenant has mortgaged the goods and chattels on the demised premises, the mortgagee enters and takes possession, and the tenant becomes bankrupt, owing more than a year's rent, and the landlord distrains, he is entitled to make the distress available for the whole rent due to him, as the Bankruptcy Act was never intended to favour the mortgagee at the expense of the landlord (*a*).

Things distrainable under licence to distrain.—If a debtor gives his creditor a licence to enter upon the debtor's land and distrain all the goods and chattels upon the debtor's premises (*b*), and sell them in satisfaction and discharge of the debt, this will not enable the creditor to seize and sell the property of a stranger, for a licence of this sort cannot be made to extend to and to bind those who are not parties to it (*c*). A licence to seize chattels is a mere personal authority, to be exercised by the licensee, and cannot be granted over or assigned to another (*d*). The grantee of a rent-charge, with power of distress, may justify the taking corn, &c., in a stack or in trusses, under 2 Will. & M. sess. 1, c. 5 (*ante*, p. 719),

(*z*) *Evans* v. *Wright*, 2 H. & N. 527; 27 L.J. Exch. 50.

(*a*) *Brocklehurst* v. *Lawe*, 7 E. & B. 185; 26 L.J. Q.B. 107; sect. 129 of the old Act (12 & 13 Vict. c. 106), under which this case was decided, and sect. 42 of the present Act (46 & 47 Vict. c. 52) are substantially the same.

(*b*) As to after-acquired property, see *Reeve* v. *Whitmore*, 32 L.J. Ch. 497; 33 *ib.* 63.

(*c*) *Howes* v. *Ball*, 7 B. & C. 481; 6 L.J. (O.S.) K.B. 106; *Freeman* v. *Edwards*, 2 Exch. 739; 17 L.J. Ex. 258.

(*d*) *Brown* v. *Metrop. Counties Assur. Soc.*, 28 L.J. Q.B. 236; 1 E. & E. 838; *Davis & Co., In re*, 22 Q.B.D. 193.

in the same way as a landlord under a distress for rent; also the taking of the goods of a stranger on the premises charged with the rent. If the plaintiff, whose goods have been taken, held under a demise prior to the rent-charge, he ought to reply that fact (*e*).

Distress and seizure of goods fraudulently removed.—By 11 Geo. 2, c. 19, s. 1, it is enacted, that if any tenant of any lands or tenements, upon the demise or holding whereof any rent is reserved, shall fraudulently or clandestinely convey away from the demised premises his goods or chattels (*f*), to prevent the landlord from distraining for arrears of rent, it shall be lawful for the landlord, or any person by him for that purpose lawfully empowered, within thirty days next ensuing the carrying away of the goods, to seize the same wherever they shall be found, as a distress for the rent, and sell and dispose of them as if they had been actually distrained upon the demised premises (*g*), provided (s. 2), they have not, before the seizure, been sold *bonâ fide* and for a valuable consideration to a person ignorant of the fraud. Where the goods have been placed in any building or inclosure locked or fastened, the landlord, his bailiff or agent, first calling to his assistance a constable or peace-officer, &c., may in the daytime break open the building and seize the goods; but, before breaking open a dwelling house, oath must be made (s. 7), before a justice of the peace, that there is reasonable ground to suspect that such goods and chattels are in the dwelling house (*h*).

If it appears that rent was due at the time of the removal of the goods, and that the goods were taken away on or after the day the rent became due, for the purpose of putting them out of reach of a distress, the removal is a fraudulent removal within the meaning of the statute (*i*).

If, therefore, goods are removed on quarter-day, they may be followed, though the rent is not in arrear, and there is no right to distrain until the day after (*k*). But if the rent is not due, or there is sufficient distress on the demised premises, independently of the goods removed, to satisfy the rent, the removal is not fraudulent, and the lessor cannot consequently follow and distrain

(*e*) *Johnson* v. *Faulkner*, 2 Q.B. 936; 11 L.J. Q.B. 193; as to a distress for tithe rent-charge, see *Arnison, Ex parte*, L.R. 3 Exch. 56; 37 L.J. Ex. 57.

(*f*) The provisions of the statute apply to the goods of the tenant only, and not to the goods of a stranger, although fraudulently removed: *Tomlinson* v. *Consolidated Credit Corporation*, 24 Q.B.D. 135.

(*g*) The goods must have been fraudulently removed before the termination of the tenancy: *Gray* v. *Stait*, 11 Q.B.D. 668; 52 L.J. Q.B. 412.

(*h*) As to pleas of justification of the seizure of goods under this statute, see *Williams* v. *Roberts*, 7 Exch. 629; 22 L.J. Ex. 61.

(*i*) *Opperman* v. *Smith*, 4 D. & R. 33; 2 L.J. (O.S.) K.B. 108; *John* v. *Jenkins*, 1 Cr. & M. 227; 2 L.J. Ex. 83.

(*k*) *Dibble* v. *Bowater*, 2 E. & B. 564; 22 L.J. Q.B. 396.

the goods (*l*). The statute applies solely to the goods of a tenant, and not to those of a stranger. If therefore a lodger removes his goods to prevent them from being distrained for rent due from the tenant whose lodger he is, the landlord cannot follow them and distrain them (*m*). To deter tenants from fraudulently removing their goods to avoid a distress, a penalty to the amount of double the value of the things distrained is imposed upon the offender, which may be recovered by an action of debt, or (if the goods do not exceed 50*l.* in value) by a summary proceeding before two justices (*n*).

What amounts to distress for rent.—It is sufficient to constitute a distress if the lessor, in person or by deputy, enters upon the demised premises and announces to the tenant, or his servants, or the persons in actual occupation of the property, that he detains the things intended to be distrained for his rent. Thus, where a stranger was about to remove some goods he had deposited on the demised premises, and the lessor, hearing of his intention, came upon the land and declared that he would not suffer the things to be removed until his rent was paid, and then went away, and in the course of the day sent a broker, who made a formal distress, but in the meantime the stranger had removed his property off the demised premises, it was held that the distress was commenced by the landlord's entry and declaration, and that the landlord was justified in retaking the goods at the place to which they had been removed (*o*). But a mere notice by a landlord that he has distrained things which are not distrainable, unaccompanied by any seizure or removal of the goods, will not constitute any cause of action (*p*). If a warehouse-keeper, who lets out warehouse-room and places of deposit for goods, or receives goods to be warehoused and kept at a certain rent, and has power to distrain the goods in his hands for the warehouse-rent, gives notice to the owner of the goods that he will not deliver certain goods in his warehouse to the order of the latter until the rent due for warehouse-room is paid, and then detains the goods, the detainer and notice amount to a distress for the rent (*q*). Where a lodging-house keeper, claiming rent to be due to him from his lodger, locked up the goods of the latter in the room which the lodger held, and in which they had been placed by him, and kept the key in his pocket, refusing the

(*l*) *Rand* v. *Vaughan*, 1 Sc. 670; 4 L.J. C.P. 239.

(*m*) *Thornton* v. *Adams*, 5 M. & S. 38.

(*n*) *Horsefall* v. *Davy*, 1 Stark. 169; *Bromley* v. *Holden*, M. & M. 175; *Bach* v. *Meats*, 5 M. & S. 200.

(*o*) *Wood* v. *Nunn*, 2 Moo. & P. 30; 6 L.J. (O.S.) C.P. 198; *Cramer* v. *Mott*, L.R. 5 Q.B. 357; 32 L.J. Q.B. 172; *Swann* v. *Falmouth* (*Earl*), 8 B. & C. 456; 6 L.J. (O.S.) K.B. 374; *Thomas* v. *Harries*, 1 Sc. N.R. 524; 9 L.J. C.P. 308.

(*p*) *Beck* v. *Denbigh*, 29 L.J. C.P. 273.

(*q*) *Green* v. *St. Kath. Dock Co.*, 19 L.J. Q.B. 53.

lodger access to them, saying that nothing should be removed until his bill was paid, and the lodger brought an action of trespass for a seizure of the goods, it was held that the action was not maintainable (*r*).

Abuse of right to distrain, rendering persons trespassers ab initio.—If a landlord going to distrain breaks open an outer door (*s*), or gets in through a window, and then breaks the door open and seizes the goods in the house, this is not a distress, but a trespass, and he is responsible for all the damage sustained by the tenant (*t*); and if a distress has been lawfully effected in the first instance, but the landlord or his bailiff abuses the distress by using or working horses or animals distrained, he becomes, at common law, a trespasser *ab initio* (*u*); but, by 11 Geo. 2, c. 19, s. 19, where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainor a trespasser *ab initio;* but the party grieved may recover satisfaction for the damage in a special action of trespass, or on the case, at the election of the plaintiff, and if he recover he shall have full costs. This statute, however, does not apply where the original entry was unlawful, and no valid distress has been effected (*v*). There is no illegality in distraining by getting over a wall and then entering the house by an open window (*w*).

If a distrainor abuses a distress by working an animal distrained, the owner may interfere to prevent it, and an action cannot be maintained against him for a pound-breach or rescue (*x*).

Unlawful distress when no rent in arrear.—If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and, after a seizure has been made, he may rescue his goods at any time before they are impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*y*). By 2 Will. & M. sess. 1, c. 5, s. 5, it is enacted, that if any person shall distrain for rent pretended to be due or in arrear when no rent is due, the party so distraining shall forfeit double the value of the chattels so distrained and sold, together with full costs of suit.

(*r*) *Hartley* v. *Moxham*, 3 Q.B. 701; 12 L.J. Q.B. 41; *Cotton* v. *Bull*, Easter Term, 1857, C.P.; *Cramer* v. *Mott*, *ante*, p. 727.

(*s*) As to what is an "outer door," see *American Concentrated Must Co.* v. *Hendry*, 62 L.J. Q.B. 388.

(*t*) *Attack* v. *Bramwell*, 32 L.J. Q.B. 146; 3 B. & S. 520; Addison on Torts, 361 (ed. 7).

(*u*) *Oxley* v. *Watts*, 1 T.R. 12; *Six Carpenters' case*, 8 Co. 146 a.

(*v*) *Attack* v. *Bramwell*, *supra*.

(*w*) *Long* v. *Clarke*, (1894) 1 Q.B. 119; 63 L.J. Q.B. 108.

(*x*) *Smith* v. *Wright*, 6 H. & N. 821; 30 L.J. Exch. 313.

(*y*) Gilbert on Distress, 61.

Excessive distresses.—By the statute of Marlbridge (52 Hen. 3, c. 4) it is enacted, that distresses shall be reasonable and not too great; and that he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses (*z*). If the landlord distrains goods and chattels beyond what is reasonably and fairly necessary for the purpose of realising the rent and expenses, he renders himself liable to an action for damages at the suit of the tenant, even although the tenant has not, in fact, sustained any damage (*a*). If he distrains the crops growing in two fields, when the crop growing in one would be sufficient, when at maturity, to satisfy the rent and charges, the distress is an excessive distress (*b*). But it is not for every trifling excess that an action is maintainable; it must be clearly disproportionate and excessive (*c*). And "if there is but one thing which can be taken, so that it must be taken or the party must go without his distress, for taking it no action lies, though it much exceeds the sum for which the distress is taken" (*d*). A distress may be excessive although the goods when sold may not realise enough to cover the rent due and the expenses (*e*). The action may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself (*f*); and if the lessee, after the distress, enters into an agreement with the landlord respecting the sale and disposition of such distress, or authorises him to dispense with some or all of the usual forms preparatory to a sale, he does not thereby waive or abandon his right of action for the excessive distress (*g*). The tenant is entitled to recover damages for a wrongful distress, although he had the free use of the goods all the time they were in the constructive custody of the law (*h*).

Distress for more rent than due.—If a landlord who has distrained, not excessively, for rent in arrear demands a larger sum for arrears than the tenant admits to be due, that alone does not make the detention of the goods by the landlord or his bailiff unlawful. The tenant must be taken to know, that neither the validity of the distress nor of the detainer depends on that demand, and that if he wishes to make the latter unlawful he should tender the sum which he alleges to be really due, together with the costs of the distress (*i*). A declaration, therefore, which

(*z*) 2 Inst. c. 4, p. 107.
(*a*) *Chandler* v. *Doulton*, 34 L.J. Exch. 89; 3 H. & C. 553.
(*b*) *Piggott* v. *Birtles*, 1 M. & W. 441; 5 L.J. Ex. 193.
(*c*) *Roden* v. *Eyton*, 6 C.B. 430; 18 L.J. C.P. 1.
(*d*) *Field* v. *Mitchell*, 6 Esp. 71.
(*e*) *Smith* v. *Ashforth*, 29 L.J. Exch. 259.
(*f*) *Fisher* v. *Algar*, 2 C. & P. 374; *Bail* v. *Mellor*, 19 L.J. Exch. 279.
(*g*) *Willoughby* v. *Backhouse*, 2 B. & C. 821; 2 L.J. (O.S.) K.B. 174.
(*h*) *Baylis* v. *Usher*, 4 M. & P. 790; 9 L.J. (O.S.) C.P. 42.
(*i*) *Glynn* v. *Thomas*, 11 Exch. 870; 25 L.J. Exch. 125.

alleges that the plaintiff held certain premises as tenant to the defendant at a certain rent, and that the defendant wrongfully seized certain goods of the plaintiff on the demised premises for certain arrears of rent alleged to be due, and afterwards sold the goods for the said arrears, whereas a small part only of the rent claimed to be due was due, discloses no cause of action in the absence of an allegation that the defendant sold more than was enough to satisfy the rent actually due and the costs of the distress (*k*). The distraining of chattels on a claim of more rent being in arrear than is in fact in arrear, and selling them, is not actionable; firstly, because the distrainor for rent is not bound by the amount for which he claims to distrain, and though he takes the distress, alleging that he does so for an amount exceeding the real arrears of rent, he may sell afterwards only for that which is really due; secondly, because, from a mere allegation that the distrainor sold for the alleged arrears and costs, it is not to be inferred that he sold more than was necessary to raise the amount of the arrears actually due. If, however, the untrue claim has been followed by a sale of more of the goods taken than was sufficient to raise the amount of rent really in arrear, with the legal charges, then there is a cause of action. It is not enough in an action against a landlord for distraining for more rent than is really due to allege it to have been done maliciously, for an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent (*l*).

Repeated distresses for same rent.—A landlord cannot lawfully distrain twice for the same rent, unless the distress has been withdrawn at the instance of the tenant, or unless there has been some mistake as to the value of the things taken, or there was not sufficient distress on the premises, and the claim for rent is still unsatisfied (*m*); or unless the distress has been rendered abortive by the threats or misconduct of the tenant. If, after a sale of chattels that have been distrained and sold in due course of law, the tenant by force or threats prevents the purchaser from taking the chattels off the land, the landlord may re-enter and distrain again (*n*). And if the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and the note is dishonoured when it arrives at maturity, the landlord may distrain again (*o*).

(*k*) *Tancred* v. *Leyland*, 16 Q.B. 669; 20 L.J. Q.B. 316; *French* v. *Phillips*, 26 L.J. Exch. 82; 1 H. & N. 564.

(*l*) *Stevenson* v. *Newnham*, 13 C.B. 297; 22 L.J. C.P. 110.

(*m*) *Smith* v. *Goodwin*, 4 B. & Ad. 413; 2 L.J. K.B. 192; *Bagge* v. *Mawby*, 8 Exch. 649; 22 L.J. Ex. 236; *Dawson* v. *Cropp*, 1 C.B. 961; 14 L.J. C.P. 281.

(*n*) *Lee* v. *Cooke*, 3 H. & N. 203; 27 L.J. Exch. 337.

(*o*) *Parrott* v. *Anderson*, 7 Exch. 93; 21 L.J. Exch. 291.

Impounding goods—Pound-breach.—The landlord may impound the things distrained in any barn or building, hovel or rick, or on any fit part of the demised premises (*p*). As soon as the distrainor has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded within the meaning of the statute. Where cattle which had been distrained for rent were left in a field on a farm where they were taken, and the gates of the field, which had been properly secured by the broker who levied the distress, were opened, and the beasts taken out and driven away, it was held that this was a pound-breach, rendering the person who committed the act liable to treble damages under the statute (*q*). And if the distrainor enters and makes a general announcement of the distress on one day, and follows up the proceeding on the next, by giving the tenant notice of the particular things distrained and taken, the impounding is complete, at all events from the time of such notice (*r*). It is not necessary that a landlord who has impounded distrained goods upon the premises under section 10 of the Distress for Rent Act, 1737, should retain actual possession of them (*s*).

Formerly the distrainor, in removing the goods distrained, might have removed them to any place he thought fit for the purpose of impounding them, but 1 & 2 Ph. & M. c. 12, s. 1, amending the statute of Marlbridge (*ante*, p. 729), prohibits the distrainor from driving the distress out of the hundred, rape, wapentake, or lathe in which it has been taken, except it be to a pound overt within the same shire, not above three miles distant from the place where such distress was taken, and enacts that no cattle or goods distrained shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the distress so taken at one time. If the distrainor uses or consumes for his own private use things distrained and impounded; if he draws beer out of a barrel (*t*), tans hides, or uses or works beasts or cattle, he subjects himself to an action for damages at the suit of the owner thereof (*u*). As soon as the goods are impounded they are in the custody of the law, and the tenant cannot retake them without being guilty of pound-breach and subjecting himself to an indictment (*v*), and also to an action for treble damages and costs of suit, although the distress may be wrongful or irregular, and no rent may be in arrear or due (*x*).

(*p*) 2 Will. & M. sess. 1, c. 5, s. 4; 11 Geo. 2, c. 19, s. 10.
(*q*) *Castleman* v. *Hicks*, Car. & M. 266; *Firth* v. *Purvis*, 5 T.R. 432.
(*r*) *Thomas* v. *Harries*, 1 Sc. N.R. 524; 9 L.J. C.P. 308.
(*s*) *Jones* v. *Beirnstein*, (1900) 1 Q.B. 100; 69 L.J. Q.B. 1.
(*t*) *Dod* v. *Monger*, 6 Mod. 216.
(*u*) *Duncomb* v. *Reeve*, Cro. Eliz. 783.
(*v*) *Rex* v. *Bradshaw*, 7 C. & P. 233.
(*x*) 2 Will. & M. sess. 1, c. 5, s. 4; 11

But where the distress is being used in a manner which the law will not justify, the owner may interfere to prevent the abuse (*y*). If the pound is broken, and the goods are unlawfully taken away, the landlord may follow them and recapture them, but he must not break open the doors of a private house, or stable, or inclosure, nor enter the grounds of a third person for the purpose of retaking the goods, except it be on fresh pursuit (*z*).

Penalties are imposed by 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, on parties neglecting to feed impounded cattle.

If the landlord refrains, at the request of the tenant, from removing the goods from the different rooms in which the landlord or his bailiff finds them, but takes an inventory of the goods, puts a man in possession, and hands to the tenant a notice of distress referring to the inventory, this is to all intents and purposes a distraining and impounding of the goods. Each room is, for the convenience of the tenant, and with his assent, converted into a pound for the goods therein (*a*).

Abandonment of distress.—Leaving possession of goods distrained is not necessarily an abandonment of the distress. If, therefore, a bailiff or party in possession goes away for a temporary purpose, and is then locked out, he may break open the outer door of the house to recover possession of the distress (*b*).

Statutory power of sale.—The statute 2 Will. & M. c. 5, enacted that where any goods and chattels shall be distrained for any rent reserved or due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods shall not, within five days next after such distress taken, with notice thereof and the cause of such taking left at the chief mansion-house, or other most notorious place on the premises charged with the rent, replevy the same with sufficient security, &c.; that then, after such distress and notice, and after the expiration of the said five days, the person distraining "shall and may," with the sheriff or under-sheriff of the county, or with the constable, &c., cause the goods and chattels to be appraised by two sworn appraisers, and after such appraisement "shall and may lawfully sell (*c*) the goods so distrained for the best price (*d*) that can be gotten towards satisfaction of the rent and charges." But now, by the Law of Distress Amendment Act, 1888 (*e*), the

Geo. 2, c. 19, s. 10; Co. Litt. 47 b; *Costworth* v. *Betison*, 1 Ld. Raym. 104.

(*y*) *Smith* v. *Wright*, 6 H. & N. 821; 30 L.J. Ex. 313.

(*z*) *Rich* v. *Woolley*, 5 M. & P. 675; 7 Bing. 651.

(*a*) *Tennant* v. *Field*, 8 E. & B. 336; 27 L.J. Q.B. 33.

(*b*) *Bannister* v. *Hyde*, 29 L.J. Q.B. 141.

(*c*) See *King* v. *England*, 33 L.J. Q.B. 145; 4 B. & S. 782, *post*, p. 737; *Sharp* v. *Fowle*, 12 Q.B.D. 385; 53 L.J. Q.B. 309.

(*d*) See *Hawkins* v. *Walrond*, 1 C.P.D. 280; 45 L.J. C.P. 772.

(*e*) 51 & 52 Vict. c. 21, s. 5.

necessity for appraisement is abolished unless the tenant or owner require in writing an appraisement to be made, in which case he must pay the costs of it. By the same Act the period for replevying is extended from five to fifteen days if the tenant or owner request in writing this extension, and give security for any additional cost caused thereby, but the person levying has power, with the consent in writing of the tenant or owner, to sell the goods at any time before the expiration of this period (*f*).

Tender of rent rendering sale unlawful.—If, after the impounding, and before the sale, a tender of the rent and expenses is made, the landlord cannot lawfully proceed to sell the things distrained; for it has been held that upon the equity of the above statute, which gives the tenant five days to replevy the things distrained (s. 2), the tenant ought to have the same time for tendering the rent and expenses, and that an action is maintainable against a landlord who persists in selling after tender of the rent and costs at any time within the five days (*g*). In the case of a distress of growing crops the tenant may, at any time before the corn is ripe and fit to be cut, tender the rent due, and if, after that, the landlord takes the corn, he may be proceeded against as a trespasser (*h*).

Whenever goods have been seized as a distress for rent, and a tender is made of a sum sufficient to cover the rent actually due, and the cost of the distress up to the time of the tender, and the bailiff refuses to give up the goods and the tenant is obliged to pay a larger sum to get back his goods, he is entitled to an action for damages (*i*). But if the landlord distrains for a larger sum than is due, but not excessively, the tenant should tender the amount really due, if he wishes to make the detention of the goods unlawful (*k*).

Parties to whom tender may be made.—A bailiff authorised to distrain for rent has power given him at the same time to receive the rent, and the landlord has no right to circumscribe the bailiff's authority in this respect, for a tenant whose goods are seized under the extraordinary power vested in the landlord of distraining, ought to be enabled in all cases to release them at once by tender of the rent and costs to the bailiff. The power to receive the rent is therefore necessarily annexed to the warrant to distrain (*l*); but it does not follow, that because the tender may be made to the

(*f*) Sect. 6.

(*g*) *Johnson* v. *Upham*, 21 L.J. Q.B. 252; 2 E. & E. 250, overruling, on this point, *Ladd* v. *Thomas*, 12 Ad. & E. 117; 9 L.J. Q.B. 345, and *Ellis* v. *Taylor*, 8 M. & W. 415; 10 L.J. Ex. 462.

(*h*) *Owen* v. *Legh*, 3 B. & Ald. 470.

(*i*) *Loring* v. *Warburton*, 28 L.J. Q.B. 31; E. B. & E. 507; *Johnson* v. *Upham*, *supra*.

(*k*) *Glynn* v. *Thomas*, 11 Exch. 870; 25 L.J. Ex. 125.

(*l*) *Hatch* v. *Hale*, 15 Q.B. 10, 15; 19 L.J. Q.B. 289.

bailiff who distrains, it may be made also to any bailiff's follower who may be put into temporary possession of the goods (*m*).

Power of sale of growing crops and things fraudulently removed—Tender before sale.—The 11 Geo. 2, c. 19, which enables landlords to distrain things fraudulently removed from the demised premises, also cattle or stock of their tenants depasturing on commons, appurtenant or anyways belonging to the demised premises, and growing crops (*ante*, p. 720), enacts that it shall be lawful for the landlord in convenient time to appraise, sell, or otherwise dispose of the same towards the satisfaction of the rent and charges, in the same manner as other goods and chattels may be appraised and disposed of, the appraisement to be taken when the crops are cut, gathered, cured, and made, and not before; but it is enacted (s. 8), that, if after any distress for arrears of rent so taken, and at any time before the crops shall be ripe and cut, cured or gathered, the tenant or lessee, his executors, &c., shall pay to the landlord or to the steward or other person usually employed to receive the rent, the whole rent then in arrear, with the costs and charges of the distress, then, and upon such payment, or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same shall cease, and the crops and produce distrained shall be delivered up to the tenant.

Notice of distress is not essential at common law to the validity of the distress (*n*). It has been expressly laid down, that if the lord distrain for rent or services, he has no occasion to give notice to the tenant for what thing he distrains, for the tenant by intendment knows what things are in arrear for his lands as rent and services, &c. (*o*); but 2 Will. & M. c. 5, s. 1, requires, as we have seen (*ante*, p. 732), notice of the distress to be given preparatory to a sale by the landlord, and 11 Geo. 2, c. 19, authorising the distress and sale of goods fraudulently removed (*ante*, p. 726), and of the cattle and stock of tenants depasturing on commons appurtenant or belonging to the demised premises, and growing crops (*ante*, p. 720), requires (s. 9) notice of the place where the goods and chattels distrained shall be lodged, to be given within one week to the tenant, or left at his last place of abode.

As the tenant is to have five days (or fifteen upon request (*p*)), under the statute of Will. & Mary, to replevy from the time he receives notice of the distress, the notice should be given as soon as the distress has been levied. If the distress is not clearly intended

(*m*) *Boulton* v. *Reynolds*, 29 L.J. Q.B. 11.

(*n*) *Trent* v. *Hunt*, 9 Exch. 20; 22 L.J. Ex. 318.

(*o*) 1 Roll. Abr. 674, Distress, pl. 1; *Tancred* v. *Leyland*, 16 Q.B. 669; 20 L.J. Q.B. 316.

(*p*) 51 & 52 Vict. c. 21, s. 6.

to include all the goods and chattels upon the demised premises, the landlord must give the lessee distinct notice of the things included in such distress, in order that he may know what he is to replevy. And for this purpose, as soon as the distress is made, whether by the lessor or his bailiff, an inventory of the goods distrained should be made and served upon the lessee, together with the notice of the distress. The notice of the distress should set forth the amount of rent distrained for, and the particular things taken (*q*). A written notice of distress is not invalidated by a statement that the rent is due to *A*, whereas it is due to *B*, provided *B* has authorised the distress (*r*). If the landlord removes and sells goods and chattels which were not included in the inventory and notice, and which have not consequently been comprised in the distress, he is liable to an action for damages at the suit of the tenant (*s*).

Sale.—If the tenant, after he has received notice of the distress, neglects for the period given, to be reckoned exclusively both of the day of distress and of the day of sale, to pay the rent, the lessor or distrainor may sell the goods for the best price (see *infra*) that can be got for them, and apply the purchase-money in discharge of the rent and the costs of the sale (*t*), leaving the surplus, if any, in the hands of the sheriff, under-sheriff, or constable, for the owner's use. If the tenant holds under a covenant not to carry hay or straw off the demised premises, the landlord who has distrained hay or straw must, nevertheless, sell it in the ordinary way for the best price. If he sells it, subject to a condition that the purchaser shall consume it on the land, he is liable to an action by the tenant for not selling it at the best price (*u*).

Costs and expenses.—By 57 Geo. 3, c. 93, it is enacted, that no persons making any distress for rent under 20*l.* shall take or receive out of the produce of the things distrained and sold any more than the following costs and charges: *i.e.*, for levying the distress, 3*s.*; for the man in possession, 2*s.* 6*d.* per day (and even this charge may not under all circumstances be justifiable (*x*)); for the appraisement, 6*d.* in the pound, and the amount of the stamp; for advertisements, 10*s.*; for catalogues, sale, and commission, and delivery of goods to the purchaser, 1*s.* in the pound on the net produce of the sale. If more costs and charges are levied than

(*q*) *Wakeman* v. *Lindsey*, 14 Q.B. 625; 19 L.J. Q.B. 166; *Kerby* v. *Harding*, 6 Exch. 234; 20 L.J. Exch. 163.

(*r*) *Trent* v. *Hunt*, *ante*, p. 734.

(*s*) *Bishop* v. *Bryant*, 6 C. & P. 484.

(*t*) *Robinson* v. *Waddington*, 18 L.J. Q.B. 250; the marginal note of this case, in 13 Q.B. 753, is incorrect.

(*u*) *Ridgway* v. *Stafford* (*Ld.*), 6 Exch. 404; 20 L.J. Exch. 226; *Hawkins* v. *Walrond*, 1 C.P.D. 280; 45 L.J. C.P. 772; *ante*, p. 732.

(*x*) *Arnison*, *Ex parte*, L.R. 3 Exch. 56; 37 L.J. Ex. 57.

those allowed by the Act, the party aggrieved has a summary remedy before two justices for treble the amount of the charges, or he may bring an action for the recovery of them; but it is provided (s. 4) that no judgment shall be given against the landlord for such treble costs, unless he has personally levied the distress. Every broker or other person who shall make and levy any distress is to give a copy of his charges, and of all the costs and charges of the distress, signed by him, to the person on whose goods and chattels any distress shall have been levied, although the rent demanded may exceed the sum of 20*l.* (*y*). When the rent distrained for exceeds 20*l.*, the costs are not limited to any particular amount or fixed scale of charge, but they must be fair and reasonable (*z*).

Effect of non-compliance with statutes authorising sale.—By sect. 19 of 11 Geo. 2, c. 19, where any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agents, the distress itself shall not be deemed to be unlawful, nor the parties making it be therefore deemed trespassers *ab initio;* but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage he shall have sustained thereby, and no more. The plaintiff, therefore, can only recover for an irregularity in distraining and selling where actual damage is proved. For the original taking there is to be no action; the distrainor is to be considered as being in possession of the goods, notwithstanding a subsequent irregularity. And although he holds the goods with a special authority to deal with them in a particular way, and is liable for abusing that authority, yet the Act says that the tenant shall recover full satisfaction for the damage, and no more. Where, therefore, there is no special damage there can be no satisfaction, and a verdict for nominal damages is not sustainable. Where the damages are merely nominal the defendant is entitled to a verdict (*a*). But the statute, as we have seen, does not apply to cases where the original entry upon the premises was effected in an unlawful manner, as by breaking open an outer door, and where, consequently, no valid distress has ever been effected (*b*).

Keeping distress without selling.—It has generally been considered that the words in the 2 Will. & M. c. 5, s. 2, "shall and

(*y*) 1 & 2 Ph. & M. c. 12, s. 2; *Child* v. *Chamberlain*, 5 B. & Ad. 1049.

(*z*) *Lyon* v. *Tomkies*, 1 M. & W. 603; 5 L.J. Ex. 260. The Lord Chancellor has power from time to time to make rules for regulating the fees, charges, and expenses incidental to distresses, and for regulating the securities to be given by bailiffs. See 50 & 51 Vict. c. 21, s. 8; Rules made pursuant to the section, Aug. 31, 1888.

(*a*) *Rodgers* v. *Parker*, 18 C.B. 112; 25 L.J. C.P. 220; *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 L.J. Exch. 246.

(*b*) *Attack* v. *Bramwell*, 32 L.J. Q.B. 146; 3 B. & S. 520, *ante*, p. 728.

may lawfully sell," mean that the landlord must give the statutory notice of the distress, and must proceed to sell, if the tenant does not replevy within the due period, or desire the landlord not to sell. If, however, the landlord should neglect to give notice of the distress, and to sell, but should content himself with keeping the goods in his hands, he will not be liable to an action for the detention or conversion of the chattels, unless the tenant can prove that he had gained a right to have the goods delivered up to him, and that he had sustained some special damage by the detention (*c*). The landlord has a lien for his rent upon the things distrained, and has at common law a right to keep them as a pledge until his rent is paid (*ante*, p. 709), and he can only be made responsible for not selling in an action founded upon the statute; but the landlord may, with the assent of the tenant, detain the things distrained, or convert them to his own use in satisfaction and discharge of the rent (*d*). To obtain a title as against a third person whose goods have been distrained, there must be an actual sale; a taking of the goods by the landlord at the appraised value is not sufficient (*e*). When a landlord distrains and does not sell he cannot while he holds the distress bring an action for rent (*f*).

Indemnification of bailiffs.—If a landlord employs a bailiff to make a distress on a tenant for rent alleged to be due from such tenant to the landlord, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress in an action brought against him by such tenant, the bailiff may maintain an action against the landlord for compensation (*g*).

Action for damages for wrongful distress.—If the landlord has distrained for more rent than is due, and the tenant has tendered the amount due before the distress made, his remedy, if a distress is afterwards made, would be either by replevin, or an action for a trespass, or for a wrongful seizure and conversion of the things distrained (*ante*, p. 728). If the tender is made after the distress, an action would be maintainable for the detention of the property (*h*). The mere retaining by the landlord of the goods distrained after the tenant has gained a right to have them delivered up to him will not render the landlord liable to an

(*c*) *West* v. *Nibbs*, 4 C.B. 186; *Glynn* v. *Thomas*, 11 Exch. 870; 25 L.J. Ex. 125; *Rodgers* v. *Parker*, *supra*; see *Fell* v. *Whittaker*, L.R. 7 Q.B. 120; 41 L.J. Q.B. 78.

(*d*) *Jones* v. *Sawkins*, 5 C.B. 142; 17 L.J. C.P. 92.

(*e*) *King* v. *England*, 33 L.J. Q.B. 145; 4 B. & S. 782.

(*f*) *Lehain* v. *Philpott*, L.R. 10 Ex. 242; 44 L.J. Ex. 245.

(*g*) *Rawlings* v. *Bell*, 1 C.B. 959; 14 L.J. C.P. 265; *Ibbett* v. *De La Salle*, 6 H. & N. 237; 30 L.J. Exch. 44.

(*h*) *Gulliver* v. *Cosens*, 1 C.B. 788; 14 L.J. C.P. 215; *Glynn* v. *Thomas*, 11 Exch. 870; 25 L.J. Ex. 125; *ante*, p. 733.

action for a trespass. A landlord, therefore, who refuses a proper tender, is not to be regarded as a trespasser, merely by reason of his nonfeasance in failing to deliver up the distress on being required so to do, but his refusal may amount to evidence of a conversion (*i*). If a landlord makes a second distress for the same rent when he might have taken sufficient at first, he is liable to an action for the wrongful conversion of the things seized under the second distress (*k*). The wrongful seizure of beasts of the plough, or of the tools and implements of a man's trade, may be made the foundation of an action of trespass as well as of an action upon the case (*l*).

An action for an excessive distress may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself (*m*). Where the plaintiff was tenant of a house, in which were goods that had been assigned to his wife's trustee, who lived with them, but the plaintiff had the actual use and enjoyment of the goods, it was held he had sufficient special property in the goods to entitle him to maintain an action for an excessive distress (*n*).

Parties to be made defendants.—Where a landlord authorised his bailiff to distrain for rent, due to him from his farm tenant, and the bailiff by mistake distrained the cattle of another person beyond the boundary of the farm, and sold them, and paid over the money he received for them to the landlord, it was held that the landlord was not responsible for the trespass, unless he received the money knowing of the wrongful seizure, or unless he meant to adopt the act of the bailiff at all hazards (*o*). But if the landlord has appointed an inexperienced, insolvent, or incompetent bailiff, or has neglected to furnish him with proper instructions, he will be responsible in damages in an action for negligence. Every landlord who gives a broker a general authority to distrain is responsible if his broker exceeds his authority, by distraining things which are not distrainable (*p*), or if he sells goods without having them duly appraised (*q*); but a landlord who does not personally interfere in making a distress is not liable for the

(*i*) *West* v. *Nibbs*, 4 C.B. 172; 17 L.J. C.P. 150.

(*k*) *Dawson* v. *Cropp*, 1 C.B. 961; 14 L.J. C.P. 281; *ante*, p. 730.

(*l*) *Nargatt* v. *Nias*, 28 L.J. Q.B. 143; 1 E. & E. 439.

(*m*) *Fisher* v. *Algar*, 2 C. & P. 374; *Bail* v. *Mellor*, 19 L.J. Ex. 279; see further, as to actions for unlawful seizure and conversion, and unlawful detention of chattels, Addison on Torts, pp. 498—507 (ed. 7).

(*n*) *Fell* v. *Whittaker*, L.R. 7 Q.B. 120; 41 L.J. Q.B. 78. As to the remedy for a wrongful distress under the Agricultural Holdings Act, 1883, see sects. 46—49.

(*o*) *Lewis* v. *Read*, 13 M. & W. 837; 14 L.J. Ex. 295; *Freeman* v. *Rosher*, 13 Q.B. 780; 18 L.J. Q.B. 340.

(*p*) *Gauntlett* v. *King*, 3 C.B. N.S. 59.

(*q*) *Haseler* v. *Lemoyne*, 5 C.B. N.S. 530; 28 L.J. C.P. 103.

neglect of the broker in not delivering a copy of his charges, &c., pursuant to the statute (*r*) (*ante*, p. 735).

All persons who aid, or counsel, or direct, or join in a trespass, are joint-trespassers, but one partner cannot drag another into a trespass without his previous consent, or without his subsequent concurrence (*s*).

A cognizance by a defendant, as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor (*t*).

Avowries by joint tenants, coparceners, and tenants-in-common.—If the distress is made by a bailiff or agent on behalf of all, all must join in the avowry and conusance (*u*). Tenants-in-common, on the other hand, must avow the taking of the distress in respect of their several shares. Thus, if three tenants-in-common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more (*x*). But one of several tenants-in-common may, as we have seen, distrain and avow for his own share of the rent (*ante*, p. 715).

The old plea of *viens in arrere* simply alleged that no part of the rent, alleged in the avowry to be in arrear, was in arrear. Under that plea payments made to a ground landlord, or other incumbrancer having claims paramount to the claim of the immediate landlord making the distress, could be given in evidence in reduction of the rent, as such payments were always presumed to be authorised by the landlord, he being obliged to protect the tenant from them, and were treated as payments of rent by the tenant (*y*). But payments which are not a direct charge upon the demised premises cannot be given in evidence in satisfaction and discharge of the rent, unless they were directed or sanctioned by the landlord (*z*). The meaning of the plea *viens in arrere* was, that the plaintiff at the time of the distress was in arrear to nobody; and if he had not paid anybody, he could not, under this plea, contest the defendant's right to the rent (*a*).

Plea of not guilty "by statute" in actions for unlawful distress.—By 11 Geo. 2, c. 19, s. 21, it is enacted, that in all actions of

(*r*) *Hart* v. *Leach*, 1 M. & W. 560; 5 L.J. Ex. 244. As to distress by certified bailiffs, see 51 & 52 Vict. c. 21, s. 7.

(*s*) *Petrie* v. *Lamont*, Car. & M. 93, 96.

(*t*) *Whitehead* v. *Taylor*, 10 Ad. & E. 210; 9 L.J. K.B. 65.

(*u*) *Stedman* v. *Bates*, 1 Salk. 389.

(*x*) Litt. ss. 314—317; *Philpott* v. *Dobbinson*, 3 M. & P. 320; 7 L.J. (O.S.) C.P. 248.

(*y*) *Jones* v. *Morris*, 3 Ex. 742; 18 L.J. Ex. 477. As to payments under the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 96, see *Ryan* v. *Thompson*, L.R. 3 C.P. 144; 37 L.J. C.P. 134.

(*z*) *Davies* v. *Stacey*, 12 Ad. & E. 506; 9 L.J. Q.B. 393.

(*a*) Wightman, J., *Wheeler* v. *Branscombe*, 5 Q.B. 379; 13 L.J. Q.B. 83.

trespass, or upon the case, against persons entitled to rents or services, their bailiffs or other persons, relating to any entry upon premises chargeable with such rents or services, or to any distress or seizure thereupon, it shall be lawful for the defendants to plead the general issue, and give the special matter in evidence, inserting in the margin of the plea the words "by statute" (*b*). Under the plea of not guilty "by statute," therefore, the defendant may give in evidence that he entered the plaintiff's house under a warrant of distress for rent, and was forcibly turned out of possession, and that he thereupon re-entered, and broke open the door of the house, in order to seize the plaintiff's goods. Everything which he might lawfully do in order to make the distress is admissible in evidence under this plea (*c*). The plea puts in issue not only the matter of justification, but the tenancy and ownership of the goods (*d*).

Plea of recovery of goods in action of replevin.—A plea by the defendant, setting forth that the plaintiff commenced and prosecuted an action against the defendant in the county court of the district within which the distress was taken, and obtained the judgment of the court for the return of the goods, and has recovered his goods, and damages for the taking and detaining them, is a good plea in bar to an action for an excessive distress, as it shows that the plaintiff has already had his remedy (*e*). So, where the defendant's broker appeared upon the plaintiff's premises, and said, "Unless you pay me 21*l.* for rent, and three guineas for expenses, I shall take your goods," and the plaintiff paid the money, it was held that it did not lie in the defendant's mouth, after receiving the money, to say there was no distress (*f*).

Proof of excessive distress.—It is not, as we have seen, for every trifling excess that an action is maintainable for an excessive distress. It must be disproportionate to some considerable extent (*ante*, p. 729), and must be productive of actual loss or damage to the plaintiff (*g*). If the ground of action is that the defendant distrained for more rent than was really due, the plaintiff must prove that he tendered to the defendant the sum really due, with enough to cover the lawful charges of the distress (*h*); or that the defendant sold the things distrained, and realised by the sale of them more than was sufficient to satisfy the rent really due with

(*b*) R.S.C., Ord. XIX. r. 12; Ord. XXI. r. 19. See, however, 56 & 57 Vict. c. 61, s. 2 (e).

(*c*) *Eagleton* v. *Gutteridge*, 11 M. & W. 469; 12 L.J. Ex. 359.

(*d*) *Williams* v. *Jones*, 11 Ad. & E. 643.

(*e*) *Phillips* v. *Berryman*, 2 Doug. 288.

(*f*) *Hutchins* v. *Scott*, 2 M. & W. 811; 6 L.J. Ex. 186.

(*g*) *Rodgers* v. *Parker*, 18 C.B. 112; 25 L.J. C.P. 220; *Lucas* v. *Tarleton*, 3 H. & N. 120; 27 L.J. Exch. 246; *Piggott* v. *Birtles*, 1 M. & W. 441; 5 L.J. Ex. 193.

(*h*) *Glynn* v. *Thomas*, 11 Exch. 870; 25 L.J. Exch. 125.

the costs of the distress (*i*). A distress may, as we have seen, be excessive, although the goods when sold may realise less than the rent and expenses (*k*).

Proof of waiver of right of action.—A right of action for an unlawful or excessive distress once vested, can only be destroyed by a release under seal, or by the acceptance and receipt of something in satisfaction of the wrong done. A tenant, therefore, does not waive his right of action for an excessive distress, though he afterwards enters into a written agreement with his landlord respecting the sale of the effects seized (*l*).

Proof of tenancy as between plaintiff and defendant, if not admitted upon the pleadings, may be established by parol evidence of the fact, notwithstanding that the tenancy has been created by a lease or agreement in writing not produced (*m*). Proof of payment and acceptance of rent will establish the fact of the relationship of landlord and tenant between the person paying and the person receiving the rent, notwithstanding the existence of a written contract of demise between them which is not produced (*n*). "I have no doubt," observes Bayley, J., "that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the landlord" (*o*). But payment of rent under a distress is not a conclusive admission of the title of the distrainor. Counter-evidence may be given on the part of the tenant to show that the distrainor never had any title (*p*). Proof of payment of rent by a tenant to an agent of the landlord who has received it on account of the landlord, and paid it over to him, is evidence against the tenant that he holds of such landlord, although the latter was unknown to him, and he supposed at the time he paid the money that the agent received it on account of another person (*q*). But proof of payment of rent to a particular individual claiming to be entitled to receive it, is only *primâ facie* evidence of a tenancy under the claimant, and the presumption of the particular tenancy may be rebutted by proof that the payment was made by mistake or under a false representation (*r*). Proof of an attornment by the tenant to a receiver

(*i*) *Tancred* v. *Leyland*, 16 Q.B. 680; 20 L.J. Q.B. 316; *French* v. *Phillips*, 1 H. & N. 564; 26 L.J. Ex. 82.

(*k*) *Smith* v. *Ashforth*, 29 L.J. Ex. 259, *ante*, p. 729.

(*l*) *Willoughby* v. *Backhouse*, 2 B. & C. 821; 2 L.J. (O.S.) K.B. 174; *Baylis* v. *Usher*, 4 M. & P. 790; 9 L.J. (O.S.) C.P. 42.

(*m*) *Rex* v. *Kingston-on-Hull*, 7 B. & C. 611; 6 L.J. (O.S.) M.C. 24.

(*n*) *Doe* v. *Morris*, 12 East, 237, 239, n.

(*o*) *Panton* v. *Jones*, 3 Campb. 372; *Cooper* v. *Blandy*, 4 M. & Sc. 569; 3 L.J. C.P. 274.

(*p*) *Knight* v. *Cox*, 18 C.B. 645; 25 L.J. C.P. 314.

(*q*) *Hitchings* v. *Thompson*, 5 Exch. 54; 19 L.J. Ex. 146.

(*r*) *Fenner* v. *Duplock*, 9 Moore, 40; 2 L.J. (O.S.) C.P. 102.

appointed by the Court of Chancery is proof of a tenancy by estoppel as between the tenant and the receiver; but the attornment does not enure to the benefit of the person subsequently declared by the court to be the owner of the property (*s*).

Proof of the nature and terms of a tenancy will best be effected by production of the written demise, where the tenant holds under a lease or agreement in writing. If the contract is in the hands of the defendant, the plaintiff who desires to prove the amount of the rent, the time at which, or the circumstances under which, it became due, should give notice to the defendant to produce it at the trial, in order to let in secondary evidence of its contents (*t*). The old rule of law that the terms of a tenancy or the amount of the rent can be proved only by the production of the writing when the tenant holds under a written contract of demise, does not exclude evidence of admissions and acknowledgments of those terms made by a defendant holding under a lease in writing not produced. It has been held that whatever a person says, or his acts amounting to admissions, are evidence against himself, although they relate to the contents of some deed or writing, and go to prove the nature and contents of a written instrument not produced (*u*). Where a defendant held lands under a written demise, it was held that the defendant's verbal declarations of the existence of the tenancy, and of the amount of the rent paid by him to the plaintiff, were admissible in evidence against him, without the production of the writing under which he held (*x*). Where on the letting of lands the terms of the demise were read from a printed paper by the landlord's agent, and the tenant entered and occupied, and paid rent, it was held that the agent might give oral evidence of the terms, using the printed memorandum to refresh his memory (*y*).

Damages recoverable—Double value.—By sect. 5 of 2 Will. & M. sess. 1, c. 5, if any distress and sale be made by virtue and under colour of that Act for rent pretended to be in arrear and due, where no rent is in arrear or due to the person distraining, the owner of the goods distrained and sold may, by action of trespass, or upon the case, against the person distraining, recover double the value of the chattels so distrained and sold, together with full costs of suit. When an action is brought upon this statute, the jury should be directed, if they find for the plaintiff, to ascertain in the

(*s*) *Evans* v. *Mathias*, 7 E. & B. 590; 26 L.J. Q.B. 309.

(*t*) Roscoe's Nisi Prius Evidence, p. 9 (ed. 17).

(*u*) *Slatterie* v. *Pooley*, 6 M. & W. 668; 10 L.J. Ex. 8; *Boulter* v. *Peplow*, 9 C.B. 493; 19 L.J. C.P. 190; *Earle* v. *Picken*, 5 C. & P. 542.

(*x*) *Howard* v. *Smith*, 3 M. & Gr. 254; 10 L.J. C.P. 245.

(*y*) *Bulton (Lord)* v. *Tomlin*, 5 Ad. & E. 863; 6 L.J. K.B. 45.

first place the actual value of the goods, and then to give damages to the plaintiff to the amount of double the value. If the jury assess the damages generally at a certain sum, and it turns out that they have assessed only the actual value or the single damage, the mistake cannot be rectified, and judgment cannot be entered up for the double or treble value. But if they expressly find and assess only the actual value, the plaintiff may apply to the court to have judgment entered up for double value, according to the statute (*z*).

Whenever the landlord has distrained, without any right or authority to distrain, there is a trespass upon, and injury to, the realty, independently of the trespass in regard of the seizure of the chattels, and the tenant is entitled to recover substantial damages for the disturbance of the peaceful possession of his house, as well as for the unlawful seizure of the goods.

The damages recoverable where the entry upon the premises was effected in an unlawful manner, and the parties had no right to touch the goods after they had entered, by reason of the trespass in entering, are the same as would be recoverable from a stranger who had broken and entered the house without any colour of authority, and it does not lie in the defendant's mouth to say, in mitigation of damages, that he had sold the goods, and applied the proceeds of the sale in satisfaction and discharge of the rent (*a*). Where a distress is wrongful, the party distrained upon has a right to be replaced in the situation in which he was before the seizure. If goods, therefore, wrongfully distrained have been sold, or money has been paid to procure the liberation of goods distrained, the value of the goods in the one case and the money paid in the other will be recoverable, as well as any special damage that may have been sustained, and the landlord cannot appropriate the money he has received by trespass and wrong in payment of the rent due to him (*b*).

Recovery of special damage.—By the express terms of sect. 19 of 11 Geo. 2, c. 19 (*ante*, p. 736), the party injured by an unlawful act committed *after* a lawful distress, is only to recover the amount of damage he has actually sustained. This damage, in the case of a wrongful seizure and sale of growing crops, is the difference between the amount for which the crops would have been sold if the sale had been regular, and what they actually sold for; and where there is no difference, or it is proved that the crops were sold

(*z*) *Masters* v. *Farris*, 1 C.B. 715; Addison on Torts, p. 85 (ed. 7).

(*a*) *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L.J. Q.B. 146.

(*b*) *Attack* v. *Bramwell*, *supra*; *Sowell* v. *Champion*, 6 Ad. & E. 407; 7 L.J. Q.B. 197.

for more than they were worth, no damages are recoverable, and the defendant is entitled to a verdict (*c*).

In an action for selling goods distrained for rent without complying with the provisions of 2 Will. & M. sess. 1, c. 5 (*ante*, p. 732), the measure of damages is the real value of the goods sold minus the rent. The wrongdoers cannot get off by handing over to the plaintiff the mere proceeds of the sale (*d*).

In an action for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, the plaintiff is not entitled to recover the full value of the crops beyond the amount for which the distress ought to have been levied. "The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession; and some compensation for the loss of the absolute ownership and power of disposition for the same time; or, if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a greater amount" (*e*).

If the landlord takes some things that are distrainable, and other things which are not, this does not render the distress wrongful *ab initio;* but the wrong is limited to the seizure of the goods which were not distrainable, and the tenant is entitled to recover only the actual damage sustained by him from the seizure of those particular chattels (*f*). In respect of the things not distrainable, the distrainor is a trespasser *ab initio*, and the full value of them is recoverable (*g*).

Nominal damages are recoverable in an action for an excessive distress where no actual damage is proved (*h*).

(*c*) *Rodgers* v. *Parker*, 18 C.B. 112; 25 L.J. C.P. 220; *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 L.J. Ex. 246; *Proudlove* v. *Tremlow*, 1 Cr. & M. 326; 2 L.J. Ex. 111.

(*d*) *Knight* v. *Egerton*, 7 Exch. 407; *Biggins* v. *Goode*, 2 Cr. & J. 367; *Whitworth* v. *Maden*, 2 C. & K. 517.

(*e*) *Piggott* v. *Birtles*, 1 M. & W. 451; 5 L.J. Ex. 193.

(*f*) *Harvey* v. *Pocock*, 11 M. & W. 740; 12 L.J. Ex. 434.

(*g*) *Keen* v. *Priest*, 4 H. & N. 236; 28 L.J. Ex. 157; *Attack* v. *Bramwell*, *ante*, p. 743; *Edmondson* v. *Nuttall*, 34 L.J. C.P. 102; 17 C.B. N.S. 280.

(*h*) *Chandler* v. *Doulton*, 3 H. & C. 553; 34 L.J. Exch. 89. But it is not so in the case of an irregularity after distress under 11 Geo. 2, c. 19, s. 19, *ante*, p. 736.

SECTION II.

THE LETTING OF CHATTELS.

Bailments for hire.—The term bailment denotes, in the common law, a delivery or transfer of a chattel from one person to another, in order that something may be done with it, either for the benefit of the owner, or of the party who receives it as the temporary possessor, or for the mutual benefit of both of them, and is applied to contracts for the letting and hiring of chattels, as well as to contracts for the delivery of them to persons for safe custody or to workmen to be worked upon or dealt with in the course of their employment. The term is also equally applicable to contracts for the letting and hiring of realty, although it is not used in the common law to denote that class of contracts. In this class of contracts, the person who delivers the chattel for the purposes of the contract is called the bailor, and the party who receives it the bailee. If one man bails or delivers a chattel to another to be used for hire upon the express or implied understanding that the chattel is to be put into a serviceable state and made ready for immediate use by the hirer, there is no implied warranty or undertaking on the part of the bailor that the chattel is in any particular state or condition, or fit for any particular purpose. But, if he expressly or impliedly represents it to be fit for immediate use, or to be applicable to any particular purpose, he impliedly warrants the use for which he receives the hire. If a man, for example, lets out the naked hull or the mere fabric of a vessel, upon the terms that the hirer is to man and equip her, and get her ready for sea, there is no implied warranty or undertaking on the part of the shipowner that the vessel is in any particular state and condition at the time of the making of the contract. But, if he mans and provisions and equips the vessel himself, and holds her out as fit for immediate use, there is an implied promise or undertaking on his part that she is seaworthy and fit for use, and properly found and provided with stores and provisions, seamen and officers, and all things needful to the due prosecution of the voyage (*a*). And, if a man lets out furniture for immediate use, there is an implied warranty

(*a*) *Lyon* v. *Mells*, 5 East, 437; *Burges* v. *Wickham*, 33 L.J. Q.B. 17; 3 B. & S. 669; *Stanton* v. *Richardson*, L.R. 9 C.P. 390; 43 L.J. C.P. 230; *Steel* v. *State Line Steamship Co.*, 3 App.Cas. 72; *Tattersall* v. *National Steamship Co.*, 12 Q.B.D. 297; 53 L.J. Q.B. 332; *The Glenfruin*, 10 P.D. 103; 54 L.J. P. 49; *The Laertes*, 12 P.D. 187; 56 L.J. P. 108; *Gilroy* v. *Price*, (1893) A.C. 56; *Queensland National Bank* v. *P. & O. Co.*, (1898) 1 Q.B. 567; 67 L.J. Q.B. 402; *Maori King* v. *Hughes*, (1895) 2 Q.B. 550; 65 L.J. Q.B. 168.

on his part that it is fit for use, and free from all defects inconsistent with the reasonable and beneficial enjoyment of it (*b*). If he lets out a horse bridled and saddled, and prepared for immediate use by an equestrian, he impliedly warrants the equipments to be road-worthy and fit for use, and the horse itself to be well shod (*c*), and free from such vices and defects as render it dangerous and unfit to ride.

Duties and responsibilities of hirers of chattels.—If a coach-proprietor lets his coach and horses for a journey, and the coach is driven by the coachman, and is under the direction and management of the servants, of the owner, the latter is bound to keep the horses properly shod, and the carriage in good travelling order; but, if the possession thereof is transferred to the hirer, and the carriage is driven and managed by the hirer's servants, this duty then falls upon the hirer, although the owner or letter of the chattel may, under certain circumstances, be obliged to repay to the hirer the money expended by him in repairs. Whenever a chattel delivered to a hirer to be used for hire has sustained a partial injury through an inherent defect in the article itself, or by reason of some inevitable accident which threatens its destruction, and the effects of such partial injury may be obviated and the chattel preserved for future use by repairs, there is an implied authority from the owner to the hirer to undertake the necessary repairs, and incur all such expenses as a prudent man would, under the circumstances, incur for the preservation of his own property.

Use of chattels let to hire—Losses from negligence.—Every hirer of a chattel is bound to use the thing let in a proper and reasonable manner, to take the same care of it that a prudent and cautious man ordinarily takes of his own property (*d*), and to return it to the bailor or owner at the time appointed for its return (or within a reasonable period after request, if no such time has been agreed upon), in as good condition as it was in at the time of the bailment, subject only to the deterioration produced by ordinary wear and tear and reasonable use, and by injuries caused by accidents which have happened without any fault or neglect on the part of the hirer. Where the hirer contracted to deliver up a barge at the conclusion of the hiring "in good working order with all her rigging, gear and implements complete," it was held that this must be construed with reference to the condition of the barge (which was an old one) at the commencement of the hiring (*e*).

(*b*) *Sutton* v. *Temple*, 12 M. & W. 60; 13 L.J. Ex. 17.

(*c*) *Blakemore* v. *Bristol & Exeter Ry.* 8 E. & B. 1051; 27 L.J. Q.B. 167.

(*d*) *Coupé Co.* v. *Maddick*, (1891) 2 Q.B. 413; 60 L.J. Q.B. 676.

(*e*) *Shroder* v. *Ward*, 13 C.B. N.S. 410; 32 L.J. C.P. 150.

Losses from piracy, robbery, theft, disease, and accident.—If the thing let to hire perishes, or is destroyed by fire, or is stolen without any neglect on the part of the hirer, the latter will not be responsible for the loss (*f*); but in cases of stealing, a robbery by force must be proved, or, if there has been a secret theft, it must be shown by the hirer that he had taken all such precautions as are ordinarily taken by prudent men to protect their own property. If a ship hired for a particular voyage, and placed in the possession and under the control of the hirer, be captured by pirates, or be lost in a storm in the ordinary course of the voyage, the owner must bear the loss; but, if the hirer has deviated from the ordinary course, and sailed unnecessarily through dangerous channels, or into seas infested with pirates, and needlessly encountered risks not contemplated by the owner at the time of the hiring, and which would probably not have been run by him except for a greatly increased rate of remuneration, the hirer is liable for the loss. An owner of a chattel which is out on hire for an unexpired term may maintain an action against a third person for a permanent injury thereto (*g*).

Determination of bailment.—If chattels have been bailed or let to hire for a certain term, and the bailee does an act which is equivalent to the destruction of the chattels, or which is entirely inconsistent with the terms of the bailment; if he sells, or attempts to sell, the chattels, or to dispose of them in such a way as to put it out of his power to return them, the act operates like a disclaimer of tenancy (*ante*, p. 655), the bailment is at an end, and the possessory title reverts to the bailor, and entitles him to maintain an action for the value of the chattels (*h*).

Loans of money to be used for hire.—The lending of money for hire is ordinarily denominated a loan at interest, as distinguished from a *commodatum* or gratuitous loan, where the sum advanced only is paid back without any interest or fruits of increase. A loan of money to be used for hire is a loan for use and consumption, the identical thing lent not being intended to be returned, but its equivalent in value and kind. The absolute property, therefore, in the subject-matter of the loan passes together with the transfer of the possession to the hirer or borrower; and the latter becomes indebted to the lender in an equivalent in value and amount, with interest, which must be paid and rendered to the latter at the time agreed upon, or within a reasonable period after demand made, in

(*f*) *Williams* v. *Lloyd*, W. Jones, 179; *Taylor* v. *Caldwell*, 3 B. & S. 836; 32 L.J. Q.B. 164.

(*g*) *Mears* v. *L. & S. W. Ry.* 11 C.B. N.S. 850; 31 L.J. C.P. 220; and see *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L.J. Ex. 231.

(*h*) *Fenn* v. *Bittlestone*, 7 Exch. 159; 21 L.J. Ex. 41.

case no time for its return has been limited. The liability of the hirer or borrower, consequently, to repay the equivalent amount is not discharged by the loss of the money from robbery, fire, or inevitable accident. On a contract to lend money, no action will lie for the money; an action will only lie for breach of the contract; the measure of damages will be the loss sustained by the borrower by reason of the breach (*i*).

Moneylenders.—The rights of persons lending money at interest are dealt with by the Moneylenders Act, 1900 (*k*). The term "moneylender" is defined to include every person whose business is that of moneylending, or who advertises or holds himself out as carrying on that business; but does not include pawnbrokers, registered friendly, building or loan societies, any corporate body authorised by statute to lend money or any person *bonâ fide* carrying on banking or insurance business, or "any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money."

Where any such moneylender takes proceedings for the enforcement of any agreement or security for money lent the court may reopen the transaction if it is satisfied that the interest charged is excessive and that the transaction is harsh and unconscionable, and may relieve the person sued from the payment of any amount in excess of the sum which the court may adjudge to be fairly due. The like powers may be exercised on an application for a proof by a moneylender in any bankruptcy proceedings (*l*). In order that the transaction may be reopened, it must, in addition to satisfying other conditions in sect. 1, be harsh and unconscionable in the sense that it would have given rise to a claim for relief from a court of equity before the passing of the Act (*m*).

Liabilities of borrower—Care to be taken of things borrowed—Negligence and misconduct of borrower.—The borrower is obliged to render back the identical thing lent in as good a condition as it was in when borrowed, subject only to the deterioration resulting from inherent defects or produced by ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required (*n*). "The borrower is bound," observes Holt, C. J., "to the strictest care and diligence to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by

(*i*) *South African Territories* v. *Wallington*, (1897) 1 Q.B. 692; 66 L.J. Q.B. 551.

(*k*) 63 & 64 Vict. c. 51.

(*l*) Sect. 1. Sect. 2 compels moneylenders to register their names and to carry on business in their registered names.

(*m*) *Wilton* v. *Osborne*, (1901) 2 K.B. 110; 70 L.J. K.B. 507.

(*n*) *Handford* v. *Palmer*, 5 Moore, 74.

the use of them, so that, if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse to go westward, and the bailee go northward, if any accident happen to the horse on the northern journey, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than as he was lent, that accident would not have happened to him" (*o*). If a horse is lent for the performance of an ordinary journey, and the borrower leaves the high road and travels unnecessarily through by-paths or dangerous roads, and the horse falls and is injured, he will be responsible to the lender; but, if the horse is lent for the purpose of hunting, then the borrower is justified in using it in by-paths and dangerous places, and may expose it to all the ordinary risks of the chase, because those risks are necessarily incident to the use for which the horse was borrowed, and were known to and must have been contemplated by the lender.

The owner must stand to all the ordinary risks to which the chattel is naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer. If a carriage, for example, let to hire, breaks down on the ordinary public thoroughfare, through the badness of the road, or is injured by a flood or inundation, the owner must bear the loss, although the carriage was driven by the servants and horses of the hirer. But if the hirer had gone out of his way to meet the danger—if he had travelled by unusual and difficult roads, or crossed a plain subject to floods, when he might have kept the high ground, and been safe, he must make good the loss that has been occasioned thereby. If the owner sends his own postilion or coachman to drive the carriage, the hirer is discharged from all attention to the horses and the risks of the road, and is bound only to take ordinary care of the glasses and inside of the carriage whilst he sits in it, unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands (*p*). If a horse is hired as a saddle-horse, the hirer has no right to use it in a cart, or as a beast of burden; if it is hired to go to Richmond, he has no right to go with it to York; and if, during such misuser, a loss occurs, the hirer will be responsible therefor. If a horse hired for a journey is taken ill on the road, and the hirer calls in a farrier, he will not be responsible if the horse dies, although the death may have been occasioned by the injudicious treatment of the latter; but if the hirer neglects to

(*o*) *Coggs* v. *Bernard*, 2 Raym. 915; Bract. lib. 3, ch. 2, s. 1, pp. 99, 100.
(*p*) Jones on Bailments, 88 (ed. 4).

avail himself of proper advice and assistance, or chooses ignorantly to prescribe himself, and from unskilfulness gives the horse improper medicine, and the horse dies, he is liable to the owner for the loss (*q*). It is of course the primary duty of the hirer, in the absence of an express stipulation to the contrary, to supply an animal hired by him with suitable food during the time it is intrusted to him for use; and if a hired horse is exhausted, or becomes ill, and refuses its food, and the hirer notwithstanding pursues his journey, and by so doing injures or kills the horse, he will be responsible therefor to the owner (*r*).

The gratuitously permitting a person to use a shed, by himself or his servant for a particular purpose, is a mere revocable licence, and has no analogy to a bailment of personal property; and the only duty imposed on such person is that there shall not be negligence in the use of the shed; and he is not liable for the negligence of his servant not within the scope of his employment (*s*).

Losses from ordinary casualties.—The measure of care and diligence to be exercised for the protection and preservation of a thing bailed by way of *commodatum*, whilst it remains in the possession of the borrower, is that amount of care, prudence, and foresight which the most vigilant and careful of men exercise for the preservation and protection of their own property. The foundation for this increased liability on the part of the borrower, in comparison with the hirer of a chattel, arises from the fact that the lender himself derives no benefit from the contract, but in making the bailment performs a gratuitous act of kindness dictated by his confidence in the bailee. The borrower cannot be made responsible for inevitable accidents, or casualties which could not have been foreseen, and which no human prudence could have guarded against; but he will be answerable for the "least neglect." If the borrower of a horse puts the horse in the stable, and the horse is stolen from thence, the borrower will not be answerable for him. But, if the borrower or his servant leave the stable-door open at night, and thieves take the opportunity of that and steal the horse, he will be chargeable for the loss; for the neglect to lock the door may have encouraged the thieves, and been the occasion of the robbery (*t*).

Misuser by borrower—Want of skill.—If the borrower takes the horse off the high road against the will of the lender, and rides him into wet and slippery ground, and the horse slips and is

(*q*) *Deane* v. *Keate*, 3 Campb. 4.
(*r*) *Handford* v. *Palmer*, 5 Moore, 79; *Bray* v. *Mayne*, 1 Gow, N.P.C. 1.
(*s*) *Williams* v. *Jones*, 33 L.J. Ex. 297; 3 H. & C. 256.
(*t*) *Coggs* v. *Bernard*, 2 Raym. 916; Bract. lib. 3, ch. 2, p. 99; Doctor and Student, Dial. 2, ch. 38.

injured, the borrower must make good the loss. It has been said that every lender of a horse for riding impliedly bargains, at the time he makes the loan, for the exercise on the part of the borrower of competent skill in riding and the management of a horse (*u*); but, if the bailor chooses, without making any previous inquiry, to entrust a fiery and high-spirited horse to a stranger of whose skill in horsemanship he knows nothing, he has no right to expect the management and dexterity of an experienced rider. Neither, if he lends valuable property to a notorious drunkard or a notoriously wild and reckless character, has he any right to expect the care and attention of a very vigilant and painstaking person (*x*). The use of the loan, moreover, is strictly personal to the borrower, founded on the confidence reposed in him, and does not, in general, warrant a user by his servants (*y*).

Restoration of thing borrowed or its equivalent—Loss by robbery, fire, or inevitable accident.—In the case of a loan by way of MUTUUM, the borrower is bound to restore, at the time agreed upon or within a reasonable period after request, an article of the same kind and quality as the one originally lent to him. If, by the agreement of the parties, an article of a different character is to be returned, the contract is not a *mutuum*, but an exchange or sale (*z*). As the right of property in the thing bailed is transferred to the bailee by a bailment by way of *mutuum*, so also is the risk of loss. If, therefore, the bailee is robbed before he reaches home, or the thing bailed is destroyed by wreck, fire, or inevitable accident before it can be used, the bailee must, nevertheless, pay the equivalent which he owes to the bailor at the time appointed (*a*). When the loan is made by way of COMMODATUM, the borrower must return the specific thing lent within a reasonable period after request, and if he neglects so to do, he is responsible for all accidents that afterwards happen to it. He has no right to detain the thing borrowed for any antecedent debt due to him. "The plain reason is that it would be a departure from the tacit obligations of the contract. No intention to give a lien for a debt can be implied from the grant of a mere favour." Neither can the borrower set up a right to detain the chattel for the payment of necessary expenses incurred by him in the keeping and preserving it (*b*).

Adverse claimants.—Eviction by title paramount, post, p. 782.

Implied obligations and duties of lender.—There is an implied

(*u*) Jones on Bailments, 65 (ed. 4); *Wilson* v. *Brett*, 11 M. & W. 115.
(*x*) Bract. lib. 3, tit. 2, s. 1, 99 b.
(*y*) *Bringloe* v. *Morrice*, 1 Mod. 210.
(*z*) *South Australian Insurance Co.* v. *Randell*, L.R. 3 P.C. 101.
(*a*) Doct. & Stud. Dial. 2, ch. 38; Bract. 99 a, b.
(*b*) *Turner* v. *Ford*, 16 M. & W. 212; 15 L.J. Ex. 215.

undertaking on the part of the lender to the borrower of a chattel not to conceal from the borrower secret defects in the chattel known to the lender, which may make the use of the chattel perilous to the borrower. Thus, if one man lends a gun to another, and the lender knows at the time he lends the gun that it is unsafe and dangerous to use, and neglects to disclose the fact to the borrower, he will be responsible in damages to the latter if the gun bursts and injures him (*c*). But a gratuitous lender of an article is not liable for injury resulting to the borrower or his servant, while using it, from a defect not known to the lender (*d*).

Loans of money to one of several partners.—Where one of several partners, who was travelling for orders, called upon the plaintiff in the country, and, after transacting business with him, on account of the firm, borrowed a sum of money to defray his expenses back to London, Lord Kenyon held that, as the money was lent to the partner while employed on the partnership business, the partnership was responsible for the payment of the debt (*e*). But, if the partner professes to borrow money for the firm, and misapplies it, and there be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover the amount from the other partners (*f*). And, if the creditor lending the money advances it at the request of one of the partners, for the known private purposes and private accommodation of the latter, and not for the trading purposes of the co-partnership, such creditor cannot make the firm responsible for the repayment of the money (*g*). But, where a member of a partnership was in the habit of drawing bills in his own name upon the firm, and getting them discounted, and applying the proceeds to the general purposes of the partnership, and the firm regularly accepted and paid the bills so drawn until it became bankrupt, it was held that the members of the firm must be taken to have given their co-partner authority to raise money for the use of the firm upon the bills in question, and that the money advanced by way of discount upon them might be treated as a loan to the partnership (*h*). There is no implication of law from the mere existence of a trade partnership, that one partner has authority to bind the firm by opening a banking account on its behalf in his own name (*i*).

(*c*) *Blakemore* v. *Bristol & Exeter Ry.*, 8 E. & B. 1051; 27 L.J. Q.B. 167; *Coughlin* v. *Gillison*, (1899) 1 Q.B. 145; 68 L.J. Q.B. 147.

(*d*) *MacCarthy* v. *Young*, 6 H. & N. 329; 30 L.J. Ex. 227.

(*e*) *Rothwell* v. *Humphreys*, 1 Esp. 405. And see now 53 & 54 Vict. c. 39, s. 5, *ante*, p. 335.

(*f*) *Loyd* v. *Freshfield*, 9 D. & R. 19.

(*g*) *Bishop* v. *Jersey* (*Countess*), 23 L.J. Ch. 483; 2 Drew. 143; *Emly* v. *Lye*, 15 East, 11; *Smith* v. *Craven*, 1 Cr. & J. 500; 9 L.J. (O.S.) Ex. 174; *Bevan* v. *Lewis*, 1 Sim. 376.

(*h*) *Denton* v. *Rodie*, 3 Campb. 493; *Bolitho, Ex parte*, Buck, 100; and see now 53 & 54 Vict. c. 39, s. 6, *ante*, pp. 336, 344.

(*i*) *Alliance Bank* v. *Kearsley*, L.R. 6 C.P. 433; 40 L.J. C.P. 249.

Loans to registered companies.—There is nothing illegal in a registered company commencing business, and proceeding to raise money in the exercise of their borrowing powers, before the whole of the nominal capital has been subscribed (*k*). If the directors of a registered joint-stock company are empowered to borrow money, the power to be exercised in accordance with certain prescribed formalities, and the directors borrow money without complying with the formalities, this is a matter between them and the shareholders, and does not deprive the lender of his rights against the company (*l*), for he has a right to presume that the formalities have been gone through (*m*); but if they have no such powers, the lender should have informed himself of the fact, and he cannot recover from the company (*n*). Although the managers of the company are raising money for purposes unauthorized by the deed of settlement or articles of association, yet, if the shareholders, with full knowledge of these transactions, take no steps to ascertain whether the capital has been properly increased or not, but reap the benefit derived from the increase, they cannot be afterwards heard to say that the money was not advanced for the general use and purposes of the partnership (*o*). Debentures issued by a company under a general power of borrowing, in part discharge of existing debts, are valid (*p*).

Damages in actions for not replacing stock.—In an action for not replacing stock lent on a given day, the measure of damages is the value of the stock in the market on the day on which it ought to have been replaced, or at the time of trial, at the option of the plaintiff (*q*). Where, however, a stock mortgage was made for a term of years, for securing the re-transfer of stock at the end of the term, and payment in the meantime of interest calculated on the proceeds of the stock sold to raise the loan, and, the mortgage having been allowed to run after the end of the term, the stock fell in price, it was held that the mortgagee was not entitled to the market value of the stock at the end of the term, but that the mortgagor could redeem on replacing the specific amount of stock originally sold (*r*). If dividends are to be paid in the intermediate time, interest may be given upon the value of the capital stock (*s*).

(*k*) *M'Dougall* v. *Jersey Imp. Hotel Co.*, 34 L.J. Ch. 28; 2 H. & M. 528.

(*l*) *Agar* v. *Athenæum Life Assur. Co.*, 3 C.B. N.S. 725; 27 L.J. C.P. 95; *Royal British Bank* v. *Turquand*, 6 E. & B. 332; 25 L.J. Q.B. 317; *Fountaine* v. *Carmarthen Ry.*, L.R. 5 Eq. 316; 37 L.J. Ch. 429; *Romford Canal Co.*, *In re*, 24 Ch.D. 85; 52 L.J. Ch. 729.

(*m*) *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93; 65 L.J. Ch. 536.

(*n*) *Irvine* v. *Union Bank of Australia*, 2 App.Cas. 366; 46 L.J. P.C. 87.

(*o*) *Magdalena St. Nav. Co.*, *In re*, 29 A. L.J. Ch. 667; Johns. 690; *Elect. Tel. Co.*, *In re*, 30 Beav. 225; *Troup's Case*, 29 Beav. 353.

(*p*) *Inns of Court Hotel Co.*, *In re*, L.R. 6 Eq. 82; 37 L.J. Ch. 692.

(*q*) *Shepherd* v. *Johnson*, 2 East, 211; *M'Arthur* v. *Seaforth* (*Lord*), 2 Taunt. 257; *Downes* v. *Back*, 1 Stark. 318; *Owen* v. *Routh*, 14 C.B. 327; 23 L.J. C.P. 105; see *Michael* v. *Hart*, (1902) 1 K.B. 482; 71 L.J. K.B. 265.

(*r*) *Blyth* v. *Carpenter*, L.R. 2 Eq. 501; 35 L.J. Ch. 823.

(*s*) *Dwyer* v. *Gurry*, 7 Taunt. 14.

CHAPTER III.

CONTRACTS OF SECURITY.

SECTION I.

GENERAL PRINCIPLES.

The contract of mortgage, founded upon our common law doctrine of conditions, is a contract whereby a debtor grants or conveys an estate or interest in land, or transfers goods and chattels to his creditor, subject to a proviso that, if the debt is discharged by a day named, the grant or transfer shall be void, and the debtor shall be again entitled to his lands or his goods, and shall hold them as if the grant or transfer had never been made. By a contract of this description the right of property in the thing mortgaged passes to the creditor, subject to be divested by the payment of the debt at the appointed time (*a*).

It has been considered advisable to omit from the present edition the general law relating to mortgages of realty, as the subject is too large to be capable of adequate treatment in this work, and the reader is referred to special treatises on the subject.

The contract of pledge is a bailment or delivery of goods and chattels by one man to another, to be held as a security for the payment of a debt or the performance of some engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged, or the engagement has been fulfilled. The thing deposited as a security is called a pawn or pledge; the party making the deposit, the pawnor or pledgor; and the person who receives it into his possession, the pawnee or pledgee. The contract is to be distinguished from the contract of hypothecation by the transfer of the possession, or the actual delivery of the thing

(*a*) *Ryall* v. *Rowles*, 1 Ves. sen. 358.

intended to be charged, to the creditor, and from the contract of mortgage by the absence of a transfer of the ownership or right of property thereof to the pawnee during the continuance of the trust. A *lien*, on the other hand, gives no right of property to the person entitled to it, but is merely a personal right to retain goods, and continues only so long as the holder keeps possession, either by himself or his servant. There is, therefore, no right to sell or otherwise dispose of the subject-matter of the lien (*b*).

SECTION II.

MORTGAGE, ETC., OF CHATTELS (*c*).

Mortgages of goods and chattels.—A mortgage of goods and chattels may be made by simple contract (*d*) as well as by deed. If, by the terms of a bill of sale or assignment of chattels by way of mortgage, the mortgagor is to hold and enjoy the chattels as the mere servant or agent of the mortgagee, or at the will of the mortgagee, the latter is entitled to the possession of them whenever he thinks fit to call for it, and may seize and carry away and sell the property (*e*). It is not necessary that the advance of the money and the delivery of the possession of the goods should be contemporaneous; but it is sufficient if the goods be delivered within a reasonable time of the advance in pursuance of the contract of pledge (*f*). If the mortgage debt is to be paid on demand, and the mortgagor is to possess the mortgaged property until default has been made in payment, the mortgagee has no right of possession until demand has been made (*g*). If the mortgage-debt is to be paid by a day named, and the mortgagor is to hold possession until default has been made, there is a re-grant and bailment of the goods to the mortgagor for the intervening period, and the mortgagee has no right to the possession of them until the mortgagor's time of holding has expired, and, if he takes possession, he

(*b*) Gibbs, C.J., *Pothonier* v. *Dawson*, Holt, N.P. 385.

(*c*) The rights and liabilities of parties to bills of sale will be found fully described in Addison on Torts, pp. 458—476 (ed. 7).

(*d*) *Flory* v. *Denny*, 7 Exch. 581; 21 L.J. Ex. 223; *Maughan* v. *Sharpe*, 17 C.B. N.S. 443; 34 L.J. C.P. 19.

(*e*) *Mayhew* v. *Suttle*, 4 E. & B. 347; 24 L.J. Q.B. 54.

(*f*) *Hilton* v. *Tucker*, 39 Ch.D. 669; 57 L.J. Ch. 973.

(*g*) *Bradley* v. *Copley*, 1 C.B. 697; 14 L.J. C.P. 222.

will subject himself to an action (*h*). But, if the mortgagor deals fraudulently with the mortgaged goods thus left in his possession, as if he attempts to sell them, the bailment is determined, the possessory title reverts to the mortgagee, and he may immediately commence an action for the recovery of the goods or their value (*i*). Where the title-deeds of land have been deposited, the equitable mortgagee is entitled to foreclosure, but this doctrine does not apply to a pledgee of personal chattels, who is only entitled to an order for sale (*k*).

If goods are assigned to the mortgagee upon trust to permit the mortgagor to hold and enjoy them until default has been made in payment of the mortgage-debt and interest by a day named, and upon further trust to sell them upon such default being made, the mortgagee has the legal right of possession incumbered with the trust as well as the right of property, and may maintain an action against anyone who wrongfully converts them to his own use (*l*). A proviso in a mortgage of chattels that, after default made in payment of the mortgage-debt after notice, it shall be lawful for the mortgagee to receive and take into possession, and thenceforth to hold and enjoy, the mortgaged chattels, and to sell and dispose of them, and that, until default, it shall be lawful for the mortgagor to hold and make use of them, does not prevent the mortgage from operating as an immediate transfer of the right of property in the chattels to the mortgagee. The latter is the legal owner, whether in or out of possession (*m*).

A mortgage of goods and chattels and moveables (excepting ships) will, in general, be found to be a doubtful and inadequate security for the payment of money; for, as the mortgagor is left in the possession of the goods, and continues the apparent owner of them, he will be able to defeat the title of the mortgagee in a variety of ways. He may sell the goods in market overt to a *bonâ fide* purchaser, without notice of the mortgage, and so divest the mortgagee of his right of property in them, and deprive him of his security; and if the mortgagor becomes bankrupt, the chattels may become lost to the mortgagee by reason of their having been left in the possession of the mortgagor as reputed owner (*n*).

Pledges of goods and chattels—Things which may be given in pledge.—By the common law, all kinds of goods and chattels, title-deeds, and securities for money, promissory notes and bills of

(*h*) *Brierly* v. *Kendall*, 17 Q.B. 937; 21 L.J. Q.B. 161.
(*i*) *Fenn* v. *Bittleston*, 7 Exch. 152; 21 L.J. Ex. 41.
(*k*) *Carter* v. *Wake*, 4 Ch.D. 605; 46 L.J. Ch. 841.
(*l*) *White* v. *Morris*, 11 C.B. 1015; 21 L.J. C.P. 185.
(*m*) *Gale* v. *Burnell*, 7 Q.B. 850; 14 L.J. Q.B. 340.
(*n*) *Shuttleworth* v. *Hernaman*, 1 De G. & J. 322; 26 L.J. Bankr. 61.

exchange, letters of allotment and scrip, certificates of shares, and even money itself when marked or inclosed in a bag, purse, or parcel, so as to be capable of identification, may be pledged (*o*).

Parties entitled to pledge.—One man cannot, as a general rule, convey to another a right over property which he does not himself possess. If a servant takes his master's jewels and pledges them, the pledge cannot alter the ownership of them, or give the pledgee any right to detain them as against the owner (*p*). But, if a man obtains goods under colour of a contract intended to transfer the property in the goods to him, and then pledges them, the pledgee will have a lien upon the goods to the amount of his advances. If, for example, a man purchases and obtains possession of a specific chattel, and pays for it by a fictitious bill of exchange, or by a cheque on a bank where he has no funds, and then pledges the article with a party who advances money upon it without any knowledge of the fraud, the pledgee will have a lien upon his advances against the vendor who has been defrauded (*q*); but, if the property has not passed—if, for instance, the article has been stolen, or possession thereof has been obtained by false pretences—and it has then been pledged, the pledgee will have no lien upon it as against the owner. If a person obtains possession of a delivery order, dock warrant, or any documentary evidence of title to goods on the faith of a false and fraudulent representation, and obtains possession of the goods under the order, or gets them transferred into his name, or obtains warrants for their delivery to his order, and then pledges the goods or warrants, the pledgee will have no title to detain them as against the owner, who has been defrauded (*r*). If the pawnor has only a limited interest in the subject-matter of the pledge, he can only pawn to the extent of such interest, and, when that expires, the pawnee must surrender the pledge to the party who succeeds to the legal ownership. Therefore, where a quantity of plate was settled upon a widow for life, and she pawned it and then died, it was held that the pawnee had no right to detain the pledge as against the remainderman, although he had no notice of the widow's limited interest at the time he advanced the money (*s*). If the vendor of an estate delivers the conveyance as an escrow, to take effect on payment of the residue of the purchase-money, the property in the

(*o*) *Isaack* v. *Clark*, 2 Bulstr. 306; *Ross* v. *Moses*, 1 C.B. 227, 232.

(*p*) 34 Hen. 6, fol. 25, pl. 33; *Hartop* v. *Hoare*, 3 Atk. 44; 2 Str. 1187.

(*q*) *Parker* v. *Patrick*, 5 T.R. 175; *White* v. *Garden*, 10 C.B. 919; 20 L.J. C.P. 166.

(*r*) *Kingsford* v. *Merry*, 1 H. & N. 503; 26 L.J. Ex. 83; discussed by Lord Halsbury in *Henderson* v. *Williams*, (1895) 1 Q.B. 521; 64 L.J. Q.B. 308; *Cole* v. *North Western Bank*, L.R. 10 C.P. 354, 373; 44 L.J. C.P. 233; and see also 52 & 53 Vict. c. 45, s. 9; and 56 & 57 Vict. c. 71, s. 25.

(*s*) *Hoare* v. *Parker*, 2 T.R. 376.

title-deeds is so vested in the purchaser, that the vendor obtaining possession of them and pawning them confers on the pawnee no right to detain them after tender of the residue of the purchase-money (*t*).

Implied warranty of title on part of pledgor.—Every person who pledges personal property impliedly undertakes that the property pledged is his own; and, if it turns out not to be so, the pledgee may restore it to the lawful owner coming forward and claiming the goods, and may set up the *jus tertii* in answer to an action by the pledgor for the recovery of the pledge (*u*). Every person, on the other hand, who receives goods and chattels into his possession by way of pledge, impliedly undertakes to return them to the pawnor as soon as the object of the pledge has been accomplished, unless it be shown that the pledgor had no right to pledge them, and the owner has intervened and claimed them. Nothing contained in the Factors Act, 1889, is to prevent the owner from recovering the goods from an agent or his trustee in bankruptcy, or from having the right to redeem such goods or documents of title, at any time before they have been sold, upon repayment of the amount of the lien thereon, or from recovering from any person with whom the goods have been pledged by the agent any balance of the produce of the sale of the goods after deducting the amount of his lien (*x*). If the pledge has been received as security for the due payment of a debt or the performance of a contract, it must be returned by the pawnee as soon as the debt is discharged or the contract has been fulfilled, unless it has been lost or destroyed by accident, without any default or misconduct or want of proper care on the part of such pawnee.

By the Factors Act, 1889 (*y*), where a mercantile agent (*z*) is with the consent of the owner in the possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him, when acting in the ordinary course of business (*a*) of a mercantile agent, shall, subject to the provisions of the Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not,

(*t*) *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

(*u*) *Cheesman* v. *Exall*, 6 Exch. 344; 20 L.J. Ex. 209; *Jones* v. *Peppercorne*, 28 L.J. Ch. 158; Johns. 430; *Biddle* v. *Bond*, 34 L.J. Q.B. 137; 6 B. & S. 225; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187; unless he always knew that the pledgor had no title and that the adverse claimant had, and has, dealt with the goods in a way creating an estoppel: *Davies, Ex parte*, 19 Ch.D. 86. As to pledge of negotiable instruments, see *Baker* v. *Nottingham Banking Co.*, 60 L.J. Q.B. 542.

(*x*) 52 & 53 Vict. c. 45, s. 12.

(*y*) 52 & 53 Vict. c. 45.

(*z*) See sect. 1 for definition of the terms "mercantile agent," "possession," "goods," "pledge," and "person."

(*a*) As to meaning of "ordinary course of business," see *Biggs* v. *Evans*, (1894) 1 Q.B. 88.

at the time of the disposition, notice that the person making the disposition has not authority to make the same (*b*). Subject to this proviso, a disposition of goods by a mercantile agent, after the consent of the owner to his possession of them is withdrawn, is valid (*c*).

Where a person intrusted with goods for the purpose of sale only, pledges them with a pawnbroker, he is not a mercantile agent "acting in the ordinary course of business of a mercantile agent," and the pawnbroker is not protected by section 2 (1) from an action by the owner to recover the value of the goods (*d*).

Where a mercantile agent has obtained possession of any documents of title to goods, by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall be deemed to be with the consent of the owner (*e*). For the purposes of the Act the consent of the owner is to be presumed in the absence of evidence to the contrary (*f*).

A pledge of the documents of title to goods is to be deemed to be a pledge of the goods (*g*).

Where a mercantile agent pledges goods as a security for a debt or liability due from him to the pledgee, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*h*).

Any valuable consideration—including a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security—is sufficient for the validity of a disposition of the goods under the Act; but where the goods are pledged by a mercantile agent, in consideration of the delivery or transfer of other goods, or of documents of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods greater than the value of the goods, documents, or security so given in exchange (*i*).

An agreement with a mercantile agent through his clerk or other person, authorised in the ordinary course of business to make contracts of sale or pledge on his behalf, is for the purposes of the Act to be deemed to be an agreement with the agent (*k*).

Where the owner of goods has given possession of them to another person for the purpose of consignment or sale, or has

(*b*) 52 & 53 Vict. c. 45, s. 2 (1).
(*c*) Sect. 2 (2).
(*d*) *Hastings* v. *Pearson*, (1893) 1 Q.B. 62; 62 L.J. Q.B. 75.
(*e*) Sect. 2 (3).
(*f*) Sect. 2 (4).
(*g*) Sect. 3. This section, like sects. 2—7, only applies to pledges by mercantile agents: *Inglis* v. *Robertson*, (1898) A.C. 616; 67 L.J. P.C. 108.
(*h*) Sect. 4.
(*i*) Sect. 5.
(*k*) Sect. 6.

shipped the goods in the name of another person, and the consignee has no notice that such person is not owner of the goods, the consignee is, in respect of any advances to such person, to have the same lien on the goods as if he were the owner (*l*); but nothing in the section is to limit or affect the validity of any sale, pledge, or disposition by a mercantile agent (*m*).

Where a person having sold goods continues or is in possession of them, or of the documents of title to them, the delivery or transfer by him, or by a mercantile agent acting for him, of such goods or documents, under any sale, pledge, or other disposition or agreement for the same, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to do so (*n*). Where a person having bought or agreed to buy goods obtains, with the consent of the vendor, the possession of the goods or of the documents of title to them, the delivery or transfer by such vendee, or by a mercantile agent acting for him, of the goods or documents under any sale, pledge, or other disposition, or any agreement for the same, to any person receiving them in good faith and without notice of any lien or right of the original vendor, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title, with the consent of the owner (*o*). The expression "a person having agreed to buy goods" does not include a person who has an option to buy, the owner being bound to sell if the option is exercised. So where the owner of a piano let it on hire, the hirer agreeing that he should pay monthly instalments and might terminate the agreement by delivering up the piano, but that the piano should be his on payment of all the instalments, and until then the piano should be the property of the owner, it was held that the hirer had only an option to buy, and did not come within sect. 9 of the Factors Act, 1889 (*p*). A hire-and-purchase agreement under which the hirer has no power to determine the agreement by returning the goods is an agreement to buy within the section (*q*). The section protects an auctioneer who, in good faith and without notice of any lien of the original seller, receives and sells goods

(*l*) 52 & 53 Vict. c. 45, s. 7 (1).

(*m*) Sect. 7 (2).

(*n*) Sect. 8. This section is reproduced in sect. 25 (1) of 56 & 57 Vict. c. 71, *ante*, p. 555.

(*o*) Sect. 9. This section has no application where the pledgor has obtained the documents of title from the warehouse-keeper by virtue of the pledgor's ownership of the goods: *Inglis* v. *Robertson*, (1898) A.C. 616; 67 L.J. P.C. 108.

(*p*) *Helby* v. *Matthews*, (1895) A.C. 471; 64 L.J. Q.B. 465, distinguishing *Lee* v. *Butler*, (1893) 2 Q.B. 318; 62 L.J. Q.B. 591.

(*q*) *Hull Ropeworks Co.* v. *Adams*, 65 L.J. Q.B. 114.

delivered to him by a person who had obtained them under a hire-and-purchase agreement providing for payment by instalments which had not been paid (*r*). It seems unnecessary, in order that this section should apply, for there to be a memorandum of the contract of sale, so as to satisfy the present requirements of sect. 4 of the Sale of Goods Act, 1893 (*s*).

Where a document of title to goods has been lawfully transferred to a person as buyer or owner of the goods, and he transfers it to a person who takes it in good faith, and for valuable consideration, such transfer shall have the same effect in defeating the vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading (*t*).

The transfer of a document may be either by indorsement or in some cases by delivery (*u*).

Pledgor's right of redemption.—A thing may be pledged for a certain period, or it may be pledged indefinitely, no time being fixed for its redemption, or for the happening of the event which is to give the pledgor a right to have it back. In the first case the pledgee cannot demand payment of the debt, nor can the pledgor lawfully demand the restoration of the pledge, until the time appointed has expired. In the second case the pledgor is entitled to redeem at any time, by tendering to the pledgee the amount due to him, and the pledgee may compel the pledgor to redeem, or be foreclosed and lose his right of redemption altogether. If the debtor pays the debt due, or tenders it to the creditor, and demands the pledge, and the creditor refuses to deliver it up, the debtor may maintain an action for its recovery, unless his right to redeem has been barred by judgment of foreclosure, or has been forfeited under an express clause of forfeiture inserted in the original contract, or unless the pledge has been sold by the creditor pursuant to a power of sale reserved to him (*x*).

Sale of pledgor's right of property and right of redemption.—As the ownership and general right of property in the pledge remain vested in the pledgor, the latter may sell the pledge subject to the lien of the pledgee, and substitute the purchaser in his place, so as to entitle the latter to redeem (*y*). If several chattels are pawned for one sum, separate sales may be made of each to different purchasers; but the pawnee will not be bound to part with any of the

(*r*) *Shenston* v. *Hilton*, (1894) 2 Q.B. 452; 63 L.J. Q.B. 584.

(*s*) *Hugill* v. *Masker*, 22 Q.B.D. 364; 58 L.J. Q.B. 171, decided on the similar provisions of 40 & 41 Vict. c. 39, s. 4 (repealed).

(*t*) 52 & 53 Vict. c. 45, s. 10.

(*u*) Sect. 11.

(*x*) *Ratcliff* v. *Davies*, Cro. Jac. 245; Yelv. 178; 1 Bulst. 29, 31; *Kemp* v. *Westbrook*, 1 Ves. sen. 278.

(*y*) *Franklin* v. *Neate*, 13 M. & W. 486; 14 L.J. Ex, 59.

chattels until his whole debt is paid. Subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made.

Forfeiture of pledge.—Common law does not follow the later Roman and Continental law in treating agreements for the forfeiture of pledges to be null and void, as being contrary to public policy. The court, however, will relieve against the forfeiture in the case of pledges of land; but it will not, in general, interfere in the case of pledges of moveables (*z*), unless the value of the pledge greatly exceeds the amount of the debt which it was intended to secure.

Foreclosure of right of redemption—Pledgee's power of sale.—It would appear to be an implied term of every contract of pledge that the thing deposited shall be made available for the liquidation of the debt it was intended to secure, in case the pledgor is unable or unwilling to pay such debt (*a*). The law will not condemn the pledge to remain useless in the hands of the creditor, or suffer it to perish, but will enable the latter, after due notice given to the debtor, and every fair opportunity afforded him to redeem, to sell the pledge and appropriate the proceeds of the sale in liquidation of the debt, paying over the surplus that may remain to the creditor (*b*); or, if the value of the pledge does not exceed the amount of the debt due upon it and the costs and expenses of a sale, the creditor will be allowed to appropriate the pledge to his own use, and hold it as his own property, discharged of all claim of ownership and right of redemption on the part of the creditor. Lord Hardwicke is reported to have said that a decree of foreclosure is not necessary, in cases of pledges of personal chattels, to bar the pledgor's right of redemption, and enable the pledgee to sell (*c*); but, so long as the ownership and right of property in the pledge have not been vested in the pledgee, the latter cannot sell more than his own claim or lien upon the pledge, and can only transfer the pledge burthened with the pledgor's right of redemption, unless a power of sale has been expressly or impliedly reserved to him by contract (*d*). In order to make himself the owner of the pledge, the pledgee must bar the pledgor's right of redemption by a decree of foreclosure (*e*). "A right of lien gives no right to sell the goods;" but, if it is reasonably to be inferred, from the nature of the transaction between the parties, that the

(*z*) *Lockwood* v. *Ewer*, 9 Mod. 278.

(*a*) Story on Bailments, s. 311.

(*b*) *Pigot* v. *Cubley*, 15 C.B. N.S. 701; 33 L.J. C.P. 134; Willes, J., *Martin* v. *Reid*, 11 C.B. N.S. 730; 31 L.J. C.P. 126.

(*c*) *Lockwood* v. *Ewer*, 9 Mod. 279.

(*d*) *Micklethwaite* v. *Merrill*, 19 L.T. 61.

(*e*) *Wayne* v. *Hanham*, 9 Hare, 62; 20 L.J. Ch. 530.

contract was to this effect, "If I (the borrower) re-pay the money, you must re-deliver the goods; but, if I fail to repay it, you may use the security I have left in your hands to re-pay yourself," the pledgee will then be entitled to sell, after notice to the pledgor of his intention, and may satisfy the debt out of the proceeds of such sale (*f*). If the deposit has been made to secure the payment of a sum of money by a day certain, there is, it has been held, an implied authority to sell in case of non-payment by the day named (*g*); but notice should be given to the debtor in order to bar the equity of redemption. If notice is given to the pledgor that, unless the pledge is redeemed, and the debt due thereon paid by a given day (a reasonable time for redemption being allowed), the pledge will be sold by public auction, and the proceeds of the sale applied in liquidation of the debt, and the pledgor neglects to redeem, and pays no attention to the notice, and the sale then takes place, the pledgor may fairly be deemed to have authorised the sale, or to be an assenting party thereto (*h*).

Accounts between pledgor and pledgee.—Whenever the pledge has been sold by the pledgee, he is liable to be called upon to account for the proceeds of the sale, and to pay over to the pledgor any surplus that may be found to exist after deducting the debt, costs, and expenses. The possession of the pledge does not suspend the right of the pledgee to proceed personally against the pledgor for the recovery of the debt in respect of which the pledge was taken, as it is only a collateral security (*i*).

Custody and safe keeping of pledge.—Every person who receives goods into his possession by way of pledge impliedly undertakes to take the same care of them that a prudent man ordinarily takes of his own property. His liability, in this respect, is analogous to that of the hirer of chattels for use (*ante*, p. 745), the contract being, like the contract of letting and hiring, a contract for the mutual benefit of both parties. The pawnee or pledgee, consequently, is not responsible for the loss of the goods by robbery or accident, if he has taken reasonable care of them (*k*); and he may, notwithstanding the loss and his consequent inability to return the deposit, sue for the recovery of his debt. But, if the goods have been stolen under circumstances manifesting a want of reasonable care for their safety, he will of course be responsible for the loss. It is not enough for the pawnee to say that the goods have been

(*f*) *Pothonier* v. *Dawson*, Holt, 385; *Smart* v. *Sandars*, 3 C.B. 380, 401; 16 L.J. C.P. 39; 5 C.B. 895, 915; 17 L.J. C.P. 258.

(*g*) *Pigot* v. *Cubley*, 15 C.B. N.S. 701; 33 L.J. C.P. 134, *ante*, p. 762.

(*h*) *Tucker* v. *Wilson*, 1 P. Wms. 260.

(*i*) *Lawton* v. *Newland*, 2 Stark. 72; *South Sea Co.* v. *Duncomb*, 2 Str. 919; Holt, 461; *Anon.*, 12 Mod. 564; *Scott* v. *Parker*, 1 Q.B. 809; 10 L.J. Q.B. 244.

(*k*) *Syred* v. *Carruthers*, E. B. & E. 469; 27 L.J. M.C. 273.

lost by robbery or accident; he must prove the fact, and show that he was free from blame (*l*).

Use of things pledged.—"If the pawn be something that will be the worse for wear, as clothes, the pawnee cannot use it; but if it will not be the worse for wear, as jewels, the pawnee may use them; but then it must be at his peril, for, if he is robbed in wearing them, he is answerable. Also, if the pawn be of such a nature that the keeping is a charge to the pawnee, as if it be a cow or horse, the pawnee may milk the cow or ride the horse; and this is in recompense of the keeping. If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them at all events; because the pawnee, by detaining them after tender of the money" (the time of payment having arrived, or no time being fixed), "is a wrongdoer, and it is a wrongful detainer of the goods; and a man that keeps goods by wrong must be answerable for them at all events" (*m*). If a pawnee re-pawns or sells, before any default in payment by the original pawnor, the latter cannot sue the sub-pawnee or vendee to recover the pledge without tendering the amount for which the pledge was originally made (*n*).

As the right of property in the pledge remains, as we have already seen, in the pledgor until foreclosure, forfeiture, or sale, the pledgor may maintain an action against a stranger who unlawfully possesses himself of the goods; but, if there is any injury or conversion by a stranger for which an action will lie on the part of both the pledgor and pledgee, a recovery by one ousts the other of his right to recover: for there cannot be a double satisfaction (*o*). If the pledgor has sold his interest in the pawn to a third party, the latter will be the proper person to sue for damages resulting from injury to the pawn from the default or negligence of the pawnee, as the owner for the time being is the proper plaintiff (*p*). But a pawnbroker's interest in a redeemable pledge may be seized in execution by the sheriff under a *fi. fa.* (*q*).

Statutory rights and liabilities of pawnbrokers.—The rights and liabilities of pawnbrokers are regulated by the Pawnbrokers Act, 1872 (*r*). The Act, however, does not apply to loans of above ten pounds.

(*l*) *Doorman* v. *Jenkins*, 2 Ad. & E. 256; 4 L.J. K.B. 29.

(*m*) *Coggs* v. *Bernard*, 2 Ld. Raym. 912.

(*n*) *Johnson* v. *Stear*, 15 C.B. N.S. 330; 33 L.J. C.P. 130; *Johnson* v. *Lanc. & Y. Ry.*, 3 C.P.D. 499; *Donald* v. *Suckling*, L.R. 1 Q.B. 585; 35 L.J. Q.B. 232; *Halliday* v. *Holgate*, L.R. 3 Ex. 299; 37 L.J. Ex. 174. As to sale by pawnee, see 56 & 57 Vict. c. 71, s. 21.

(*o*) Bac. Abr. Trover, C.; *Rooth* v. *Wilson*, 1 B. & Ald. 59.

(*p*) *Franklin* v. *Neate*, 13 M. & W. 486; 14 L.J. Ex. 59.

(*q*) *Rollason, In re*, 34 Ch.D. 495; 56 L.J. Ch. 768.

(*r*) 35 & 36 Vict. c. 93.

Who are to be deemed pawnbrokers.—Every person who keeps a house, shop, or other place for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases, or receives, or takes in any goods or chattels, and pays, or advances, or lends thereon any sum of money not exceeding 10*l.*, with or under any agreement or understanding, express or implied, or to be from the nature and character of the dealing reasonably inferred that such goods or chattels may be afterwards redeemed or repurchased on any terms whatever, is to be deemed to be a pawnbroker within the meaning of the Act (*s*). Every pawnbroker's name must be placed over the door of his place of business (*t*); and therefore a secret partnership in the business of a pawnbroker is illegal and void (*u*).

Sale of unredeemed pledges.—Pawnbrokers' sales are regulated by the provisions of the Pawnbrokers Act. If, at any time before the sale has actually taken place, the pledgor tenders the principal, interest, and expenses incurred, he has a right to have back the things pledged, and the pawnbroker cannot lawfully proceed with the sale (*x*). A special contract pawn ticket, given in the form prescribed by the Act, does not exclude the common law right of the pawnbroker to recover the balance due to him if the article pawned is sold for less than the amount of the debt (*y*).

Warranties on sales of unredeemed pledges.—We have already seen that, in the case of sales by pawnbrokers of unredeemed pledges expressly sold as such, the pawnbroker only warrants the subject-matter of the sale to be a pledge, the time for the redemption of which has expired. He sells merely his own title and interest in the pledge; and it is the duty of a purchaser to investigate that title (*ante*, p. 525); and, if he is evicted by reason of the want of title in the pledgor to make the pledge, he has no remedy over against the pawnbroker, unless the latter expressly warranted the title. The indemnity given by sect. 25 to a pawnbroker who delivers a pledge to the person producing the pawn-ticket applies only as between the pawnor or owner who has authorised the pledging of the goods, but does not affect the common law rights of an owner of goods pledged against the owner's will (*z*).

Imperfect hypothecation of goods and chattels—Licences to distrain to secure payment of debt.—The common law repudiates the hypo-

(*s*) Sect. 6.
(*t*) Sect. 13.
(*u*) *Armstrong* v. *Lewis*, 2 Cr. & M. 297; 3 L.J. Ex. 359; *Gordon* v. *Howden*, 12 Cl. & Fin. 237; *Frazer* v. *Hill*, 1 Macq. 392.
(*x*) *Walter* v. *Smith*, 5 B. & Ald. 441.
(*y*) *Jones* v. *Marshall*, 24 Q.B.D. 269; 59 L.J. Q.B. 123.
(*z*) *Singer Manufacturing Co.* v. *Clark*, 5 Ex.D. 37; 49 L.J. Ex. 224.

thecation of chattels or moveables in its general and extended signification; for, if parties who had bought things in a public market, or in the ordinary way of trade, of persons who had the possession and visible ownership of them, were liable, after they had paid the purchase-money, to be called upon by third parties who had secret charges or liens upon such goods for further payment, all public confidence would be destroyed, and trade and commerce annihilated. But the law permits goods and chattels to be subjected to what is called by Continental jurists imperfect hypothecation, *i.e.*, a debtor may, by deed under seal, grant to his creditor a right to seize and sell a specified chattel, or all his goods and chattels generally, in satisfaction and discharge of the debt, in case of the non-payment thereof at an appointed period. Such a power gives the creditor no right to follow the goods into the hands of third parties; but so long as they remain in the possession of the debtor himself and continue his property, the creditor may seize them in the same way that a landlord distrains and sells the goods and chattels of his tenant on the demised premises for rent in arrear (*a*). A power of this description may be made to extend to all the after-acquired chattels of the debtor, as well as to the goods and chattels of which he was possessed at the time of the contract or grant. Where the owner of a cow, being indebted to the defendant for agistment, and being desirous of contracting a further debt for straw, &c., agreed with the defendant that the cow should stand as a security for the debt, and that the defendant should be at liberty, upon a certain contingency, to take the cow wherever he could find her, and hold her till he was paid, and, the contingency having happened, the defendant seized the cow, it was held that he had a right so to do, and that he was entitled to detain her as against the owner until he received payment of his debt (*b*). The right of detainer gives no right of sale, although it is exercised at great expense (*c*); but, if a debtor gives to his creditor a licence to enter upon his land and seize his cattle and crops and sell them in satisfaction and discharge of the debt, the licensee will be justified as against the licensor, in seizing and selling under the licence (*d*). But the operation of a licence of this description cannot be extended beyond the immediate parties to it; and, therefore, as soon as the rights of third parties intervene, the power or authority becomes nugatory and useless. Thus, where a vendor entered into a written agreement for the sale of a coach on credit,

(*a*) *Chidell* v. *Galsworthy*, 6 C.B. N.S. 471.

(*b*) *Richards* v. *Symons*, 8 Q.B. 90; 15 L.J. Q.B. 35.

(*c*) *Thames Iron Works Co.* v. *Patent Derrick Co.*, 29 L.J. Ch. 714; 1 Jo. & H. 93.

(*d*) *Carr* v. *Allatt*, 27 L.J. Ex. 385.

upon the terms that, if the price was not paid pursuant to the agreement, he "should have and hold a claim upon the coach;" and the purchaser died, and, the money not being paid, the vendor got possession of the coach and detained it as a security for the debt; it was held that, although he would have been justified in so doing as between himself and the purchaser, yet, the latter being dead, he had no right to detain it as against the purchaser's personal representative (*e*), or against a trustee in bankruptcy (*f*). Neither can the licence be assigned or granted over to another so as to enable the assignee to distrain upon the licensor (*g*); nor can it prevail against the claim of a judgment creditor, so long as parties claiming under it have not perfected their title by taking possession of the property before it is seized in execution by the sheriff. A legal interest in the property, *bonâ fide* acquired before possession taken by the person claiming under the licence, will prevail over the claim of the latter (*h*). A promise to pay money when the debtor receives a debt due to him from a third person does not amount to an equitable charge on the debt (*i*).

Revocation of licence by act of bankruptcy.—A licence to seize and sell chattels in satisfaction and discharge of a debt gives no title to any specific chattels; but, when executed by the creditor's taking possession of property under the licence, it clothes the licensee with the ownership of such property (*k*). If, therefore, after a debtor has granted his creditor a licence of this description, he commits an act of bankruptcy, and a receiving order is made against him, the licence will be annulled as regards his trustee (*l*).

Mortgages of ships and shares in vessels.—It was at one time held that the Court of Chancery would give no effect to a contract to assign a ship as security for money due not registered in accordance with the Merchant Shipping Acts (*m*). But by sect. 57 of the Merchant Shipping Act, 1894 (*n*), the expression "beneficial interest," whenever used in the Act, includes interests arising under contract and other equitable interests; and the intention of the Act is declared to be that, without prejudice to the provisions contained therein for preventing notice of trusts from

(*e*) *Howes* v. *Ball*, 7 B. & C. 484; 6 L.J. (O.S.) K.B. 106.

(*f*) *Carr* v. *Acraman*, *infra*.

(*g*) *Brown* v. *Metropolitan County Society*, 1 E. & E. 838; 28 L.J. Q.B. 236; *Davis & Co., In re*, 22 Q.B.D. 193.

(*h*) *Reeve* v. *Whitmore*, *Martin* v. *Whitmore*, 33 L.J. Ch. 63; and see *Holroyd* v. *Marshall*, 10 H.L.C. 191; 33 L.J. Ch. 193.

(*i*) *Field* v. *Megaw*, L.R. 4 C.P. 660.

(*k*) *Congreve* v. *Evetts*, 10 Exch. 308; 23 L.J. Ex. 273.

(*l*) *Carr* v. *Acraman*, 11 Exch. 566; 25 L.J. Ex. 90; *Baker* v. *Gray*, 17 C.B. 462; 25 L.J. C.P. 161; *Cole* v. *Kernot*, L.R. 7 Q.B. 534; 41 L.J. Q.B. 221.

(*m*) *Liverpool Borough Bank* v. *Turner*, 30 L.J. Ch. 379; see *Chasteauneuf* v. *Capeyron*, 7 App.Cas. 127; 51 L.J. P.C. 37. A British ship seems to be a ship intended to be the property of a British owner: *Union Bank of London* v. *Lenanton*, 3 C.P.D. 243; 47 L.J. C.P. 409.

(*n*) 57 & 58 Vict. c. 60, s. 57.

being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the Act on registered owners and mortgagees, and without prejudice to the provisions therein contained relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interests therein in the same manner as equities may be enforced against them in respect of any other personal property (*o*). A legal mortgage of a ship has, however, priority over an equitable charge previously given, even where the legal mortgagee takes with notice of the charge (*p*). The mortgagee is not to be deemed to be the owner of the ship or share (*q*), nor the mortgagor to have ceased to be owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt. The mortgagor in possession may employ and charter the ship; and the court will restrain the mortgagee from interfering with his contracts (*r*). The mortgagee has power absolutely to dispose of the mortgaged ship or share, and to give effectual receipts for the purchase-money; but, when there are several mortgages, no subsequent mortgagee can, except under an order of court, sell such ship or share without the concurrence of every prior mortgagee. A registered mortgage of a ship or share is not affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding the mortgagor at the time of his becoming bankrupt may have the ship in his possession and disposition, and be reputed owner thereof. Provision is made for the transfer of mortgages, and for the transmission of the interest of mortgagees by death, bankruptcy, insolvency or marriage (*s*). A mortgage of a ship passes to the mortgagee articles on board the ship necessary for her navigation or for the prosecution of the adventure on which she was engaged at the time of the mortgage (*t*). The guardian of a registered infant owner of a ship has no power under sect. 55, subsect. 1, of the Merchant Shipping Act, 1894 (*u*), to sell or mortgage the ship on behalf of the infant (*x*).

A mortgagee who takes possession of a ship, or gives the

(*o*) See *Ward* v. *Beck*, 32 L.J. C.P. 113; 13 C.B. N.S. 668; and *Hughes* v. *Sutherland*, 7 Q.B.D. 160; 50 L.J. Q.B. 567.

(*p*) *Black* v. *Williams*, (1895) 1 Ch. 408; 64 L.J. Ch. 137.

(*q*) *European, &c. Mail Co.* v. *Royal Mail Packet Co.*, 4 K. & J. 676; *Dickinson* v. *Kitchen*, 8 E. & B. 789; *Marriott* v. *Anchor Reversionary Co.*, 30 L.J. Ch. 571; 3 De G. F. & J. 177.

(*r*) *Collins* v. *Lamport*, 34 L.J. Ch. 196; *The Celtic King*, (1894) P. 175; 63 L.J. P. 37; *The Heather Bell*, (1901) P. 272; 70 L.J. P. 57.

(*s*) 57 & 58 Vict. c. 60, ss. 31—46.

(*t*) *Coltman* v. *Chamberlain*, 25 Q.B.D. 328; 59 L.J. Q.B. 563.

(*u*) 57 & 58 Vict. c. 60, s. 55 (1), which replaces sect. 99 of the Act of 1854.

(*x*) *Michael* v. *Fripp*, L.R. 7 Eq. 95; 38 L.J. Ch. 29.

charterer notice of his mortgage, and demands the freight before the freight becomes payable, is entitled, as against the mortgagor and his assigns, to receive it (*y*); but until the mortgagee takes possession or does some equivalent act, the mortgagor is entitled to the freight, and is not accountable to the mortgagee for what he receives (*z*). When the mortgage is of the entirety of the vessel, the mortgagee may take exclusive possession; when it is of shares only, he cannot take possession so as to prevent the other part-owners from also taking possession. A mortgagee of shares in a ship may, without formally taking possession, give notice of his interest, and require payment to himself of his share of the freight (*a*). Until possession is taken by the mortgagee, the mortgagor remains *dominus* of the ship as to its employment or rate of freight (*b*). A mortgagee of a ship is entitled to payment in priority to materialmen not in such actual possession at the time of supplying the materials as to give them a lien (*c*). A subsequent mortgage, duly registered, of a ship has priority over a claim for necessaries (*d*). The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout, not only what is due on his first mortgage, but also the amount of any subsequent charge he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight (*e*). The effect of an omission to register a mortgage of a ship is to postpone the mortgagee's claim to that of a subsequent registered mortgagee or transferee; but such omission is no answer to a claim by the first mortgagee for freight, as against a purchaser of the cargo without notice of the mortgagee's title (*f*). If the mortgagor of a ship attaches the goods to the ship in such a way as to make them part of the ship's equipment, then such act, if followed by the mortgagee taking possession, will constitute a "delivery" of the goods by the hirer under a "disposition" to the mortgagee within section 9 (*g*).

(*y*) *Rusden* v. *Pope*, L.R. 3 Ex. 269; 37 L.J. Ex. 137; *Brown* v. *Tanner*, L.R. 3 Ch. 597; 37 L.J. Ch. 923; *Wilson* v. *Wilson*, L.R. 14 Eq. 32; 41 L.J. Ch. 423.

(*z*) *Keith* v. *Burrows*, 2 App.Cas. 636; 46 L.J. C.P. 801.

(*a*) *Cato* v. *Irving*, 21 L.J. Ch. 675; 5 De G. & Sm. 210; *Willis* v. *Palmer*, 7 C.B. N.S. 340; 29 L.J. C.P. 194; *Gardner* v. *Cazenove*, 1 H. & N. 423; 26 L.J. Ex. 17.

(*b*) *Keith* v. *Burrows*, *supra*.

(*c*) *The Scio*, L.R. 1 A. & E. 353.

(*d*) *The Pacific*, 2 B. & L. 243; 33 L.J. Adm. 120; *The Two Ellens*, L.R. 4 P.C. 161; 41 L.J. Adm. 33.

(*e*) *Liverpool Marine Credit Co.* v. *Wilson*, L.R. 7 Ch. 507; 41 L.J. Ch. 798.

(*f*) *Keith* v. *Burrows*, 1 C.P.D. 722; 45 L.J. C.P. 876, reversed on appeal upon another point; 2 C.P.D. 163; 46 L.J. P.C. 452; affirmed 2 App.Cas. 636; 46 L.J. C.P. 801.

(*g*) *Hull Ropeworks Co.* v. *Adams*, 65 L.J. Q.B. 114.

Maritime liens—Bottomry.—The contract of hypothecation of ships known to the civil law, and enforced in our Courts of Admiralty, is a contract whereby the captain of a vessel in a foreign port, not having any credit in the port where the vessel is lying, is enabled to obtain money for the repair and equipment of the vessel, and for supplies and sea stores for the prosecution of the voyage (*h*), by creating a charge or lien upon the vessel itself in favour of the lender, so that, if the vessel is sold or mortgaged by the owners, it will pass burthened with the charge or debt into the hands of the purchaser or mortgagee. The charge or lien created by a contract of this description is called a maritime lien. Wherever a maritime lien exists, it gives a right or claim upon a vessel, *jus ad rem*, to be carried into effect by legal process. This claim travels with the vessel into whosesoever possession it may come, and is enforced in the Court of Admiralty by a proceeding *in rem* (*i*). No such right can be acquired but by express agreement; and a ship-master can only make such an agreement if he act within the scope of his authority (*k*). The contract by which a maritime lien is generally created by English ship-masters is termed a contract of bottomry, from the keel or bottom of the vessel being generally expressly hypothecated, or charged with the payment of the debt, and being used figuratively in the contract to denote the whole ship. It is essential to the validity of this species of hypothecation that the sea risk should be incurred by the lender, that is to say, that the debt should be incurred, and charged upon the vessel, upon the understanding that, if the vessel is lost, the lender loses his money, but, if it arrives safe at the port of destination, it shall stand charged with the payment of the debt. The master has no authority to hypothecate the vessel in any other manner (*l*); and the Court of Admiralty has no jurisdiction to enforce any other contract (*m*). As a remuneration for this risk, the creditor has always been entitled to take and charge upon the vessel any rate of interest or remuneration for the loan or debt that the parties might agree upon, termed maritime interest (*n*). The only events which

(*h*) *The Huntley*, 1 Lush. 24; *The Edmond*, 30 L.J. Adm. 128; but disbursements for charges for which the consignee of the cargo is liable are not the subject of bottomry: *Ib.*

(*i*) *Harmer* v. *Bell*, 7 Moore, P.C. 267; *Menetone* v. *Gibbons*, 3 T.R. 267; *Ladbrooke* v. *Crickett*, 2 *ib.* 649.

(*k*) It has been held that 3 & 4 Vict. c. 65, s. 6, does not give a maritime lien in respect of necessaries supplied to a foreign ship in an English port: *The Henrich Bjorn*, 11 App.Cas. 270; 55 L.J. P. 80; nor in respect of mere towage apart from salvage: *Westrup* v. *Gt. Yarmouth Co.*, 43 Ch.D. 241; 59 L.J.Ch. 111; nor in respect of brokerage on a charter-party: *The Marianne*, (1891) P. 180; 60 L.J. P. 39; nor does 24 & 25 Vict. c. 10, s. 10, create or give the master a maritime lien for disbursements: *The Sara*, 14 App.Cas. 209; 58 L.J. P. 57. See, however, 57 & 58 Vict. c. 60, s. 167, *post*, p. 894.

(*l*) *Stainbank* v. *Fenning*, 11 C.B. 51; 20 L.J. C.P. 226.

(*m*) *The Royal Arch*, Swabey, 269, 281; *The Indomitable*, Swabey, 446; 5 Jur. N.S. 632; *The Ida*, L.R. 3 A. & E. 542; 41 L.J. Adm. 85.

(*n*) *Joy* v. *Kent*, Hardr. 418.

will discharge a bottomry bond are payment and an absolute total loss. A constructive total loss of the ship does not discharge the bond (*o*).

Power of ship-master to hypothecate.—The extent of the authority of the master of a vessel to bind the owners either of the ship or cargo, is derived from, and governed by, the law of the flag (*p*). By our law the ship-master has no right to create a lien upon the vessel, until he has made every reasonable endeavour to obtain supplies, repairs, or money, upon his own personal credit or that of the owners (*q*). It is not until all other means of obtaining necessaries fail that he has authority to hypothecate the ship, and to give maritime interest, which is in effect defeating the object of the adventure, and transferring to the creditor much of the profits of the voyage (*r*). If the master at a foreign port is able to communicate speedily with the owners, it is his duty to do so before he orders repairs or supplies (*s*); and, where practicable, he must do so before he can create a lien on the vessel or cargo (*t*). It is no excuse for not communicating with the owner under such circumstances, that he is insolvent, unless he has been judicially declared so, and the ownership of the vessel has vested in his trustee in bankruptcy, in which case notice should be given to the trustee (*u*). If the ship-master borrows money for his own purposes or for those of the consignee of the cargo (*x*), as distinguished from those of the ship-owners, his contract will fail to create a lien upon the vessel (*y*). Repairs executed, or advances made, on personal credit cannot afterwards be converted into a bottomry transaction. There may, however, be cases of extreme urgency, where the master is dead, and the merchant advances money intending to require a bottomry bond from the beginning, and gives the owners the earliest possible notice of his intention, in which the bond might be upheld, though no agreement for it was originally made; but they are cases of exception to the general principle. The master ought, in general, to be distinctly apprised of the intention of a lender of the money to require a bottomry bond, that he may have time and opportunity to exercise his discretion as to entering into the contract, or to try at least to take other means to avoid the necessity,

(*o*) *Thomson* v. *Royal Exchange Assur. Co.*, 1 M. & S. 30; *Broomfield* v. *Southern Insurance Co.*, L.R. 5 Ex. 192; 39 L.J. Ex. 186.

(*p*) *The Karnak*, L.R. 2 P.C. 505; 38 L.J. Adm. 57.

(*q*) *Heathorne* v. *Darling*, 1 Moore, P.C.C. 5; *The Nelson*, 1 Hagg. 176; *La Ysabel*, 1 Dod. 273; *The Orelia*, 3 Hag. 84; *The Dunvegan Castle*, *ib.* 331.

(*r*) *The Pontida*, 9 P.D. 177; 53 L.J. P. 78.

(*s*) *Wallace* v. *Fieldin*, 7 Moore, P.C.C. 398; *Duranty* v. *Hart*, 2 Moo. P. C. N.S. 289; 33 L.J. Adm. 116; *The Olivier*, Lush. 484; *The Hamburg*, 32 L.J. Adm. 161.

(*t*) *Kleinwort & Co.* v. *Cassa Marittima of Genoa*, 2 App.Cas. 156.

(*u*) *The Panama*, L.R. 3 P.C. 199; 39 L.J. Adm. 37.

(*x*) *The Edmond*, 30 L.J. Adm. 128.

(*y*) *The Reliance*, 3 Hag. 66.

to advise with the owners of the ship and cargo, if it be practicable, or, if not, at least to consult with persons on the spot.

But, although when a ship-master orders repairs and supplies on credit given to him personally, those who gave the credit cannot take a bottomry bond, yet a merchant, a stranger to the transaction, or even an agent, if he has not made himself responsible, may advance money on bottomry to liquidate those demands (*z*); and a bottomry bond may, it seems, be given at the same time with, and as a collateral security for, bills of exchange for repairs and necessaries for the voyage, in this sense that, if the bills of exchange are honoured, the bottomry bond is discharged (*a*).

If, after a bond hypothecating the vessel has been entered into, the vessel becomes damaged, and puts into a foreign port for shelter, it cannot be sold by the master so as to extinguish the maritime lien; and, as the doctrine of constructive total loss does not apply to bottomry bonds, if the ship is found unseaworthy and sold, the bondholder will be entitled to a first charge on the proceeds (*b*). In the case of British ships, the certificate of registry is (*c*) the great evidence of title; and all bottomry bonds and hypothecations ought to be, and generally are, indorsed upon it; and no man should purchase a British ship, even in a foreign port, without seeing the certificate. It is the duty of purchasers of British ships in foreign ports to make strict inquiries and be especially careful to guard themselves against liens which adhere to the ship; and they cannot be safe in cases of sale by the master, unless recourse is had to a court of justice, and a decree is obtained for the sale of the vessel (*d*). A British consul in a foreign port is entitled, under certain circumstances of urgent necessity, when the master is dead, to hypothecate a vessel and cargo through the medium of a bottomry bond (*e*).

Lien on vessels causing damage.—The owner of a vessel damaged at sea by collision with another vessel has a lien upon the vessel causing the damage, which may be enforced in the Court of Admiralty by a proceeding *in rem* against the vessel, so that, if the vessel causing the damage is carried to a distant port, and sold to a *bonâ fide* purchaser without notice of the lien, the vessel may nevertheless be attached in the hands of such *bonâ fide* purchaser and sold to satisfy such damage. But this lien may be lost by negligence

(*z*) *The Wave*, 15 Jur. 518; *The Augusta*, 1 Dods. 283; *The Laurel*, 33 L.J. Adm. 17; Br. & L. 191.

(*a*) *Stainbank* v. *Shepard*, 22 L.J. Ex. 341; 13 C.B. 441; *The Emancipation*, 1 Wm. Rob. 124. As to what amounts to a valid "bottomry" bond, see *The Haabet*, (1899) P. 295; 68 L.J. P. 121.

(*b*) *The Great Pacific*, L.R. 2 P.C. 516; 38 L.J. Adm. 45.

(*c*) See Addison on Torts, p. 533 (ed. 7).

(*d*) *The Catharine*, 15 Jur. 231.

(*e*) *The Cynthia*, 16 Jur. 748.

or delay, where the rights of third parties are thereby compromised (*f*). A maritime lien is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached (*g*). But no bottomry bondholder or mortgagee can be a competitor with a successful suitor in a cause of damage in the Admiralty Court. The lien of the latter will prevail over both the mortgage and the bottomry bond, unless the bottomry bond has been granted after the damage has been done.

Priority of maritime liens.—Where there were two bottomry bonds attaching on the vessel causing the damage, one entered into before, and the other after, the collision, it was held that the lien for the damage must be preferred to the lien of the first bondholder, but that it did not extend to the increased value of the vessel resulting from repairs effected at the cost of the second bondholder (*h*). Where several bottomry bonds have been given by the master at different periods during the voyage, those of the latest date have the priority of payment, on the supposition that the last bond operates for the protection of the prior interests (*i*). A bottomry bond also executed under the pressure of necessity at a foreign port will supersede a previous mortgage of the ship (*k*).

Hypothecation of cargoes and merchandize.—The master of a ship may, under the pressure of extreme necessity, and where he is unable to communicate with the owner (*l*), hypothecate the cargo as well as the ship, to enable him to raise funds to prosecute the voyage and deliver the goods at the port of destination. He is clothed with an implied authority to take whatever steps ought to be taken to protect them from impending destruction (*m*). But he can do no more than the owners themselves could if actually present; and he cannot sell against their will (*n*). He may create and continue a charge upon the cargo in favour of the lender of the money so long as such cargo remains in his possession; but he has no power to hypothecate it so as to enable the creditor to follow it after it has been sold or transferred (*o*). Where a ship, freight, and cargo were hypothecated at a foreign port by one bottomry bond for necessary repairs, and the plaintiff's goods formed part of the cargo so hypothecated, and the ship and freight realised less than the sum borrowed, and the goods became liable

(*f*) *The Europa*, 2 Moo. P.C. N.S. 1; 32 L.J. Adm. 189.

(*g*) *Harmer* v. *Bell*, 7 Moore, P.C. 267, 285; *The Elin*, 8 P.D. 129; 52 L.J. P. 55.

(*h*) *The Aline*, 1 W. Rob. 120.

(*i*) *The Betsy*, 1 Dods. 289; *The Rhadamanthe*, *ib.* 201.

(*k*) *The Duke of Bedford*, 2 Hag. 294.

(*l*) *Australasian Steam Navigation Co.* v. *Morse*, L.R. 4 P.C. 222.

(*m*) *The Gratitudine*, 3 Rob. 240.

(*n*) *Australasian Steam Navigation Co.* v. *Morse*, *supra*; *Acatos* v. *Burns*, 3 Ex.D. 282; 47 L.J. Ex. 566.

(*o*) *Busk* v. *Fearon*, 4 East, 319.

for the deficiency, and the plaintiff was compelled to pay it to release his goods, it was held that he might maintain an action against the shipowner for the recovery of the money he had been obliged to pay to release his cargo; also that the shipowner could not abandon the ship and freight, and refuse to ratify the act of the master, because the costs and expenses exceeded the value of the ship, when repaired, and the freight; and that "a merchant advancing money on bottomry in a foreign port, though bound to show a reasonable case of unprovided necessity for the advance, from the want of repair, or otherwise, is not bound to inquire into the expediency of incurring the expense of these repairs with reference to the interest of the owner" (*p*). By the French law, on the contrary, the shipowner in a similar case may abandon the ship and freight, and, if he does so, will not be liable to the shipper for money paid to release the cargo (*q*).

Illegal pledges.—By the Merchant Shipping Act, 1894, s. 15 (*r*), any pledge of the certificate of registry of a ship is made illegal and void; and, therefore, if a sole owner and captain pledges the certificate for good consideration, he may nevertheless re-demand the document for the purposes of navigation, and may maintain an action against the pledgee if it is not delivered up on request (*s*).

Mortgages of fixtures may be made through the medium of any instrument of conveyance in writing, and need not be by deed (*t*). If certain fixtures are enumerated in a mortgage-deed, and there is then a clause embracing all fixtures upon the premises, fixtures of all kinds will pass to the mortgagee (*u*). If the mortgagor makes default in payment of the mortgage debt at the time appointed, the mortgagee may proceed to sell, without taking proceedings to foreclose, and may apply the proceeds of the sale in liquidation of the mortgage debt, interest and costs (*x*). But he will be ordered to account for and pay over any surplus that may remain (*y*). If he does not think fit to sell, he can obtain a decree of foreclosure, and bar the equity of redemption, and make the property his own (*z*).

Right to fixtures as between mortgagor and mortgagee.—A mortgagor in possession may become tenant at will to the mortgagee, or tenant at sufferance; but he is not, in general, tenant for any

(*p*) *Duncan* v. *Benson*, 1 Exch. 537; 17 L.J. Ex. 238; affirmed 3 Exch. 644; 18 L.J. Ex. 169.

(*q*) *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115; 35 L.J. Q.B. 74; see *Greer* v. *Poole*, 5 Q.B.D. 272; 49 L.J. Q.B. 463.

(*r*) 57 & 58 Vict. c. 60, s. 15.

(*s*) *Wiley* v. *Crawford*, 1 B. & S. 253; 30 L.J. Q.B. 319. See also Addison on Torts, p. 534 (ed. 7).

(*t*) *Thompson* v. *Pettitt*, 10 Q.B. 101; 16 L.J. Q.B. 163.

(*u*) *Haley* v. *Hammersley*, 30 L.J. Ch. 771; 3 De G. F. & J. 587.

(*x*) *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 2 Atk. 303.

(*y*) *Harrison* v. *Hart*, 1 Comyns, 393.

(*z*) *Wayne* v. *Hanham*, 9 Hare, 62; 20 L.J. Ch. 530.

term. The cases, therefore, respecting the right to dis-annex and remove fixtures as between landlord and tenant, have no application to the case of mortgagor and mortgagee. A mortgage made by the owner of the inheritance will, in general, pass all the fixtures thereon, though they are not named in the deed, and although they are trade fixtures which have been annexed to the freehold for the more convenient using of them and not to improve the inheritance, and are capable of being removed without any appreciable damage to the freehold (*a*). They pass to the mortgagee as part and parcel of the inheritance; and the mortgagor does not, by becoming tenant to the mortgagee, acquire any right to remove any portion of them, although they would be removable in ordinary cases as between landlord and tenant (*b*). Trade fixtures, affixed to mortgaged freehold premises after the mortgage, by the mortgagor and partner, occupying the premises for the purpose of their trade, pass to the mortgagee (*c*). But this is not so when the fixtures belong to a tenant of the mortgagor (*d*). A mortgagee of business premises, by leaving the mortgagor in possession, impliedly authorizes him to carry on his business and to do everything which is usual and proper for that purpose (*e*).

SECTION III.

MORTGAGE, ETC., OF INCORPOREALS.

Mortgages of shares and stock in a public company may be effected by the execution by the mortgagor of the ordinary deed of

(*a*) *Climie* v. *Wood*, L.R. 4 Ex. 328; 38 L.J. Ex. 223; *Holland* v. *Hodgson*, L.R. 7 C.P. 328; 41 L.J. C.P. 146; *Cumberland Union Banking Co.* v. *Maryport Hematite Co.*, (1892) 1 Ch. 415; 61 L.J. Ch. 335; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 66 L.J. Ch. 114. As to dog grates substituted for the purpose of improving the inheritance, see *Monti* v. *Barnes*, (1901) 1 K.B. 205; 70 L.J. K.B. 225.

(*b*) *Walmsley* v. *Milne*, 7 C.B. N.S. 115; 29 L.J. C.P. 97; *Mather* v. *Fraser*, 2 K. & J. 536; 25 L.J. Ch. 361; *Haley* v. *Hammersley*, 30 L.J. Ch. 771; 3 De G. F. & J. 587.

(*c*) *Cotton, Ex parte*, 2 M. D. & D. 725; *Cullwick* v. *Swindell*, L.R. 3 Eq. 249; 36 L.J. Ch. 173; *Longbottom* v. *Berry*, L.R. 5 Q.B. 123; 39 L.J. Q.B. 37; *Sheffield Building Society* v. *Harrison*, 15 Q.B.D. 358; 54 L.J. Q.B. 15.

(*d*) *Sanders* v. *Davis*, 15 Q.B.D. 218; 54 L.J. Q.B. 576.

(*e*) *Gough* v. *Wood & Co.*, (1894) 1 Q.B. 713; 63 L.J. Q.B. 564; *Thomas* v. *Jennings*, 66 L.J. Q.B. 5; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 66 L.J. Ch. 114.

transfer conveying the shares to the mortgagee in consideration of the payment of the mortgage-money, as in the case of an absolute sale, taking at the same time a separate deed from the mortgagee, admitting that the transfer, though absolute on the face of it, was in reality made by way of mortgage, and undertaking to re-transfer the shares by a given day on repayment by the transferor of the mortgage-money. If the transfer is on the face of it made conditional by way of mortgage, and not in the ordinary form of transfer given by the statute incorporating the company, the company will refuse to register it, as they cannot, as we shall see, place on the register transfers complicated with trusts and conditions (*a*). Foreclosure, and not sale, is the remedy of an equitable mortgagee of a share in a mining partnership (*b*).

If a person transfers his shares in a company by way of mortgage, and the mortgagee, as registered owner, becomes liable for calls or other payments, he cannot compel his mortgagor to indemnify him, unless he comes to redeem the shares (*c*).

Mortgages of stock and shares void by reason of reputed ownership.—If money is advanced on the security of a transfer of shares made by way of mortgage, and the transfer is not registered in the register of shareholders of the company, so that the mortgagor still appears on the register as the holder of the shares, the shares will be in his order and disposition, and, in case of his bankruptcy, will pass to his trustee, provided the legal power to transfer the shares still continued in the mortgagor; but, if the transfer cannot be made without the production of the mortgagor's certificates of proprietorship, and these certificates have been placed in the hands of the mortgagee so as to give the latter an equitable lien upon them, then, as the mortgagor has no power to transfer, the shares are not in his order and disposition (*d*).

Lien upon shares and stock.—Certificates of proprietorship of shares frequently have a notice at the foot of them, warning the shareholder that no transfer of his shares can be effected without the production of that certificate; and the companies refuse to register a transfer-deed, unless the certificates of proprietorship of the transferor have previously been deposited at the transfer office. If, therefore, a shareholder borrows money on the security of shares, and deposits his certificates in the hands of the lender, accompanied by an agreement, in writing, to transfer the shares to the lender, or to his nominee, in case of the non-payment of the money by the time appointed, there will be a good charge upon

(*a*) *Reg.* v. *General Cemetery Co.*, 6 E. & B. 415; 25 L.J. Q.B. 342.
(*b*) *Redmayne* v. *Forster*, L.R. 2 Eq. 467; 35 L.J. Ch. 847.
(*c*) Smith's Man. of Eq. 303 (ed. 15).
(*d*) *Harrison, Ex parte*, 3 Dea. 196.

the shares (*e*); but notice of the deposit of the certificates should be given to the company, to prevent the shareholder from obtaining fresh certificates by perjury or fraud, and to do away with the inference of reputed ownership in case of the bankruptcy of the depositor in whose name the shares are registered, and so prevent the title to the shares from vesting in his trustee.

The fact that the company is not bound to take notice of any trust will not render nugatory a notice to them of the deposit of the certificates by way of security for a loan, and will not prevent a deposit of the certificates of proprietorship by way of security for a loan from constituting a valid charge upon the shares (*f*).

Where a sister advanced her brother 1,800*l.* on the security of a deposit of mining shares belonging to the brother, and received the certificates of the shares, together with an undertaking, signed by the brother, to complete the transfer of the shares to the petitioner when required, and placed the certificates and the undertaking in an inclosure which she sealed with her seal, and then deposited it in an iron safe belonging to her brother for greater security, it was held that the certificates were not in his possession, order, or disposition at all. He had certainly the custody of the packet, but could not lawfully have broken the seal to get at the contents (*g*).

(*e*) *Richardson, Ex parte*, 3 Dea. 496, 503; *Littledale, Ex parte*, 6 De G. M. & G. 730; *Stewart, Ex parte*, 34 L.J. Ch. 6.

(*f*) *Stewart, Ex parte, supra*, explaining and qualifying *Boulton, Ex parte*, 1 De G. & J. 163; 26 L.J. Bankr. 45.

(*g*) *Richardson, Ex parte*, 3 Dea. 503.

CHAPTER IV.

CONTRACTS FOR SERVICES.

SECTION I.

WORK AND LABOUR.

Deposit or simple bailment may be defined to be a delivery or bailment of goods in trust to be kept for the bailor and re-delivered on demand. It is of the very essence of a deposit that it be gratuitous; for, if anything is to be paid for the care and custody of the article, it immediately becomes a contract for the letting and hiring of labour and services and care to be employed upon the chattel. Where shares were deposited with bankers by a customer under such circumstances as would have entitled the bankers to a lien upon them for their general banking account, it was held that they were bailees for reward (*a*).

Requisites of deposit—Executory and executed promises.—To constitute a deposit, the subject-matter of the bailment must be either actually or constructively delivered to the bailee, or it must be in his possession or under his control at the time he undertakes the charge of it. A mere promise to take charge of a thing which has never either actually or constructively come into the possession of the promisor cannot constitute a deposit. But a delivery to the servant of the promisor, or to a person whom he has appointed to receive the chattel, and who has consented to hold it on his behalf, or any acts on the part of the promisor manifesting a clear intention to take charge of a thing which is not capable of manual delivery, but which has been placed at his disposal and under his control, will constitute a deposit in contemplation of law. But a man cannot be made a depositary without his knowledge and consent; he cannot have the possession of another man's property,

(*a*) *Johnston's Claim*, L.R. 6 Ch. 212; 40 L.J. Ch. 286.

with its accompanying duties and responsibilities, forced upon him against his will. Thus, if a tradesman anxious to sell his wares and merchandise sends them to my house without any previous communication with me, and without having obtained my previous consent, and they are taken in by my servant, in my absence, or without my knowledge, I do not by reason thereof become the depositary of the goods, and clothe myself with the care of them (*b*).

Liabilities of depositary—Negligent keeping—Ordinary casualties.—A depositary is only bound to take that care of things accepted by him to keep, which a reasonably prudent man takes of his own property of a like description (*c*). He will be liable to make compensation to the owner, if the goods are stolen, damaged, or lost by reason of negligence in the keeping of them; but he is not responsible for slight neglect or ordinary casualties (*d*). "He shall stand charged or not charged, according as default or no default shall be in him" (*e*). But if he is guilty of negligence, it is no answer to say that he lost his own goods at the time he lost the goods of the bailor (*f*). If a man takes charge of money, and leaves it upon a shelf, or in an open drawer in a place of public resort, when he might have placed it under lock and key, this is evidence of negligence. If a package or a box, sealed or locked, be deposited, and the depositary is not made acquainted with the contents, he is bound only to take that care of the article which its general appearance seems to require; and in case it should be lost or destroyed through neglect, he will only be liable to the extent of the apparent value of the article, without reference to the contents; but, if he is made acquainted with the contents—if he is told that the box contains gold or jewels, glass or china, of great value—he is then bound to exercise a degree of care proportioned to the proper keeping of such articles; and, if he then exposes the box in unsafe places, or subjects it to improper treatment, and the contents are damaged or destroyed, he must make compensation to the owner to the full extent of the injury sustained (*g*). Where property is deposited with bankers gratuitously, they are only liable for gross negligence (*h*). An executor stands in the position of a gratuitous bailee in respect of the assets (*i*).

(*b*) *Lethbridge* v. *Phillips*, 2 Stark. 544.
(*c*) *Giblin* v. *McMullen*, L.R. 2 P.C. 317; 38 L.J. P.C. 25.
(*d*) *Coggs* v. *Bernard*, 2 Raym. 913; *Lane* v. *Cotton*, 1 *ib.* 655; *Southcote's case*, 4 Co. 83, b; 1 Smith's L.C. 168 (ed. 10); *Jones* v. *Lewis*, 2 Ves. sen. 240; *Taylor* v. *Caldwell*, 32 L.J. Q.B. 164; 3 B. & S. 826, *ante*, p. 700.
(*e*) Doct. & Stud. ch. 38.
(*f*) *Doorman* v. *Jenkins*, 2 Ad. & E. 256; 4 L.J. K.B. 29.
(*g*) *Bonion's case*, Pasch. 8 Edw. 2; Mayn. Year Book, 275; Fitz. Abr. Detinue, 59.
(*h*) *Giblin* v. *McMullen*, L.R. 2 P.C. 317; 38 L.J. P.C. 25.
(*i*) *Job* v. *Job*, 6 Ch.D. 562.

Carelessness on the part of the depositor in selecting a person notoriously unfit to be trusted.—The law, however, expects a depositor to exercise a reasonable amount of vigilance in the protection of his own interests; and, if he will blindly deposit goods in the hands of a person of weak intellect, or a child, or a minor without experience, or a notoriously idle and careless, or drunken fellow, he cannot expect the same care from them as from a prudent and cautious housekeeper. If the goods are injured or lost by the gross negligence of such depositaries, he must bear the consequence of his own rashness and folly, and put up with the loss (*k*).

Theft by servant of depositary.—If a servant steps out of the course of his employment to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. "If one man desire to lodge with another that is no common hostler, and one that is servant to him that he lodgeth with robbeth his chamber, the master shall not be charged with the robbery" (*l*). If the carefully-selected servant of the depositary negligently leaves the door of a house or warehouse open, and thieves avail themselves of the opportunity thus afforded them to enter the house and steal the deposit, it appears that the depositary is not responsible for the theft (*m*). It is laid down by Holt, C.J., that "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master; and then the act of the servant is the act of the master" (*n*). If, therefore, a servant "quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act" (*o*). It is the custom of bankers to receive and keep for the accommodation of their customers boxes of plate and jewels, wills, deeds, and securities; and, as no charge is made for the keeping of these things, they are, as we have seen, gratuitous deposits. The bankers, therefore, are not bound to take even ordinary care of them; and, if they are stolen by a clerk or servant employed about the bank, the bankers are not responsible, unless they have knowingly hired or kept in their service a dishonest servant (*p*).

Use and enjoyment by depositary of subject-matter of deposit.—A

(*k*) *Coggs* v. *Bernard*, 2 Raym. 914, 915.

(*l*) Doct. & Stud. ch. 42; *Gayford* v. *Nicholls*, 9 Exch. 702; 23 L.J. Ex. 205.

(*m*) *Dansey* v. *Richardson*, 3 E. & B. 144, 169; 23 L.J. Q.B. 217; *ante*, p. 699, and *post*, p. 831. The Court were divided on this point.

(*n*) *Middleton* v. *Fowler*, 1 Salk. 282.

(*o*) Lord Kenyon, *M'Manus* v. *Crickett*, 1 East, 107; *Reedie* v. *L. & N. W. Ry.*, 4 Exch. 244; 20 L.J. Ex. 65; *Peachey* v. *Rowland*, 13 C.B. 182; 22 L.J. C.P. 81.

(*p*) *Giblin* v. *McMullen*, L.R. 2 P.C. 317; 38 L.J. C.P. 25, *ante*, p. 779.

depositary has no right to make use of the deposit for his own benefit and advantage; if he does so, and the thing is lost or injured, or deteriorated in value, through such user, the depositary must make good the loss. If, however, the subject-matter of the bailment is a living animal, such as a hound or a horse, which requires air and exercise, the bailee has an implied authority from the owner to use it to a reasonable extent, and is under an implied engagement to give it proper air and exercise. Where corn was deposited by a farmer with a miller, to be used as part of the miller's current consumable stock, subject to the right of the farmer to claim at any time an equal quantity of wheat of similar quality, or, in lieu thereof, the market price of such quantity, it was held that this was a sale and not a bailment (*q*).

Transfer of deposit to stranger—Remedy of depositor.—If a depositary commits a breach of trust, and sells or wastes the deposit, the depositor may maintain an action against the purchaser for the recovery of the value of the deposit if the latter neglects to yield it up on demand (*r*), unless the thing has been purchased in market overt (*s*). If the goods are bailed by A. to B., to be kept by the latter, and B. bails them to C., who uses and wastes the goods, C. is liable to an action at the suit of A. for the recovery of compensation for the damages sustained (*t*). Where a depositary has wrongfully sold the goods deposited with him, the bailor may sue him immediately for the conversion. If he does not discover the conversion until after the lapse of six years, he is, nevertheless, entitled to sue the depositary for refusing to deliver up the goods, and the Statute of Limitations will run only from the refusal to deliver on request, and not from the sale (*u*).

Restoration of deposit.—The depositary is bound to deliver up the deposit to the owner on demand, although the latter may be an entire stranger to him. Where a pony-chaise was bailed to a workman to be painted, and the latter deposited it in the hands of a party who refused to deliver it up to the owner unless the latter produced either the person who actually deposited the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property without doing either the one or the other (*x*). The bailee has no better title than the bailor; and, consequently, if a person entitled to the property

(*q*) *South Australian Ins. Co.* v. *Randell*, L.R. 3 P.C. 101.

(*r*) *Cooper* v. *Willomat*, 1 C.B. 672; 14 L.J. C.P. 219; *Fenn* v. *Bittlestone*, 7 Exch. 152; 21 L.J. Ex. 41; *White* v. *Spettigue*, 13 M. & W. 603; 14 L.J. Ex. 99.

(*s*) Addison on Torts, p. 450 (ed. 7).

(*t*) 12 Ed. 4, fol. 13, pl. 9; fol. 9, pl. 5; *Loeschman* v. *Machin*, 2 Stark. 311.

(*u*) *Wilkinson* v. *Verity*, L.R. 6 C.P. 206; 40 L.J. C.P. 141. See *Miller* v. *Dell*, (1891) 1 Q.B. 468; 60 L.J. Q.B. 404.

(*x*) *Buxton* v. *Baughan*, 6 C. & P. 674.

as against the bailor claims it, the bailee must give it up to him (*y*). No action can be brought for the return of the deposit until a demand has been made, and the period of limitations does not begin to run until the demand has been made (*z*).

Joint and several deposits.—Where goods and chattels are deposited in the hands of a bailee by the concurring will of several joint owners, one of them has no right to demand them back without the authority of all the joint depositors. If some of them ask the bailee to return the property, and others desire him to keep it, the bailee is not liable to an action at the suit of those who require him to return it (*a*). If the bailee is bound by his contract to deliver the goods to the two jointly, his refusal to deliver them on the demand of one party alone is not a conversion, nor is his detention from such one party an unlawful detainer. But, if an action is brought by several joint bailors against the bailee for non-delivery of the goods, it is a good defence to the action that the goods have been delivered up to one of them (*b*). And, wherever several joint owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals (*c*).

Transfers of subject-matter of bailment—Adverse claimants.—When chattels have been bailed, to be holden by the bailee at the disposal of the bailor, a question often arises as to the nature and extent of the liabilities of the bailee to persons who claim to be the owners of the chattels by sale or mortgage from the bailor. If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorised by him to receive them, a *bonâ fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and, in case of the refusal of the latter to deliver them to him, may maintain an action for their recovery, the bill of sale or mortgage signed by the bailor being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee.

Eviction by title paramount.—Where the plaintiff brought an

(*y*) *Biddle* v. *Bond*, 6 B. & S. 225; 34 L.J. Q.B. 137; *Batut* v. *Hartley*, L.R. 7 Q.B. 594; 41 L.J. Q.B. 273; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187. See, however, *Davies, Ex parte*, 19 Ch.D. 86; *post*, p. 883.

(*z*) *Tidd, In re*, (1893) 3 Ch. 154; 62 L.J. Ch. 915.

(*a*) *Atwood* v. *Ernest*, 22 L.J. C.P. 225; 13 C.B. 889; *May* v. *Harvey*, 13 East, 197.

(*b*) *Burke* v. *Bryant*, Addison on Torts, p. 524 (ed. 7); *Brandon* v. *Scott*, 7 E. & B. 237; 26 L.J. Q.B. 163; *Watson* v. *Evans*, 1 H. & C. 662; 32 L.J. Ex. 137.

(*c*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 851; 22 L.J. Ex. 355; *Broadbent* v. *Ledward*, 11 Ad. & E. 209.

action against the defendant for a breach of his promise to return a horse sent to him by the plaintiff, and the defence was that S. was the owner of the horse, and had forcibly taken it away from the defendant, it was held that this was a discharge of the defendant's promise, it being analogous to an eviction of a lessee by title paramount (*d*). So, where a bailor mortgages a chattel bailed, and the mortgagee has a right to demand possession from the bailee and does demand it, the latter may refuse to give the chattel up to the bailor (*e*).

Stakes in hands of stakeholders to abide event of lawful game, or money deposited upon condition.—If money has been deposited in the hands of a stakeholder to abide the event of a lawful game or race, and then to be paid over to the winner, the stakeholder holds the money as agent of the winner, and is bound on demand to pay it over to him (*f*). But, if the party is not strictly a stakeholder holding money in that character, but receives it as agent for a known principal, he is accountable only to the latter for the money (*g*). If the deposit has been made by two persons jointly, it cannot, as we have seen, be revoked and the thing deposited be demanded back by one of them alone (*h*). If a valid and binding contract is made between A. and B. for the performance of some act or duty by B. by an appointed day, or within a reasonable time after the making of the contract, and for the payment of money by A. to B. on the act being done, and the sum to be paid is, by the mutual agreement of the parties, deposited by A. in the hands of C., to be paid over to B. on the performance of his contract, and in default to be returned to A., the deposit cannot be revoked and the money demanded back from the stakeholder by A. without the consent of B. (*i*), unless the transaction is illegal (*k*). As soon as the stakeholder has received the deposit, he is bound to hold it to abide the event, and must not pay it over to either party until the condition upon which it was made payable or returnable has been accomplished. Thus, where an auctioneer has received a deposit from the purchaser of an estate, to be paid over to the vendor if a good title to the property is made out by the latter, and, in default thereof, to be returned to the intended purchaser, the latter has no

(*d*) *Shelbury* v. *Scotsford*, Yelv. 23; Littledale, J., *Wilson* v. *Anderton*, 1 B. & Ad. 457; 9 L.J. (O.S.) K.B. 48; *Biddle* v. *Bond*, 34 L.J. Q.B. 137; 6 B. & S. 225; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187. See, however, *Davies, Ex parte*, 19 Ch.D. 86, *post*, p. 883.

(*e*) *European, &c. Mail Co.* v. *Royal Mail Packet Co.*, 30 L.J. C.P. 246.

(*f*) *Applegarth* v. *Colley*, 10 M. & W. 723, 733; 11 L.J. Ex. 350.

(*g*) *Bamford* v. *Shuttleworth*, 11 Ad. & E. 926; *Edgell* v. *Day*, L.R. 1 C.P. 80; 35 L.J. C.P. 7.

(*h*) *Ante*, p. 782.

(*i*) *Marryat* v. *Broderick*, 2 M. & W. 372; 6 L.J. Ex. 113; *Emery* v. *Richards*, 14 M. & W. 728; 15 L.J. Ex. 49.

(*k*) *Ante*, p. 95; *Eltham* v. *Kingsman*, 1 B. & Ald. 683.

right to demand back the deposit, and the auctioneer is not justified in returning it, without the consent of the vendor. But, if the vendor is not able to establish his title, or the contract is rescinded or abandoned by the mutual consent of the contracting parties, the auctioneer then holds the deposit for the use, and at the disposal, of the party from whom he received it, and is bound to return it on the request of the latter (*l*). So long as the contract between the parties interested in the deposit remains open, and the event is undetermined, the right to the deposit remains in suspension, and each of the parties has an equal interest in the due fulfilment of the trust by the stakeholder. Stewards of a horse-race do not stand in the position of arbitrators between the persons who have horses in the race; and it is not necessary that they should meet together and come to a joint decision as to which horse has won, to enable the winner to recover the stakes (*m*).

If the deposit has been made to abide the event of a wager, or for the purpose of carrying into effect an unlawful transaction, the depositor may at any time before the event has happened or the deposit has been paid over, demand it back and maintain an action for its recovery (*n*).

Power of depositary to compel rival claimants to establish their title by interpleader.—If the event, when it does transpire, is not of a decisive character, and both parties set up a title to the deposit, the depositary may compel them to interplead, and so establish the right. This may be done when the depositary claims no interest in the deposit, and is not colluding with either party (*o*). A stakeholder may also pay money into court under the Trustee Act, 1893 (*p*).

Liabilities of depositary holding possession wrongfully.—If the depositary is in default in neglecting to return the chattel on demand, he is responsible for all injuries that may afterwards happen to it. He must restore it, moreover, with all its increase and profits.

Liabilities resulting from the taking possession of goods by finding.—A man may clothe himself with the liabilities of a depositary by

(*l*) *Burrough* v. *Skinner*, 5 Burr. 2639; *Edwards* v. *Hodding*, 5 Taunt. 815; *Gray* v. *Gutteridge*, 1 Moo. & R. 614; *Duncan* v. *Cafe*, 2 M. & W. 246; 6 L.J. Ex. 81.

(*m*) *Parr* v. *Winteringham*, 1 E. & E. 394; 28 L.J. Q.B. 123.

(*n*) *Ante*, p. 95; *Holmes* v. *Sixsmith*, 7 Exch. 802; 21 L.J. Ex. 312; *O'Sullivan* v. *Thomas*, (1895) 1 Q.B. 698; 64 L.J. Q.B. 398. See also *ante*, p. 112.

(*o*) *Crawshay* v. *Thornton*, 7 Sim. 398; 4 L.J. Ch. 177; *Pearson* v. *Cardon*, 2 Russ. & M. 606; *Tanner* v. *European Bank*, L.R. 1 Ex. 261; 35 L.J. Ex. 151; *Nelson* v. *Baxter*, 23 L.J. Ch. 705; 2 H. & M. 334; *Attenborough* v. *St. Katharine's Dock*, 3 C.P.D. 450; 47 L.J. C.P. 763; Ord. LVII. r. 3. See *Laing* v. *Zeden*, L.R. 9 Ch. 736; 43 L.J. Ch. 626.

(*p*) 56 & 57 Vict. c. 53, s. 42; *United Kingdom Life Assurance Co., In re*, 34 L.J. Ch. 554; 34 Beav. 493.

finding and taking possession of the lost property of another as well as by receiving property direct from the hands of the owner (*q*). "When a man doth find goods," observes Lord Coke, "it hath been said, and so commonly held, that, if he doth dispossess himself of them, by this he shall be discharged; but this is not so, as appears by 12 Edw. 4, fo. 13. For he which finds goods is bound to answer him for them who hath the property; and, if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them; for at the first it is in his election whether he will take them or not into his custody; but, when he hath them, he ought to keep them safely; and, if he be wise, he will search out the right owner of them, and so deliver them unto him." An action on the case lieth against him for ill and negligent keeping (*r*).

Liabilities of depositor—Lien of depositary.—No depositary is ever permitted in this country to set up a right of lien upon the chattel for the mere expenses he has incurred in keeping and preserving it.

Deposits of money with one of several partners.—A receipt of money by one partner on account of the firm, in the ordinary course of the business of the co-partnership, is the receipt of the co-partnership at large; and all the partners are individually responsible for the proper application of the money deposited (*s*).

By sect. 10 of the Partnership Act, 1890 (*t*), where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

By sect. 11, in the following cases—namely: (a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm—the firm is liable to make good the loss. By sect. 12, every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a

(*q*) Dial. 2, ch. 38; Story, 64, 65.

(*r*) *Isaack* v. *Clark*, 2 Bulst. 312. As to recovering the halves of bank notes, see *Smith* v. *Mundy*, 29 L.J. Q.B. 172.

(*s*) *Dundonald* (*Earl*) v. *Masterman*, L.R. 7 Eq. 504; 38 L.J. Ch. 350; *St. Aubyn* v. *Smart*, L.R. 3 Ch. 646; *Willet* v. *Chambers*, Cowp. 814; *Harman* v. *Johnson*, 2 E. & B. 61; 22 L.J. Q.B. 297; *Plumer* v. *Gregory*, L.R. 18 Eq. 621; 43 L.J. Ch. 803; *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch.D. 394; 46 L.J. Ch. 661; *Cleather* v. *Twisden*, 28 Ch.D. 340; 54 L.J. Ch. 408; *Rhodes* v. *Moules*, (1895) 1 Ch. 236; 64 L.J. Ch. 122; and see *post*, p. 797. See now sect. 5 of the Partnership Act, 1890, *ante*, p. 335.

(*t*) 53 & 54 Vict. c. 39. See *Moore* v. *Knight*, (1891) 1 Ch. 547; 60 L.J. Ch. 271.

partner therein becomes liable under either of the two last preceding sections.

Where one of a firm of solicitors received from a client a sum of money, for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money, it was held that the transaction with the client was within the scope of the partnership business, and that the partners in the firm were jointly and severally liable to make good the amount (*u*). If one of several partners in trade obtains money in the ordinary course of dealing of the co-partnership, but by means of false and fraudulent representations, and converts the money, when received, to his own use in fraud of his partners, the partnership is nevertheless responsible for the moneys so received in the name of the firm; and an innocent partner may, consequently, be as much bound by such fraudulent acts and transactions as if he himself had personally been a party to them (*x*). But, if the fraud has not been committed in the course of the partnership dealings, but in the private and separate transactions of the single partner himself with third parties, the innocent partner cannot be made responsible to those who have been defrauded in the course of such transactions. Thus, if a partner, who holds money in his hands as a trustee for third parties, brings that money into the partnership account, and employs it in the business as his own money, the other partners cannot be made responsible for the repayment of the money so employed in the business, unless they knew at the time that the money was trust money, and not the property of their co-partner (*y*). But, if money is deposited in the hands of one of several partners of a banking firm at the bank, to be held temporarily by the bank, and subsequently applied in the purchase of some particular security, and the partner absconds with the money, the firm is responsible for the repayment of the amount, although they had given no authority to their partner to receive money for investment, and the transaction, so far as it related to the application of the money when received, was not in the ordinary course of business (*z*). And, where the senior partner of a firm of stock-brokers bought transferable bonds for the plaintiff, and kept the bonds for him, and afterwards sold them, and made away with the money, it was held that the firm was responsible to the plaintiffs for the value of

(*u*) *Atkinson* v. *Mackreth*, L.R. 2 Eq. 570; 35 L.J. Ch. 624.

(*x*) *Rapp* v. *Latham*, 2 B. & Ald. 795; *Stone* v. *Marsh*, 6 B. & C. 551; 5 L.J. (O.S.) K.B. 201; *Keating* v. *Marsh*, 1 Mont. & Ayr. 582.

(*y*) *Heaton, Ex parte*, Buck, 386; *Smith* v. *Jameson*, 5 T.R. 601.

(*z*) *Thompson* v. *Bell*, 10 Exch. 10; 23 L.J. Ex. 321.

the bonds, although the junior partners were entirely ignorant of the transaction (*a*).

Deposits of money with bankers.—Money deposited in the hands of bankers in the ordinary course of business is money lent to the banker by the depositor, with a superadded obligation that it is to be repaid when called for by cheque. If interest is to be paid by the banker, the transaction amounts to a letting and hiring of the money or a loan at interest; if no interest is to be paid on the deposit, it is a *commodatum* or gratuitous loan; and in this last case, if the money remains for six years in the banker's hands without any payment by him of any part of the principal, or any acknowledgment by him in writing of the existence of the loan and of the debt, the statute of limitations will be a bar to its recovery by action (*b*). In ordinary cases of deposits of money with bankers the transaction amounts to a *mutuum* or loan for use and consumption, it being understood that the banker is to have the use of the money in return for his consent to take charge of it (*c*). Money, when paid into a bank, ceases altogether to be the money of the depositor; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it or ordered to pay it. It is the banker's money; he deals with it as his own; he makes what profit he can of it, which profit he retains to himself, paying back only the principal sum, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money, therefore, being his own, he is guilty of no breach of trust in employing it. He is not answerable to the principal if he puts it in jeopardy by engaging in hazardous speculations; but he is, of course, answerable for an equivalent amount to be paid to his customer when demanded (*d*).

Deposit of bills, notes, and securities in hands of bankers.—But bills deposited in the hands of a banker remain the property of the customer, unless there be a special agreement transferring the property in them to the banker, so that, upon the death or failure of the banker, the customer has a right to the bills so long as they remain *in specie;* but the banker has a lien upon them, if the customer has overdrawn his account (*post*, p. 794). Where

(*a*) *La Marquise de Ribeyre* v. *Barclay*, 23 Beav. 125; 26 L.J. Ch. 747.

(*b*) *Pott* v. *Clegg*, 16 M. & W. 321; 16 L.J. Ex. 210; *Howard* v. *Danbury*, 2 C.B. 803, 806.

(*c*) Alderson, B., *Robarts* v. *Tucker*, 16 Q.B. 575; 20 L.J. Q.B. 270; *Pott* v. *Clegg*, *supra*; *Sims* v. *Bond*, 5 B. & Ad. 389.

(*d*) *Foley* v. *Hill*, 2 H.L.C. 36; *ante*, p. 747.

a customer was in the habit of depositing bills with his bankers, which bills were indorsed by him, and were entered in the bank books to his credit as *bills*, not as cash, and after such entry the customer was allowed to draw to the full amount of such bills by cheques, and the bankers became bankrupt, it was held that the customer, who had a cash balance in his favour at the time of the bankruptcy, was entitled to the bills, there being no evidence that he had agreed that, when the bills were deposited, they were to become the property of the bankers (*e*). And, where a customer paid a bank-note into the bank after the ordinary hours of business, and the bankers, having previously resolved to stop payment, did not carry the amount of the note to the customer's account, but placed it aside in a separate place of deposit, taking care not to mix it with the general assets of the house, it was held that the note still remained the property of the customer (*f*). If bank-notes deposited by a customer turn out to be worthless paper, by reason of the insolvency of the bank which issued the notes, the loss falls upon the customer, if there has been no laches on the part of the banker with whom the notes were deposited. If the banker gives a receipt for the notes as cash, he is not precluded by such receipt from subsequently showing that what he received was not cash, but spurious paper (*g*).

Receipt of cheques by bankers on account of customers.—When a cheque is paid into a bank to be placed to the account of a customer, the banker is bound to use due diligence in getting the cheque paid, and must give prompt notice to his customer in case it is not paid; and, if he omits to do either of these things, he makes the cheque his own, and must bear the loss, if loss there be. Where the plaintiff received a cheque drawn upon his own bankers, and took it to their bank, and handed it to a clerk, with directions to place it to his account, and the clerk received the cheque without any observation, and the bankers, finding that the drawer of the cheque had overdrawn his account and was keeping out of the way, gave the plaintiff notice on the following day that the cheque would not be honoured by them, and that the amount of it would not be placed to his credit, it was held that the bankers were not precluded, by their having received the cheque without comment in the first instance, from subsequently refusing to credit the plaintiff with the amount; but that, if the plaintiff, at the time he deposited the

(*e*) *Thompson* v. *Giles*, 2 B. & C. 422; 2 L.J. (O.S.) K.B. 48. As to effect of drawer bank certifying cheque, see *Gaden* v. *Newfoundland Savings Bank*, (1899) A.C. 281; 68 L.J. P.C. 57.

(*f*) *Sadler* v. *Belcher*, 2 Moo. & R. 489; *ante*, p. 787; *post*, p. 790.

(*g*) *Timmins* v. *Gibbins*, 18 Q.B. 722; 21 L.J. Q.B. 403.

cheque, had asked the bankers whether they would pay it, he would have been entitled to an answer, and that the bankers would have been bound by such answer (*h*). It is often impossible to ascertain till the close of the day at the clearing-house what sums of money may be paid in to each particular account, and what are the drafts upon it; and bankers, therefore, may receive cheques drawn upon them by their customers, and may reserve to themselves the right of honouring them, or not honouring them, according to the result of the day's transactions at the clearing-house. Where bankers, at the time of receiving a cheque drawn upon them by one customer and presented by another, stated that they were not then in funds, but that they would keep the cheque in the hope of being furnished with money to pay it in the course of the day, it was held that they were bound to appropriate the first money they received from the drawer, in satisfaction and discharge of such cheque (*i*).

Duty of bankers to honour drafts of customers—Payment of cheques.—It is the duty of the banker to pay the debt due to the customer pursuant to the order, cheque, or draft of the latter. The customer may order the debt to be paid to himself or anybody else, or he may order it to be carried over or transferred from his own account to the account of any other person he pleases. He may do so by written instrument or verbal direction; but the banker is entitled to require some written evidence of the order for the transfer (*k*). The banker is bound by law to honour the cheques and drafts of his customers, provided they are presented within banking hours, and provided he has in his hands sufficient funds for the purpose belonging to the customer (*l*); and, if he refuses, he is liable to an action by the customer for substantial damages, without proof of actual damage; for it is a discredit to the customer to have his cheque refused payment (*m*). Where the plaintiff paid a sum of money to a banker in London, and directed him to forward the money to certain country bankers to the plaintiff's credit by a particular day, and the London banker received the money and neglected to forward it, it was held that he was responsible for all damages sustained by the plaintiff by reason of his not having the money at the time and place

(*h*) *Boyd* v. *Emmerson*, 2 Ad. & E. 184, 202; 4 L.J. K.B. 43.

(*i*) *Kilsby* v. *Williams*, 5 B. & Ald. 819.

(*k*) *Watts* v. *Christie*, 11 Beav. 546; 18 L.J. Ch. 173.

(*l*) *Agra, &c. Bank* v. *Hoffman*, 34 L.J. Ch. 285.

(*m*) *Marzetti* v. *Williams*, 1 B. & Ad. 424; 9 L.J. (O.S.) K.B. 42; *Rolin* v. *Steward*, 14 C.B. 595; 23 L.J. C.P. 148; *Boyd* v. *Emmerson*, *supra*; *Whitaker* v. *Bank of England*, 1 C. M. & R. 744; 4 L.J. Ex. 57; *Cumming* v. *Shand*, 5 H. & N. 95; 29 L.J. Ex. 129. As to orders on bankers operating by way of novation and substitution, see *ante*, p. 165.

appointed (*n*). The acceptance by a customer of a bill of exchange payable at his bankers is tantamount to an order from him to his banker to pay the bill to the person who, according to the law merchant, is capable of giving a good discharge for it, *i.e.*, to a person who becomes the holder by a genuine indorsement, or, if the bill is originally payable to bearer, or if there is afterwards a genuine indorsement in blank, to the person who seems to be the holder (*o*). If bankers have indorsed a bill of exchange accepted by a customer, and the bill is presented to them when it arrives at maturity, and they pay it on the day it becomes due, the bankers so paying may reserve to themselves the right to examine into the state of the accounts between them and the acceptor, their customer, and determine whether they honour the bill for the acceptor, or take it up on their own account as indorsers (*p*). As to determination of authority of bankers, see sect. 75 of Bills of Exchange Act, 1882, *post*, p. 1155.

Joint accounts and joint deposits with bankers.—Where money is paid into a bank to the joint account of several persons *nominatim*, it cannot be drawn out by one of them alone; for the bankers are not discharged from liability by payment to one of the depositors without the authority of the others (*q*). But, when one dies, the money may be drawn out by the survivor. Such is the case with money deposited in a bank in the joint names of husband and wife (*r*).

Deposits and accounts with bankers in names of trustees, agents, and receivers.—In a banking account of the ordinary kind between a banker and his customers it is not competent to any third party to interpose and to say that the customer was his agent, and that the banker has contracted with such third party through the medium of such customer, his agent. All cheques and money paid into the bank by the customer are, as between the banker and the customer, the cheques and money of the customer, whoever may be the real owner of them. If the owner of the cash allows his agent to deal with it as his own, and pay it into the bank in his own name, he has no power over it after it has reached the banker's hands. On the other hand, it is not competent to the banker, after he has placed the money to the credit of a customer, to deny the title of the latter to the money, and to set up a *jus tertii*, or to revoke the credit (*s*). If several joint owners of a sum

(*n*) *Shillibeer* v. *Glyn*, 2 M. & W. 143; 6 L.J. Ex. 21; *Wheatley* v. *Low*, Cro. Jac. 667; *Loe's case*, Palm. 281.

(*o*) *Kymer* v. *Laurie*, 18 L.J. Q.B. 218; *Robarts* v. *Tucker*, 16 Q.B. 578; 20 L.J. Q.B. 270; *post*, p. 793.

(*p*) *Pollard* v. *Ogden*, 2 E. & B. 459; 22 L.J. Q.B. 439.

(*q*) *Innes* v. *Stephenson*, 1 Moo. & R. 147; *Sims* v. *Brittain*, 4 B. & Ad. 375.

(*r*) *Williams* v. *Davies*, 33 L.J. P. & M. 127; 3 Swa. & T. 437.

(*s*) *Tassell* v. *Cooper*, 9 C.B. 533.

of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker must treat that as a contract with the one individual dealing with him, and the latter cannot impose upon the banker as many contracts as there are owners of the money (*t*).

Separate accounts opened by same person in different capacities.—Generally, as between banker and customer, the banker looks only to the customer in respect of the account opened in that customer's name, and whatever cheques that customer chooses to draw the banker is to honour, and is not to inquire what the moneys are that are paid into that account, or for what purpose they are drawn out. But, when the customer opens two separate accounts, the one being a private account of his own, and the other an account as trustee or receiver of the moneys of a known third party, the bankers are bound to take notice that the moneys placed to the last-named account are not the moneys of their customer, and they cannot make an arrangement with the latter for an appropriation of the balance in their hands on the fiduciary account to liquidate a balance due to them from their customer upon his own private account. They have no right to combine with the receiver for the appropriation of his principal's money to discharge the private debt due to them from the receiver; for no person dealing with another, and knowing him to have in his hands or under his control money belonging to a third person, can deal with the individual holding that money for his own private benefit, when the effect of the transaction is that a fraud is necessarily committed upon such third party (*u*).

Loss of trust-money in hands of bankers.—If an agent or trustee who has received a sum of money for the use of his principal or beneficiary pays the money into a bank in the name of the principal or beneficiary, and places it to the account of the latter, the amount then remains in the bank at the risk of the principal; and if the banker fails the principal must bear the loss. But, if the agent or trustee pays in the money to his own account and his own credit, this is a user of the money for which he will be responsible. If he had an implied authority to use the money, and has so exercised it, then he stands, as before mentioned, in the position of a borrower for use and consumption. In either case he is bound to make good the loss (*x*).

(*t*) *Sims* v. *Brittain*, 4 B. & Ad. 375; *Pinto* v. *Santos*, 5 Taunt. 447.

(*u*) *Bodenham* v. *Hoskins*, 21 L.J. Ch. 864; 16 Jur. 721; affirmed 2 De G. M. & G. 903; *Bridgman* v. *Gill*, 24 Beav. 302; *Kingston, Ex parte*, L.R. 6 Ch. 632; 40 L.J. Bankr. 91; per Blackburn, J., *Bailey* v. *Finch*, L.R. 7 Q.B. 42; 41 L.J. Q.B. 83; *Morier, Ex parte*, 12 Ch. D. 491; 49 L.J. Bankr. 9; *Coleman* v. *Bucks and Oxon Union Bank*, (1897) 2 Ch. 243; 66 L.J. Ch. 564.

(*x*) *Robinson* v. *Ward*, R. & M. 276; *Wren* v. *Kirton*, 11 Ves. 377; *Rocke* v.

Payment of forged cheques, drafts, and orders on bankers—Negligence of banker and of customer.—See Bills of Exchange, *post*, Ch. VI. If bankers pay a cheque under circumstances of suspicion which ought to have put them on their guard and induced them to make inquiry before paying it, they cannot debit the customer with the amount, if the cheque was never uttered or put into circulation by the customer. Thus, where the customer, finding that he had drawn a cheque for a wrong sum, tore it into four pieces and threw them away, and these four pieces were picked up, and neatly pasted together, and presented at the bank by a stranger for payment, but the rents and the pasting of the paper were quite visible, and the face of the cheque was soiled and dirty, and the cashier, nevertheless, paid it without demur or inquiry, it was held that the bankers had been guilty of a neglect of duty, and could not, under the circumstances, debit their customer with the payment (*y*). But, if the tearing is done in such a way that it is reasonable to presume it to have been done for the purpose of transmitting the cheque through the post, there will then be no neglect of duty on the part of those who pay the cheque in ignorance of its having been torn up with the intention of cancelling it (*z*). If money is drawn out of the bank by means of a forged order purporting to have been made by the customer, the banker must sustain the loss. Where a cheque drawn by a customer on his banker for a sum of money described in the body of the cheque in words and figures was afterwards altered by the holder, who substituted in a different handwriting a larger sum than that mentioned in the cheque, in such a manner that no one, in the ordinary course of business, would have observed it, and the banker paid the larger sum to the holder, it was held that he could not lawfully debit the customer with the over-payment (*a*). But, if the banker has been defrauded through the carelessness or negligence of the customer in drawing the cheque, the loss must be borne by the customer. Where the customer signed several blank cheques and left them in the hands of his wife to be filled up, and she handed a cheque to a clerk to be filled up for 50*l.* 2*s.* 3*d.*, and the clerk filled up the cheque for the specified amount, and showed it to the wife, but the "fifty" was commenced in the middle of the line, so that the words "three hundred and" could easily be

Hart, *ib.* 61; *Massey* v. *Banner*, 4 Mad. 418, 419; 1 Jac. & Walk. 241.

(*y*) *Scholey* v. *Ramsbottom*, 2 Campb. 485.

(*z*) *Ingham* v. *Primrose*, 28 L.J. C.P. 294; 7 C.B. N.S. 82.

(*a*) *Hall* v. *Fuller*, 5 B. & C. 750; 4 L.J. (O.S.) K.B. 297; as to advances by bankers, at the request of their customers on forged securities, see *Woods* v. *Thiedemann*, 1 H. & C. 478; or on securities fraudulently obtained, *Carew's Act*, *In re*, 30 Beav. 274; 31 L.J. Ch. 214; 31 Beav. 39. See *Vagliano* v. *Bank of England*, (1891) A.C. 107; 60 L.J. Q.B. 145; *post*, pp. 829, 1110.

written before it, and space was left at the bottom of the cheque for the insertion of the figure 3 between the £ and the figures 50, and the clerk on his way to the bank altered the cheque to 350*l.*, and got that amount from the bankers and absconded, it was held that the customer must bear the loss, as it had been occasioned by his own negligence and the negligence of his agent in dealing with the blank cheque (*b*). Negligence in dealing with a cheque or draft must, in order to amount to an estoppel, be negligence in the transaction itself and the proximate cause of leading the third party into mistake, and must be a breach of some duty owing to such third party or to the public at large (*c*). But where a bill of exchange for 500*l.* was presented for acceptance with a stamp of much larger than the necessary amount, and with spaces left which enabled the drawer after acceptance to turn it into a bill for 3,500*l.*, it was held that the acceptor was not liable to a *bonâ fide* holder for value for more than the 500*l.* (*d*).

Forged indorsements.—If a bill of exchange has been accepted by a customer payable to order at his bankers, the acceptance of the bill is an authority to the bankers to pay the bill only to a person who becomes the holder by a genuine indorsement from such customer. If bankers wish to avoid the responsibility of deciding on the genuineness of the indorsement, they must require their customer to make his bills payable at his own offices, and to honour the bills by giving a cheque on them; for they cannot debit a customer with a payment made to a party who claims through a forged indorsement and so cannot give a valid discharge for the bill, unless there are circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or a subsequent admission on the part of the customer of the genuineness of the indorsement inducing the bankers to alter their position, so as to preclude the customer from showing it to be forged (*e*). But, by 16 & 17 Vict. c. 59, s. 19, any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the person to whom the same shall be drawn payable, shall be sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on the banker to prove that such indorsement or any

(*b*) *Young* v. *Grote*, 4 Bing. 253; 5 L.J. (O.S.) C.P. 165.

(*c*) *Arnold* v. *Cheque Bank*, 1 C.P.D. 578; 45 L.J. C.P. 562; *Patent Safety Gun Cotton Co.* v. *Wilson*, 49 L.J. Q.B. 713; *Merchants of the Staple* v. *Bank of England*, 21 Q.B.D. 160; 57 L.J. Q.B. 418.

(*d*) *Scholfield* v. *Londesborough* (*Earl*), (1896) A.C. 514; 65 L.J. Q.B. 593.

(*e*) *Robarts* v. *Tucker*, 16 Q.B. 578; 20 L.J. Q.B. 270; sect. 24 of 45 & 46 Vict. c. 61, *post*, p. 1123.

subsequent indorsement was made by and under the direction or authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorser thereof. But this enactment does not extend to protect any other person who takes the cheque upon the faith of such forged indorsement (*f*) : see also sects. 30 and 60 of Bills of Exchange Act, *post*, pp. 1119, 1123. An indorsement of a cheque "per proc." or "as agent" is an indorsement by the payee within the statute, although the indorser has no authority to indorse (*g*).

Cheques paid by mistake.—If a banker pays the cheque of a customer, supposing that he has funds, and afterwards finds that the customer has overdrawn his account, and that he has no funds, the banker cannot recover the money from the party who presented the cheque (*h*) ; but, if the cheque was not drawn on the banker, and the latter does not pay the cheque as a banker honouring the draft of his customer, but in the same way as if he were giving change for a bank-note, all parties believing the cheque to be genuine, he can recover back the money he has paid, if the cheque turns out to be forged and worthless (*i*).

Payment of cheques at branch banks.—The different branch banks of a banking company are, as regards their separate customers, separate companies, so that a customer who keeps an account with one branch has no right to draw cheques upon, and have them cashed by, another branch. They are also separate and distinct for many other purposes (*k*). But in principle they are agencies of one principal banking firm, although regarded as distinct for special purposes (*l*). Where a customer had an account with two branches of a bank, it was held that in the absence of any special agreement with their customer the bank had a right to consider the two accounts as one, and to refuse the customer's cheque when, on adding the two accounts together, the balance was against him (*m*).

Crossed cheques.—As to crossed cheques, see *post*, Ch. VI.

Lien of bankers.—Bankers have a lien upon all the securities of their customers in their hands for advances in the ordinary course of business, unless such securities have been received under special arrangement inconsistent with the exercise of the right (*n*),

(*f*) *Ogden* v. *Benas*, L.R. 9 C.P. 513 ; 43 L.J. C.P. 259 ; *Bobbett* v. *Pinkett*, 1 Ex.D. 368 ; 45 L.J. Ex. 555.

(*g*) *Charles* v. *Blackwell*, 2 C.P.D. 151 ; 46 L.J. C.P. 368.

(*h*) *Chambers* v. *Miller*, 13 C.B. N.S. 125 ; 32 L.J. C.P. 30 ; *London Chartered Bank of Australia* v. *McMillan*, (1892) A.C. 292 ; 61 L.J. P.C. 444.

(*i*) *Woodland* v. *Fear*, 7 E. & B. 522 ; 26 L.J. Q.B. 202.

(*k*) *Woodland* v. *Fear*, *supra* ; *Clode* v. *Bayley*, 12 M. & W. 51 ; 13 L.J. Ex. 17.

(*l*) *Prince* v. *Oriental Bank Corporation*, 3 App.Cas. 325 ; 47 L.J. P.C. 42.

(*m*) *Garnett* v. *M'Kewan*, L.R. 8 Ex. 10 ; 42 L.J. Ex. 1.

(*n*) *Jones* v. *Peppercorn*, 28 L.J. Ch.

or for some special purpose (*o*). But they have no lien on boxes and their contents deposited with them for convenience and safe custody merely (*p*).

Damages for non-payment of cheques by bankers.—If a banker refuses to pay a cheque drawn upon him by a trader who keeps an account with him, and who has sufficient assets in the hands of the banker to meet the cheque at the time it is presented for payment, such trader is entitled, as we have seen, to recover substantial damages without proof of any actual damage, since the dishonouring of cheques is likely to be very injurious to the credit of persons in trade (*q*).

Mandate or gratuitous commission—Non-feazance and misfeazance.—It has been said, in reference to gratuitous undertakings to perform work, that, if the promisor does not proceed on the work, no action will lie against him for the non-feazance; but, "if he proceeds on the employment, he makes himself liable for any misfeazance in the course of that work." But, when a man promises to perform work upon, or to do something with, the chattel of another, and the chattel is bailed to him for the purpose expressed, his acceptance of the possession of the chattel in execution of his engagement is an "entering on the work and employment;" and if, after having accepted such possession and taken the chattel away with him, he neglects to do that which he promises to perform, this neglect is a misfeazance, for which he shall be responsible (*r*). "A bare being trusted," observes Holt, C.J., "with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust and take the goods into his possession" (*s*). Where a sum of money was bailed to a party upon the faith of an undertaking made by him to cause the sum to be paid to the bailor or his order at a distant place, it was held that the bailment of the money was a sufficient consideration for the undertaking, and that the mandatary was responsible for the non-fulfilment of his engagement (*t*). So, where certain boilers were delivered to a man upon the faith of an undertaking made by him to weigh them gratuitously and return them to the bailor in as perfect and complete condition as

158; Johns. 430; *Meadows, In re*, 28 L.J. Ch. 891; 26 Beav. 588; *City Bank, Ex parte*, 3 L.T. 792; *European Bank, In re*, L.R. 8 Ch. 41.

(*o*) *Brandao* v. *Barnett*, 12 Cl. & Fin. 787; *Wylde* v. *Radford*, 33 L.J. Ch. 51; *London Chartered Bank of Australia* v. *White*, 4 App.Cas. 413; 48 L.J. P.C. 75; *Bowes, In re*, 33 Ch.D. 586; 56 L.J. Ch. 143.

(*p*) *Leese* v. *Martin*, L.R. 17 Eq. 224; 43 L.J. Ch. 193.

(*q*) *Rolin* v. *Steward*, 14 C.B. 595; 23 L.J. C.P. 148.

(*r*) Holt, C.J., *Coggs* v. *Bernard*, 2 Raym. 919, 920; *Elsee* v. *Gatward*, 5 T.R. 149; *Balfe* v. *West*, 22 L.J. C.P. 175; 13 C.B. 466.

(*s*) *Coggs* v. *Bernard*, *supra*.

(*t*) *Shillibeer* v. *Glyn*, 2 M. & W. 143; 6 L.J. Ex. 21.

they were in at the time of the making of the bailment, and the mandatary took the boilers to pieces in order to weigh them, but refused to put them together again, it was held that he was responsible for his breach of contract, and must make good the damage that had been sustained by the mandator. If, therefore, a party undertakes to procure an insurance for another, and proceeds to carry his undertaking into effect by getting a policy underwritten, but deals so negligently with the policy that the benefit of the insurance is totally lost to the party for whom he promised to effect it, he is liable to an action (*u*).

Bailment of money and chattels to be carried gratuitously—Loss or damage from negligence.—A bailee who has undertaken gratuitously to convey money or goods from one place to another, and has entered upon the trust by accepting possession of the money or the goods, is bound to exercise the same care and diligence in the execution of the task as a person of ordinary care and prudence might be expected to exercise in the conveyance of his own property. If by negligence and mismanagement in the accomplishment of his undertaking the money or the goods are lost or stolen, injured or spoiled, he will be responsible for the loss. But he is not responsible for the loss of the money, if he is forcibly robbed without any default on his part.

Bailments of chattels to be mended or repaired gratuitously—Employment of unskilful persons.—If a chattel is bailed to a workman in some particular craft, upon the faith of an undertaking made by the bailee to mend it gratuitously for the benefit of the mandator, the mandatary must complete the work within a reasonable period, and must be especially mindful that the article is not injured in his hands during the performance of the work through a want of that skill which every workman in his particular craft is bound to possess (*post*, pp. 821, 822). But, if a person, known to be unskilled in the particular work he gratuitously undertakes, does the work at the solicitation of a friend with such ability as he possesses, he stands excused, although it is unskilfully done; for it is the mandator's own folly to trust him, and the party engages for no more than a reasonable exertion of his capacity (*x*).

In respect of the custody and safe keeping of the chattel, the mandatary is clothed with the ordinary liabilities and responsibilities of a depositary.

Bailment of money for investment.—If money is bailed to a man upon the faith of a promise or assurance made by him to place it out at interest, or to purchase an annuity with it for the

(*u*) *Wallace* v. *Tellfair*, cited *Wilkinson* v. *Coverdale*, 1 Esp. 76.

(*x*) *Shiells* v. *Blackburne*, 1 H. Bl. 159; *Moore* v. *Mourgue*, 1 Cowp. 479.

benefit of the bailor, the mandatary who accepts the money impliedly promises to be careful in the fulfilment of his undertaking, and to exercise ordinary care in the selection of a safe investment; and, if the money is lost by his neglect, an action will lie against him for the loss (*y*). But the mandatary is not responsible (if he does not exercise any trade or profession denoting that he has peculiar skill in money matters) for the exercise of more than ordinary care; and he is not liable for the failure of the investment, if he has used such knowledge as he possessed, and has acted with honesty of purpose in the transaction (*z*). But a solicitor, whose profession and employment naturally leads him to have some knowledge of securities for money and pecuniary investments, is responsible for the exercise of a reasonable amount of professional skill in the selection of a safe investment, although he acts gratuitously (*a*). His profession implies skill, and invites confidence: and an omission of that skill is imputable to him as gross negligence (*b*). If a sum of money is entrusted to a man to be transmitted to some distant part, or to be laid out by him in some purchase or investment for the benefit of the mandator, and with an express or implied authority or permission to use the money himself until the purpose for which it was bailed can be accomplished, and the mandatary accordingly spends the money with the intention of replacing it when necessary with other money, or pays it into his bankers to his own account, and not to the separate account of the mandator, the bailment of the money becomes a loan for use and consumption, and the bailee is clothed with the duties and liabilities and implied engagements of a borrower by way of *mutuum*, in addition to those of a mandatary. In these cases the money is payable (*c*) absolutely and at all events; and the bailee cannot excuse himself from the obligation to repay the amount by showing a loss by robbery or from inevitable accident (*d*).

Bailments of living animals—Negligent management.—If the subject-matter of the bailment consists of living animals, such as horses, oxen, cattle or sheep, the mandatary is bound to furnish them with suitable food, and to give them a reasonable amount of exercise and fresh air. If a man takes charge of cattle or sheep, and afterwards takes no heed of them, but lets them stray away on a common, and get drowned or lost, this is a breach of trust, and

(*y*) *Coggs* v. *Bernard*, 2 Raym. 910; *Whitehead* v. *Greetham*, 10 Moore, 183; 2 Bing. 464.
(*z*) *Dartnall* v. *Howard*, 4 B. & C. 345, 350; 3 L.J. (O.S.) K.B. 246.
(*a*) *Donaldson* v. *Haldane*, 7 Cl. & Fin. 762; *Bourne* v. *Diggles*, 2 Chitt. 311; *Craig* v. *Watson*, 8 Beav. 427; *Smith* v. *Pococke*, 23 L.J. Ch. 545; 2 Drew. 197.
(*b*) *Shiells* v. *Blackburne*, *ante*, p. 796.
(*c*) *Ante*, p. 747.
(*d*) *Ante*, p. 751.

he is responsible for the loss (*e*). If he turns a horse, of which he has consented gratuitously to take charge, into a dangerous pasture after dark, and the horse falls into a pit or well, or into the shaft of a mine, this is a gross neglect and breach of trust, and he shall be responsible for the loss (*f*).

What is, and what is not, gross negligence amounting to a breach of trust is often a mixed question of law and fact, but more generally a pure question of fact. It must be judged of by the actual state of society, the general usages of life, and the dangers peculiar to the times, as well as by the apparent nature and value of the subject-matter of the bailment, and the degree of care it seems to require (*g*). Where a man proved to be conversant with, and skilled in, horses was commissioned to ride a horse to a neighbouring village, for the purpose of showing it for sale, and on his arrival he rode the horse into the race-ground, which was wet and slippery, and the horse slipped and fell several times, and at last in falling broke one of its knees, it was held that the bailee had been guilty of a culpable neglect and breach of trust, and was answerable for the damage (*h*). If a farrier undertakes to treat a living animal for some disorder gratuitously, he is nevertheless bound to exercise the ordinary knowledge and skill of his profession, and will be responsible for injuries resulting from his neglect to do so (*i*).

Bailments of perishable commodities.—If the subject-matter of the bailment is a perishable commodity, the bailee is bound to bestow such an amount of labour and vigilance for its preservation as would ordinarily be bestowed by a prudent owner. If the mandatary of a valuable painting lets it lie on the damp ground, or places it in a kitchen, or against a damp wall in a room where there is no fire, when he might have placed it in a dry situation and in perfect security, this is an act of negligence (*k*) for which he is liable to an action.

Use of subject-matter of mandate.—A mandatary has no right to make use of the subject-matter of the bailment for his own gain and advantage; if he does so, and it is lost, or in any way injured or deteriorated in value by reason of the user, he must, in common with a depositary, make good the loss.

Theft and negligence by servants of mandatary.—If the mandatary has given express directions to his servant to take into his custody money, or chattels, or securities, and do with them that which he

(*e*) Hil. Term, 2 Hen. 7, 9 b; *Coggs* v. *Bernard*, 2 Raym. 913.
(*f*) *Rooth* v. *Wilson*, 1 B. & Ald. 61, 62.
(*g*) Story on Bailments, 9, 10.
(*h*) *Wilson* v. *Brett*, 11 M. & W. 113; 12 L.J. Ex. 264.
(*i*) *Shiells* v. *Blackburne*, 1 H. Bl. 162.
(*k*) *Mytton* v. *Cock*, 2 Str. 1099.

himself has undertaken to perform, the negligence of the servant in carrying into execution the orders of the master is the negligence of the master, and the latter will be responsible accordingly; but if the servant deals with the property of his own will, and without the warrant or authority of the master, the latter is not responsible, unless there be a default in him in knowingly employing a drunken, negligent, or dishonest servant.

Payment of expenses.—If the mandatary must necessarily incur expense in the execution of the commission entrusted to him, he is clothed with an implied authority from the mandator to defray such expenses (*l*); but no lien is permitted to be claimed by one upon the property of another for the expenses attendant upon the execution of a gratuitous commission.

Warehousing of chattels for reward.—When chattels are delivered to a warehouseman or storekeeper to be taken care of or kept for hire, the contract is a contract for the letting and hiring or for care and custody. Where a livery-stable keeper undertakes for reward to receive a carriage and lodge it in a coach-house, he is bound to take reasonable care that the building in which it is placed is in a proper state, so that the carriage may be reasonably safe in it; but there is no implied warranty on his part that the building is absolutely safe, and the fact that the building has been erected for him on his own ground makes no difference in his liability (*m*). A depositor of goods for safe custody, who, by himself or his servants, has an opportunity of observing certain defects in the storehouse, cannot be taken to have agreed that any risk of injury to his goods which may be occasioned by those defects shall be borne by him, and not by the bailee for hire (*n*).

Negligent keeping of goods by warehousemen, and depositaries for hire.—All persons to whom goods are delivered to be kept for hire and reward, and who are paid expressly for their care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise that amount of care which the most prudent and careful of men exercise for the protection of their own property. If the goods are injured by mice or rats, the warehouseman will be responsible for the damage (*o*), although he keeps cats to destroy vermin (*p*). In an action against a warehouseman for the non-delivery of a chattel intrusted to him to keep for hire, it is no answer for him to say that he has lost it (*q*); the mere fact

(*l*) Story on Bailments, s. 197.
(*m*) *Searle* v. *Laverick*, L.R. 9 Q.B. 122; 43 L.J. Q.B. 43.
(*n*) *Brabant* v. *King*, (1895) A.C. 632; 64 L.J. P.C. 161.
(*o*) *White* v. *Humphrey*, 11 Q.B. 44.
(*p*) *Laveroni* v. *Drury*, 8 Exch. 166; 22 L.J. Ex. 2; see *Kay* v. *Wheeler*, L.R. 2 C.P. 302; 36 L.J. C.P. 180.
(*q*) *Cairns* v. *Robins*, 8 M. & W. 258; 10 L.J. Ex. 452; *Reeve* v. *Palmer*, 28 L.J. C.P. 168; 5 C.B. N.S. 91; *Good-*

of the loss is *primâ facie* proof of negligence, and he must rebut this presumption by showing that he had taken the greatest care of the thing entrusted to him, and had no means of preventing the loss. A booking-office keeper who receives money for booking parcels, is bound to put them into a safe place, and if he leaves them in a public room, or an open shop, and they are lost or stolen, he will be responsible to the owner (*r*).

Loss of chattels by wharfingers.—The duties and responsibilities of the wharfinger, in respect of the safe keeping of the goods entrusted to him, to be dealt with in the way of his trade, are analogous to those of the warehouseman. If he receives directions to ship them on board a particular vessel, he does not discharge his duty by delivering them to one of the crew; but he is bound to place them in the hands of the captain, or some person in authority on board the vessel (*s*). If he is clothed merely with the custody of the goods, and the duty of shipping them devolves, by usage and custom, upon the master of the vessel to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal and under the care of the master and officers of such vessel, although they are not actually removed from the wharf (*t*).

Passenger's luggage deposited in cloak-rooms.—In the absence of any condition limiting their liability, railway companies are ordinary warehousemen of luggage deposited with them; but the companies almost always give a ticket where passenger's luggage is deposited in a cloak-room, and this ticket contains the terms of the contract of bailment. Before the company can rely upon these terms they must be shown to have been present to the mind of the depositor, or that he had reasonable notice of their existence (*u*). A condition upon a cloak-room ticket that a railway company "will not be responsible for articles left by passengers at the station unless the same be duly registered . . . ." and "will not be responsible for any package exceeding the value of 10*l.*" absolves the company from liability for any damage to an article which exceeds the value of 10*l.*; the condition means that the company will undertake no

man v. *Boycott*, 2 B. & S. 1; 31 L.J. Q.B. 69.

(*r*) *Dover* v. *Mills*, 5 C. & P. 175.

(*s*) *Leigh* v. *Smith*, 1 C. & P. 638, 641; 2 Esp. 695.

(*t*) *Cobban* v. *Downe*, 5 Esp. 41; Story on Bailments, 293; Jones on Bailments, 97.

(*u*) *Parker* v. *S. E. Ry.*, 2 C.P.D. 416; 46 L.J. C.P. 768; *Henderson* v. *Stevenson*, L.R. 2 H.L. (Sc.) 470; *Harris* v. *G. W. Ry.*, 1 Q.B.D. 515; 45 L.J. Q.B. 729; *Burke* v. *S. E. Ry.*, 5 C.P.D. 1; 49 L.J. C.P. 107; *Richardson, Spence & Co.* v. *Rowntree*, (1894) A.C. 217; 63 L.J. Q.B. 283. Where the plaintiff delivered to the keeper of a repository for the sale on commission of carriages a carriage to be sold, and took a receipt for it which contained an explicit reference to the conditions exhibited on the premises, but which he did not read, it was held that he was bound by the conditions: *Watkins* v. *Rymill*, 10 Q.B.D. 178; 52 L.J. Q.B. 121.

responsibility for any article over the value of 10*l.* but that such article is taken in at the risk of the owner and not at that of the company (*x*). Goods received by a railway company in a cloak-room are received by them as common carriers, and not as warehousemen, and may, therefore, be retained by them even as against the real owner until the lien upon them for charges has been discharged (*y*).

Loss of cattle—Liabilities of agisters of cattle.—A person who receives cattle or horses, or living animals to keep for the owner, and is paid expressly for his care in preserving them, as well as for their sustenance, is bound to take the utmost care of them, and he is responsible for damage and injury resulting from ordinary casualties, if such damage might have been prevented by the exercise of great care. Very slight evidence of neglect has been sufficient to induce juries to return verdicts in favour of those who have sought compensation for the loss of cattle delivered to bailees to be kept for reward. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally left open, and of the fences being in parts out of order, but it did not appear directly that the horse had strayed through any defect in the fences, or through any of the gates being left open, the jury, nevertheless, returned a verdict against the defendant for the full value of the horse (*z*). If the bailee suffers his fences to be defective, or puts the horse into a dangerous pasture, and the animal, by reason thereof, is lost or injured, this is a degree of neglect for which he is undoubtedly responsible (*a*). Where an agister placed the plaintiff's horse in a field where there were heifers, knowing that a bull was in the habit of getting into the field, though he did not know it was vicious, and the bull gored the horse, it was held that the *scienter* was immaterial, as he had contracted to take reasonable care, and had not done so (*b*).

Distinction between contracts for work and services and contracts of sale.—There is a great analogy between contracts for working up materials and the contract of sale; for, if the materials for the work, as well as the work itself, have been furnished by the workman, then the contract is in general a contract of sale; while, on the other hand, if the employer has furnished the materials, and

(*x*) *Pratt* v. *S. E. Ry.*, (1897) 1 Q.B. 718; 66 L.J. Q.B. 418.
(*y*) *Singer Manufacturing Co.* v. *L. & S. W. Ry.*, (1894) 1 Q.B. 833; 63 L.J. Q.B. 411.
(*z*) *Broadwater* v. *Blot*, Holt, N.P. 547.
(*a*) *Mosley* v. *Fosset*, 1 Roll. Abr. 4; *Halestrap* v. *Gregory*, (1895) 1 Q.B. 561; 64 L.J. Q.B. 415. See Addison on Torts, p. 390 (ed. 7).
(*b*) *Smith* v. *Cook*, 1 Q.B.D. 79; 45 L.J. Q.B. 122.

the undertaker of the work contributes his labour merely, the contract is a contract of letting and hiring of labour. In the case of works of art the work and skill of the workman constitute, in general, the essence of the contract, the materials being merely accessorial; and, whenever the skill and labour are of the highest description, and the materials of small comparative value, the contract is a contract for work, labour and materials, and not a contract of sale (*c*). A contract, for example, for the printing of a book is a contract for the letting and hiring of work and services, although the printer supplies both the paper and the ink, and not a contract of sale (*d*). The test is that "if the contract is intended to result in transferring for a price from A. to B. an article in which B. had no previous property," then it would be a contract for the sale of a chattel and not a contract for work and labour, *e.g.*, a contract by a dentist to make a set of artificial teeth, to fit the mouth of the employer (*e*).

Executory and executed contracts for work.—Contracts for work and services, like all other contracts of letting and hiring, are perfected by the bare consent of the parties, so that, as soon as the mutual promises are exchanged, the right to the benefit of the work passes to the workman or hirer of the job, and the right to the labour to the employer or letter of the work (*f*). If a mutual misunderstanding has arisen without any fault or want of good faith on either side, as if the workman has mistaken the meaning of the employer, and made one thing when another was ordered, the contract is void, as no valid and effectual consent to bind the parties has ever been given. If there is no mutual engagement between the parties for the one to do the work, and the other to provide it and pay for its execution, there is, as we have before seen, no binding contract at all, unless the engagement is under seal (*ante*, p. 13). The workman in such a case is not bound to enter upon his task; nor is the other party bound to provide the work and pay the hire. But when the work has been actually done, the person at whose request and by whose orders it was executed must pay for it, although the workman was originally under no legal obligation to do the work, nor the employer to employ him. The law generally implies a promise from the employer to pay a reasonable compensation for services rendered, unless it appears that the services were to be gratuitous, or that the workmen relied for payment upon a particular fund, and not

(*c*) See, however, the remarks of Crompton, J., and Blackburn, J., in *Lee* v. *Griffin*, 1 B. & S. 278; 30 L.J. Q.B. 252.

(*d*) *Clay* v. *Yates*, 1 H. & N. 73; 25 L.J. Ex. 237.

(*e*) *Lee* v. *Griffin*, *supra*.

(*f*) *Lara* v. *General Apothecaries' Co.*, 26 L.J. Ex. 225, *ante*, p. 5.

upon the personal responsibility of the employer (*g*). When a person has, by fraud, induced another to perform a service for him, intending not to pay for the performance of it, still there is a liability implied by the law, which may be enforced in the same way as an obligation arising out of an express contract (*h*).

Work and services in preserving lost chattel, and restoring it to owner.—Doubts have at different times been expressed as to whether a person who has voluntarily bestowed his own labour and services, and incurred expense, in the recovery and restoration of a lost chattel to the owner, is entitled to an action to recover compensation and remuneration therefor (*i*). In the case of the recovery and restoration of shipwrecked property he is clearly entitled to such a compensation; and there seems to be no valid reason for confining this right of reward to cases of salvage from shipwreck.

Salvage services.—In order to encourage persons to lend their aid for the protection of property and life from shipwreck, the law gives to the parties by whose assistance the property or lives have been saved, a claim to a reasonable compensation for their services, and a right to retain the property until they have received it (*k*). This compensation is called salvage, a term derived from the French word *salver*, or *sauver*, to save. The amount of salvage payable in the case of the recovery of property lost by shipwreck or abandoned at sea (*l*) depends upon the value of the thing saved, the degree of danger of loss, and the amount of labour and skill employed in saving it. Some maritime codes have proportioned the amount to the value of the thing saved; but this is obviously unjust; and our own law, therefore, merely directs as a general principle that a reasonable compensation shall be made (*m*). If the salvors are guilty of misconduct, and occasion injury to the ship and cargo by rescuing the vessel from one danger only to run her into another, the claim for salvage will be lost (*n*). But, if success is finally obtained, no mere error of judgment in the manner of procuring it, and no misconduct short of that which is wilful and may be considered criminal on the part of the salvors, will work an

(*g*) *Ante*, p. 418; *Poucher* v. *Norman*, 3 B. & C. 744; 3 L.J. (O.S.) K.B. 115; Parke, B., *Higgins* v. *Hopkins*, 3 Exch. 166; 18 L.J. Ex. 113; *Hingeston* v. *Kelly*, 18 L.J. Ex. 360; *Alexander* v. *Worman*, 6 H. & N. 100; 30 L.J. Ex. 198.

(*h*) *Rumsey* v. *N. E. Ry.*, 14 C.B. N.S. 641; 32 L.J. C.P. 244.

(*i*) *Lampleigh* v. *Brathwait*, 1 Sm. L.C. 136 (ed. 10).

(*k*) 57 & 58 Vict. c. 60, ss. 544—556; *Hartfort* v. *Jones*, 1 Raym. 393; Salk. 654, pl. 2; *The Fusilier*, 2 Moo. P.C. N.S. 51; 34 L.J. Adm. 25; *The Phantom*, L.R. 1 A. & E. 58. Life salvage paid under this Act is not recoverable upon an ordinary policy of marine insurance: *Nourse* v. *Liverpool Owners' Assoc.*, (1896) 2 Q.B. 16; 65 L.J. Q.B. 507.

(*l*) *The Genessee*, 12 Jur. 401.

(*m*) *The Otto Hermann*, 33 L.J. Adm. 189; *The Thomas Fielden*, 32 L.J. Adm. 61; *The Werra*, 12 P.D. 52; 56 L.J. P. 53.

(*n*) *The Dosseitei*, 10 Jur. 865; *The Yan Yean*, 8 P.D. 147; 52 L.J. P. 67.

entire forfeiture of the salvage. Mistake or misconduct, not wilful, but diminishing the value of the property salved or occasioning expense to the owners, will, however, be considered in estimating the amount of compensation to be awarded (*o*). There can be no claim to salvage where the efforts to salve have not been attended with success (*p*). A man cannot entitle himself to salvage in respect of services which have been rendered contrary to the express wishes and directions of the owner, and has no right to interfere with persons employed by the owner to save the property (*q*). And, if one set of men have taken possession of a vessel abandoned at sea and are endeavouring to preserve it, another set have no right to molest them and become participators in the salvage, unless it appears that the first would not have been able to effect the purpose without the aid of the others (*r*). A passenger is not entitled to claim salvage in respect of that ordinary assistance to a vessel in distress which it is the interest of all persons on board to give, for the purpose of avoiding the common danger (*s*). But, for extraordinary services rendered and dangers incurred for the preservation of the vessel, the passenger is as much entitled to salvage as a mere stranger (*t*). And salvage service may be performed even by the seamen of the ship salved, when an abandonment of her has put an end to their original contract (*u*). So also salvage services may be rendered by a pilot where they have put off to sea to help a vessel, the test not being whether the vessel was at the time of succour in distress or damaged, but whether the pilot could be expected to incur the risk for only pilotage reward (*x*). Where both ships belong to the same owner, the master and crew of the ship which has performed the services are entitled to salvage, provided the services performed are not within the contract which they originally entered into with the owners (*y*). And the owners of a salving vessel are entitled to remuneration, although some of them are also owners of the vessel which did the mischief (*z*). An agreement for salvage which is reasonable at the time it is made is valid, notwithstanding circumstances may render the services more expensive or hazardous than was anticipated (*a*). By sect. 156 of

(*o*) *The Atlas*, 15 Moo. P.C. 329; 31 L.J. Adm. 210.

(*p*) *The Edward Hawkins*, 31 L.J.Adm. 46; Lush. 515; *The Atlas, supra; The Renpor*, 8 P.D. 115; 52 L.J. P. 49; *The Cheerful*, 11 P.D. 3; 55 L.J. P. 5; *The Benlarig*, 14 P.D. 3; 58 L.J. P. 24; but if men are engaged by a ship in distress it is otherwise. See *The Undaunted*, Lush. 90.

(*q*) *Sutton* v. *Buck*, 2 Taunt. 312.

(*r*) Abbott, 495.

(*s*) *The Branston*, 2 Hag. 3; *The Vrede*, Lush. 322; 30 L.J. Adm. 209.

(*t*) *Newman* v. *Walters*, 3 Bos. & P. 612.

(*u*) *The Vrede, supra; The Le Jouet*, L.R. 3 A. & E. 556; 41 L.J. Adm. 95.

(*x*) *Akerblom* v. *Price*, 7 Q.B.D. 129; 50 L.J. Q.B. 629; see *The Anders Knape*, L.R. 4 P.D. 213; 48 L.J. P. 53.

(*y*) *The Sappho*, L.R. 3 P.C. 690; 40 L.J. P.C. 48; *The Scout*, L.R. 3 A. & E. 512; 41 L.J. Adm. 42; *The Cargo ex Laertes*, 12 P.D. 187; 56 L.J. P. 108.

(*z*) *The Glengaber*, L.R. 3 A. & E. 534; 41 L.J. Adm. 84.

(*a*) *The Waverley*, 40 L.J. Adm. 42; L.R. 3 A. & E. 369. See *The Mark*

the Merchant Shipping Act, 1894 (*b*), every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, is wholly inoperative (*c*); but this is not to apply to the case of any agreement made by the seamen belonging to any ship which by the terms of the agreement is to be employed on salvage service. Compulsion or fraud will avoid a contract as to salvage (*d*). Persons who merely furnish boats, tackle, or other articles of use for salvage purposes, are not entitled to be paid as salvors, but for the use of the articles they have supplied (*e*). There is no distinction between river salvage and sea salvage, the danger and meritorious nature of the services in either case being the ground on which the compensation is awarded (*f*).

Persons rendering services in themselves of a salvage nature under a contract for work and labour, are excluded from subsequently claiming against the property as salvors in respect of those services, whether the contract under which the services are performed be made with the owners of the property or with third persons (*g*).

Where a passenger ship is wrecked, and by the terms of the contract with the passengers the owners are under no liability to forward them to their destination, the master, who makes arrangements with another vessel to carry on the passengers, does so as the agent of the passengers, and not of the owners (*h*).

Services by trustees.—The law raises no implied promise of remuneration in respect of services of a fiduciary character (*i*). If, therefore, a solicitor consents to act as a trustee, and renders professional services in matters relating to the trust estate, he is not entitled to charge for such services whether he acts for himself alone, being sole trustee, or for himself and others who are his co-trustees, unless there is a provision in the trust-deed to that effect: but he is entitled to charge the trust estate with costs out of pocket (*k*). A trustee, moreover, is not allowed to make the execution of the trust a source of profit to himself, and cannot sue upon an express contract between him and his co-trustees for pay-

Lane, 15 P.D. 135; *The Rialto*, (1891) P. 175; 60 L.J. P. 71.

(*b*) 57 & 58 Vict. c. 60, s. 156. See *The Wilhelm Tell*, (1892) P. 337; 61 L.J. P. 127.

(*c*) *The Rosario*, 2 P.D. 41; 46 L.J. P. 52: seamen may, however, arrange for an apportionment. See *The Afrika*, 5 P.D. 192; 49 L.J. P. 63.

(*d*) *The Medina*, 2 P.D. 5.

(*e*) *The Charlotte*, 12 Jur. 568.

(*f*) *The Carrier Dove*, 2 Moo. P.C. N.S. 243; and see *Nicholson* v. *Chapman*, 2 H. Bl. 258.

(*g*) *The Solway Prince*, (1896) P. 120; 65 L.J. P. 45.

(*h*) *The Mariposa*, (1896) P. 273; 65 L.J. P. 104.

(*i*) *Barrett* v. *Hartley*, L.R. 2 Eq. 789.

(*k*) *Moore* v. *Frowd*, 3 Myl. & Cr. 45; 6 L.J. Ch. 372; *Christophers* v. *White*, 10 Beav. 523; *Manson* v. *Baillie*, 2 Macq. 80, questioning *Cradock* v. *Piper*, 1 Mac. & G. 664; 19 L.J. Ch. 107.

ment for his services to the trust; for each trustee is to be a check and control upon each and all the co-trustees; and one of them cannot authorize another to make professional charges to be paid out of the trust fund. Where, therefore, a number of trustees appointed one of their own body, who was a lawyer, "factor to the trust," with an allowance for his necessary charges and expenses, and a "reasonable gratification," and the factor sued his co-trustees for his professional charges "by reason of their having employed him as their commissioner, factor, cashier, and attorney in the aforesaid trust," it was held that he was not entitled to recover these charges either from them or from the trust estate (*l*). Where one of several solicitors in partnership has taken upon himself the office of trustee, the firm of which he is a member cannot charge for professional services rendered by them in the execution of the trust (*m*). Where it was proved that the partner of a trustee had, as solicitor to the trust, transacted the whole trust business entirely on his own account and for his own exclusive benefit, under an arrangement which had been made between him and his partner, that they should not be partners in any matters relating to the trust property, but that the partner who was not a trustee should, in all matters relating to the trust, act as sole solicitor to the trust, and be entitled to receive, for his own exclusive benefit, all costs and charges which might be incurred in the execution of the trust, the professional charges of the partner were allowed to be paid out of the trust estate (*n*).

Promises of presents in return for services.—If services have been rendered and benefits conferred on the express understanding that the person rendering the services is to trust entirely to the generosity of the party benefited, there is no contract (*o*). But, if a person promises to make a present in return for services rendered, there is evidence of a contract to pay a reasonable sum (*p*).

Honorary and gratuitous services.—If the employment is by custom of a purely gratuitous character, the *primâ facie* presumption of a letting and hiring of the services is rebutted as soon as the custom is proved. The office of an arbitrator is deemed to be an honorary office; and a person who acts as such cannot charge for his services, unless it was the intention of the parties that the arbitrator should be paid for his time and trouble, or unless there is an express promise to pay him for his services (*q*). Barristers

(*l*) *Manson* v. *Baillie*, 2 Macq. 80; *Aberdeen Ry.* v. *Blaikie*, 1 Macq. 461.

(*m*) *Collins* v. *Carey*, 2 Beav. 128; *Broughton* v. *Broughton*, 5 De G. M. & G. 160; 25 L.J. Ch. 250.

(*n*) *Clack* v. *Carlon*, 30 L.J. Ch. 639.

(*o*) *Roberts* v. *Smith*, 4 H. & N. 321; 28 L.J. Ex. 164; *Taylor* v. *Brewer*, 1 M. & S. 190.

(*p*) *Jewry* v. *Busk*, 5 Taunt. 302; *Bryant* v. *Flight*, 5 M. & W. 114; 8 L.J. Ex. 189; *Bird* v. *M'Gaheg*, 2 C. & K. 708.

(*q*) *Virany* v. *Warne*, 4 Esp. 47;

likewise exercise a profession of an honorary character (*r*); they cannot, therefore, maintain an action for remuneration for advice or advocacy, or for services ancillary to the service of an advocate, although there be an express contract to pay them a stipulated sum for such service (*s*); but in cases unconnected with advocacy, and for services not of a professional character, a barrister may, it seems, contract for remuneration. A physician may sue for his services, if he is registered as a physician under the Medical Acts, and is not prohibited by the college to which he belongs from bringing an action for his charges (*t*). If the service appears to have been rendered as a gratuitous act of kindness, or in discharge of a public duty, the *primâ facie* presumption of a contract of letting and hiring is repelled. Thus, if a man undertakes a journey to become bail for his friend, he is not entitled to be paid for his trouble (*u*).

The law raises no implied promise of remuneration in respect of the services of public officers. If by statute or immemorial usage a public officer is entitled to fees for his services he may maintain an action to recover them; but, where a duty is imposed by statute upon a public officer, and no provision is made for the payment of any remuneration, no action can be maintained for the recovery of any remuneration (*x*).

Rights and liabilities of employer and workman.—A person who employs another by the piece or by the job, or who lets out task-work to be done for an express or implied remuneration, is, in general, bound to do everything that is necessary to be done on his part to enable the hirer of the work to execute his engagement, and earn the hire or reward. He impliedly undertakes to resort to no misrepresentation or concealment calculated to mislead the servant, to accept the work when completed, and to pay the customary hire, in case no specific rate of remuneration has been agreed upon. When there is an absolute refusal on the part of the employer to permit the workman to perform his task, or the employer does an act absolutely incapacitating himself from performing his part of the engagement, the undertaker of the work has a right to sue immediately, for remuneration on a *quantum meruit* if the

Hoggins v. *Gordon*, 3 Q.B. 466; 11 L.J. Q.B. 286. See, however, as to lay arbitrators, *Crampton* v. *Ridley*, 20 Q.B.D. 48, 57, where it seems that a promise may be implied.

(*r*) *Lebrasseur & Oakley, In re*, (1896) 2 Ch. 487; 65 L.J. Ch. 763.

(*s*) *Kennedy* v. *Broun*, 13 C.B. N.S. 677; 32 L.J. C.P. 137; *Broun* v. *Kennedy*, 33 L.J. Ch. 71, 342; 33 Beav. 133; *Morris* v. *Hunt*, 1 Chitt. 551; *Veitch* v. *Russell*, 3 Q.B. 928; 12 L.J. Q.B. 13; *Egan* v. *Kensington Union*, 3 Q.B. 935, n.; *Att.-Gen.* v. *Royal College of Physicians*, 1 Jo. & H. 561, 591; 30 L.J. Ch. 757; *Mostyn* v. *Mostyn*, L.R. 5 Ch. 457; 39 L.J. Ch. 780.

(*t*) 49 & 50 Vict. c. 48, s. 6; *Gibbon* v. *Budd*, 2 H. & C. 92; 32 L.J. Ex. 182, see *ante*, p. 104.

(*u*) *Reason* v. *Wirdnam*, 1 C. & P. 434.

(*x*) *Jones* v. *Carmarthen* (*Mayor*), 8 M. & W. 605; 10 L.J. Ex. 401.

contract is defeasible, or, if not, for compensation for the damage he has sustained in being prevented from earning the stipulated hire (*y*).

Defeasible contracts for work and services.—If a labourer is employed to dig potatoes at so much an acre, or to cut turf at so much a load, the employer may, if there is no determinate term of employment, dispense, at any time, with the future services of the workman, paying him for the work actually done (*z*). If a party employs an agent to transact his business for him, for a certain commission, the employment is determinable at the will of the employer, unless it is coupled with an interest, and the party employed is something more than an agent in the transaction. If an agent is employed to sell property on commission, it is competent to the employer, at any time before a sale has been actually effected, to revoke the authority, and deprive the agent of the expected commission (*a*); but, if expenses have been incurred by the agent, he will be entitled to recover such expenses from the employer, and also a reasonable compensation for any labour he may have undertaken in endeavouring to execute his commission, unless it appears to have been the understanding of the parties that nothing was to be paid unless the act authorized to be done was fully accomplished (*b*). If a commission agent employed to sell property has found a purchaser and effected the authorized contract of sale, he will be entitled to his commission, although the employer may refuse to fulfil the contract; and if he has found a party willing to buy, and the employer is then unable or unwilling to sell, the agent will be entitled to remuneration for his services (*c*).

Time of performance.—By the Judicature Act, 1873, s. 25 (7), stipulations in contracts as to time or otherwise which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity (*d*). Time is frequently of the essence of the contract as regards the commencement of the work, but not so with regard to its completion. If it is made a positive term of the contract that the work shall be commenced on a day named, the employer may refuse the services of the workman, and

(*y*) *Planché* v. *Colburn*, 1 M. & Sc. 51; 1 L.J. C.P. 7; *Emmens* v. *Elderton*, 4 H.L.C. 624; 13 C.B. 495, *post*, p. 848; *Prickett* v. *Badger*, 1 C.B. N.S. 296; 26 L.J. C.P. 33; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15.

(*z*) But see *Needler* v. *Guest*, Aleyn, 9.

(*a*) *Simpson* v. *Lamb*, 17 C.B. 603; 25 L.J. C.P. 113.

(*b*) *Moffatt* v. *Laurie*, 15 C.B. 583; 24 L.J. C.P. 56; *De Bernardy* v. *Harding*, 8 Exch. 822; 22 L.J. Ex. 340; *Campanari* v. *Woodburn*, 15 C.B. 400; 24 L.J. C.P. 13.

(*c*) *Prickett* v. *Badger*, *supra*.

(*d*) *Tilley* v. *Thomas*, L.R. 3 Ch. 61.

decline to employ him, if he does not tender his services or commence the work at the appointed period; but, when the work has been commenced, the completion of it by a day named will not in general be a condition precedent to the workman's right to the stipulated hire. When the materials for the work, for example, have been furnished by the employer, and the produce of the labour becomes, consequently, his property as the work proceeds, the non-performance of the work by an appointed time does not release the employer from his obligation to pay the contract price. He must in such a case perform his part of the engagement, and bring a cross action against the undertaker of the work to recover compensation for any damage he may have sustained by reason of the non-completion of the work at the appointed period (*e*). If after the time fixed for completion the employer urges the continuance of the work, or encourages the workman to proceed, he waives the condition as to time (*f*).

Entire performance of contract condition precedent to payment.—Thus, if a coachman agrees to convey a passenger from London to York for a certain stipulated remuneration, and carries him only half the distance, he is not entitled to any payment, the precedent act to be performed being entire and indivisible. Where the plaintiff undertook to make "complete" certain dilapidated chandeliers for the sum of 10*l.*, and returned them in an incomplete state, it was held that he could not maintain an action for the work actually done (*g*). Where a solicitor covenanted to pay his clerk 2*s.* for every quire of paper he copied out, it was held that this was an entire covenant, of which no apportionment could be made *pro ratâ*, and that the clerk, consequently, could not maintain an action to recover remuneration for copying out any number of sheets less than a quire (*h*). So, where the plaintiff offered to cure a flock of sheep and lambs of a disease called the scab, at so much per head for the sheep, and so much for the lambs, and stated that he did not expect to be paid unless he cured *all* the sheep and lambs; whereupon the defendant accepted his offer, and agreed to employ him; and the plaintiff, after he had materially checked the complaint, but before he had cured the whole of the flock, brought his action for the money; it was held that he was not entitled to recover anything for his pains (*i*).

Divisible and apportionable work.—But, if the work is in its nature divisible and apportionable, and there is nothing in the terms of the contract which, either by express stipulation or neces-

(*e*) *Lucas* v. *Godwin*, 4 Sc. 509; 6 L.J. C.P. 205.
(*f*) *Burn* v. *Miller*, 4 Taunt. 748.
(*g*) *Sinclair* v. *Bowles*, 9 B. & C. 92; 7 L.J. (O.S.) K.B. 178.
(*h*) *Needler* v. *Guest*, Aleyn, 9.
(*i*) *Bates* v. *Hudson*, 6 D. & R. 3.

sary intendment, precludes the plaintiff from recovering in respect of a partial execution of it, the plaintiff may, on performing a part only of his engagement, require a corresponding part performance on the part of the defendant (*k*); and if, in a contract of this description, the defendant is deprived, by accident, of the benefit of the work before it is finished, the workman is not, by reason of such accident, deprived of his right to remuneration (*l*).

Building contracts.—If a contract has been entered into to build a house for a specific sum, to be paid on the completion of the building, the contract is entire and indivisible, and the employer is not bound to pay for a half or a quarter of a house; for the court and jury can have no right to apportion that which the parties themselves have treated as entire. But, where a builder engages to build a house, to be paid for his work and labour and the materials supplied by measure and value, or according to the customary rate of remuneration, he is entitled to demand payment from time to time as the work proceeds. Every builder who contracts for the building of a house impliedly undertakes to furnish everything reasonably necessary for its completion (*m*). Where an action was brought by a builder against his employer upon a special contract for the building of a house for a certain sum, and the builder had omitted to put into the building certain joists according to his contract, it was contended that, as the employer had got the benefit of the house, he was bound to pay what it was fairly worth; but the court held that the defendant made no such agreement (*n*). If an architect, employed to prepare plans and specifications for a house, and to procure a builder to erect it, takes out the quantities, and represents to a builder that they are correct, and the builder thereupon makes a tender which is accepted, the builder cannot upon these facts alone recover more than the contract price from the employer, although it turns out that the quantities are wrong, and the builder has expended upon the building a much larger amount of material than he contemplated (*o*).

Work to be approved of before payment.—If a tailor undertakes to make a coat, or a coachbuilder to build a carriage, upon the terms that it is not to be taken and paid for if, on inspection, style and workmanship is disapproved of, the coat or the carriage may be returned, and payment of the price refused. But if an artist is engaged to work up materials, or to paint a ceiling, and there is consequently no opportunity or power of returning him

(*k*) *Taylor* v. *Laird*, 1 H. & N. 266; 25 L.J. Ex. 329; *Button* v. *Thompson*, L.R. 4 C.P. 330; 38 L.J. C.P. 225; *Roberts* v. *Havelock*, 3 B. & Ad. 404.

(*l*) *Menetone* v. *Athawes*, 3 Burr. 1592.

(*m*) *Williams* v. *Fitzmaurice*, 3 H. & N. 844.

(*n*) *Ellis* v. *Hamlen*, 3 Taunt. 52.

(*o*) *Scrivener* v. *Pask*, L.R. 1 C.P. 715; 18 C.B. N.S. 785.

the produce of his labour, the approval of the work cannot be made a condition precedent to his right to demand some remuneration for what he has done (*p*). If a contract for the building or repairing of a house provides for the inspection and approval of the work by the employer before payment of the contract price, the employer must be afforded an opportunity of inspection before he can be called upon to pay; but he cannot, by withholding his approval unreasonably and *malâ fide*, after an opportunity of inspection has been afforded him, deprive the workman of his hire (*q*). The employer has, indeed, a right in all cases to inspect the work before he pays for it; but his approval of a builder's work is by no means essential to the maintenance of an action by the builder. It will always be a question for the jury to determine, whether the employer has acted *bonâ fide*, and ought reasonably to have been satisfied with the work done (*r*). But, where the workman works up his own materials in the manufacture of a chattel, the employer may reserve to himself a right to rescind the contract and reject the chattel, if he finds, on trial or inspection, that it does not suit him, either on the score of workmanship, or of convenience, or taste (*s*). If his acceptance of an engine, or machine, and payment of the contract price, are made dependent upon his approval of the strength and soundness of the workmanship, and he rejects the machine because it does not work well, or does not answer his purpose, and not because it is deficient either in strength or soundness, he will be held responsible for the price (*t*).

When the right to receive payment is made dependent upon the approval of an architect or surveyor, or the production of a certificate that the work has been done according to contract, no right can arise which can be enforced until the approval has been given or the certificate has been obtained (*u*). Work, therefore, which has been done, but not to the satisfaction of the surveyor or architect, cannot be charged for (*x*); but, if the certificate is fraudulently or corruptly withheld, the court will give relief; and an action may in certain cases, be maintained for the malicious, corrupt, or fraudulent withholding of the certificate both against the architect and against the employer (*y*). If the certificate is not, by the express

(*p*) *Andrews* v. *Belfield*, 2 C.B. N.S. 779.

(*q*) *Dallman* v. *King*, 5 Sc. 382; 7 L.J. C.P. 6.

(*r*) *Parsons* v. *Sexton*, 4 C.B. 899; 16 L.J. C.P. 181; *Hughes* v. *Lenny*, 5 M. & W. 183; 8 L.J. Ex. 177.

(*s*) *Andrews* v. *Belfield*, *supra*.

(*t*) *Ripley* v. *Lordan*, 6 Jur. N.S. 1078.

(*u*) *Scott* v. *Liverpool Corporation*, 25 L.J. Ch. 230; 3 De G. & J. 334; *Morgan* v. *Birnie*, 3 M. & Sc. 76; 9 Bing. 672; *Salford* (*Mayor*) v. *Ackers*, 16 L.J. Ex. 6; 16 M. & W. 85; *Moffatt* v. *Dickson*, 22 L.J. C.P. 265; 13 C.B. 543.

(*x*) *Dobson* v. *Hudson*, 1 C.B. N.S. 659; 26 L.J. C.P. 153.

(*y*) *Milner* v. *Field*, 5 Exch. 829; 20 L.J. Ex. 68; *Batterbury* v. *Vyse*, 2 H. & C. 42; 32 L.J. Ex. 177; *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L.J. Q.B. 75.

terms of the contract, required to be in writing, the architect's approbation testified by word of mouth is sufficient (*z*).

Relief against biassed or corrupt decisions of architects and surveyors.—If an architect's certificate is wrongfully or fraudulently withheld, the court will give relief, not only against the parties who are bound to pay, but also against the architect, surveyor, or engineer; and any stipulation in the contract, placing the latter in the position of an arbitrator between the employer and the workman, and making his decision final, and purporting to exclude the jurisdiction of any court with reference to his conduct, will be of no effect (*a*). If questions arising between the contractor for works and the employer are, by the contract, left to the determination of the architect, and the latter has a personal interest unknown to the contractor and adverse to him (*b*), or does not act fairly between the parties, or manifests any undue partiality, or corruption, the court will interfere to give relief, however strenuously the parties may by their contract have endeavoured to exclude the jurisdiction of the court (*c*).

Actions for wrongfully withholding the certificate may be maintained both against the architect and the employer, if it can be proved that the builder has fulfilled his contract and done all things necessary to be done by him to entitle him to the certificate, and that the architect had full knowledge thereof, and nevertheless neglected to certify in collusion with the employer (*d*). But the employer is not responsible for any misconduct of his architect or surveyor, in refusing to certify, when such misconduct is not brought about by his interference (*e*).

Effect of employer's taking possession and making use of unfinished work.—A landowner who by a building contract provides a site for the erection of a house, and delivers the ground to the builder, does not thereby part with the possession of his land; the builder has the mere temporary custody of it, and may be turned off at any time by the employer (*f*). Where by a building contract it was stipulated that certain houses should be built on the land of the employer for a certain sum by a specified day to the satisfaction of a surveyor, upon whose approval payment was to be made, and the builder became bankrupt and was unable to complete the houses,

(*z*) *Roberts* v. *Watkins*, 32 L.J. C.P. 291; 14 C.B. N.S. 592.

(*a*) *Scott* v. *Liverpool Corporation*, 25 L.J. Ch. 227.

(*b*) *Kimberley* v. *Dick*, L.R. 13 Eq. 1; 41 L.J. Ch. 38.

(*c*) *Kemp* v. *Rose*, 1 Giff. 258; *Scott* v. *Liverpool Corporation*, *supra*; *Ormes* v. *Beadel*, 2 Giff. 166; 30 L.J. Ch. 1; *Pawley* v. *Turnbull*, 3 Giff. 70; *Bliss* v. *Smith*, 34 Beav. 508.

(*d*) *Batterbury* v. *Vyse*, 2 H. & C. 42; 32 L.J. Ex. 177; *Milner* v. *Field*, 5 Exch. 829; 20 L.J. Ex. 68; *Scott* v. *Liverpool Corporation*, *supra*.

(*e*) *Clarke* v. *Watson*, 18 C.B. N.S. 278; 34 L.J. C.P. 148.

(*f*) *Camden* (*Marquis*) v. *Batterbury*, 7 C.B. N.S. 864; 28 L.J. C.P. 335.

and the employer then took possession of them and finished them, it was held that his taking possession of the unfinished houses did not amount to a waiver of the contract or of any of the terms or conditions thereof, and afforded no evidence that he accepted the benefit of the work actually done under an implied contract to pay for it according to measure and value (*g*).

Defective work accepted by employer.—Whenever the employer has accepted the benefit of work done for him under a special contract, which has been abandoned or rescinded, he is liable to pay a reasonable remuneration in respect thereof. If the workman undertakes to repair a chattel, the property of the employer, and the new work and materials are so intermixed with the old work, that the one cannot be separated from the other without injury to the chattel, so that the employer must of necessity accept the work, his liability to pay for it, in case it has been negligently executed, depends upon the utility of the work. If the chattel has been rendered more valuable by what has been done, the employer must pay the fair value of the workmanship; if it is in nowise improved, and the work done has been so negligently executed as to be worth nothing, the employer cannot be called upon for payment. If the contract is an indivisible contract for the completion of certain work, such as the contract to "make complete" the dilapidated chandeliers for the sum of 10*l.* previously mentioned (*ante*, p. 809), and the chattel is returned in an unfinished state, the employer may require the undertaker of the work to complete the article, and refuse payment of the money until it is done. The retention by the employer of his own unfinished chattel does not, in such a case, raise any inference of a waiver of any of the conditions of the special contract, or of the entering into a new contract to pay upon a *quantum meruit* (*h*). Where a contract provides for stipulated work at a lump sum and such work is not done, but its equivalent or better work is effected, no claim for such substituted work can be claimed (*i*).

Substantial performance of building contracts.—When a contract has been entered into for the building of a house for a certain sum of money to be paid on the completion of the building in accordance with certain plans and specifications, it is not essential to the maintenance of an action that there should be an exact performance in every minute particular; for, wherever divers acts of different degrees of importance are to be done on one side in return for a stipulated remuneration on the other, the performance of all the

(*g*) *Munro* v. *Butt*, 8 E. & B. 738; *Runger* v. *G. W. Ry.*, 5 H.L.C. 118; *Sumpter* v. *Hedges*, (1898) 1 Q.B. 673; 67 L.J. Q.B. 545.

(*h*) *Munro* v. *Butt*, *supra*; *Ellis* v. *Hamlen*, 3 Taunt. 52, *ante*, p. 810.

(*i*) *Forman* v. *The Liddesdale*, (1900) A.C. 190; 69 L.J. P.C. 44.

things in every minute particular is not, in general, a condition precedent to the liability to make some remuneration; but, if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it (*k*), the defendant being entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract. In every contract for work there is a condition implied by law that the work shall be done in a workmanlike manner; but this is not a condition going to the essence of the contract. "If it were a condition precedent to the plaintiff's remuneration," observes Tindal, C.J., "a little deficiency of any sort would deprive the plaintiff of all claim for payment; but under such circumstances a jury may say what the plaintiff really deserves to have" (*l*).

A building contract, with all its specifications and details, may in some respect be broken with trifling damage to the employer; and, if performance in every minute particular were made a condition precedent to the builder's right to sue upon the contract for work done, "a trifling injury to the one party might occasion the loss of all remuneration to the other for a long and laborious service" (*m*). But, where it appears from the whole tenor of the agreement that the parties thereto intended, the one to insist upon, and the other to submit to, conditions, however unreasonable, the court will in such case give effect to them (*n*).

Where a party engages to do certain work in a certain specified manner, but does not perform the work so as to correspond with the specification, he is not entitled to recover the price agreed upon, nor can he recover according to the actual value of the work done. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work to make it correspond with the specification (*o*). And the defendant is not, by reason of his having given evidence of such breach of contract on the part of the plaintiff, and obtained a reduction of the agreed price, precluded from bringing his cross-action to recover compensation for any special damage he may have sustained by reason of the non-compliance by the plaintiff with the strict terms of the engagement (*p*). Although the defendant may give evidence of such breach of contract in reduction of damages, he is not bound to do so, but may pay the whole of the contract

(*k*) *Ante*, p. 50.

(*l*) *Lucas* v. *Godwin*, 4 Sc. 509; 6 L.J. C.P. 205.

(*m*) Tindal, C.J., *Stayers* v. *Curling*, 3 Sc. 755; 6 L.J. C.P. 41.

(*n*) *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L.J. Q.B. 75.

(*o*) *Thornton* v. *Place*, 1 Moo. & R. 218.

(*p*) *Ante*, p. 588; *Mondel* v. *Steel*, 8 M. & W. 858; 10 L.J. Ex. 426; *Rigge* v. *Burbidge*, 15 M. & W. 599; 15 L.J. Ex. 309.

price, and bring a cross-action for damages for the non-performance and defective performance of the work done (*q*). Care must be taken to mark the distinction between an action on the special contract itself for the agreed price of the work, and an action upon a bill of exchange or promissory note given by way of payment of the amount. In the former the value of the work only can be recovered; in the latter the party holding bills given for the price of the work done can recover on them, unless there has been a total failure of the consideration. If the consideration fails partially, as by the inferiority of the work, the buyer must seek his remedy by a cross action. The contract may be divisible; but the security is entire (*r*). Where plans and specifications are prepared and persons invited to tender thereupon, there is no implied warranty that the work can be successfully done according to such plans and specifications (*s*).

Abatement of contract price.—Whenever a contract for work and services on the one side, and payment on the other, has been so far executed as to give rise to a cause of action, but has not been fully performed, it is competent to the defendant to show, in reduction of the price agreed to be paid, that the subject-matter of the contract is diminished in value by reason of the inefficient execution of the work. Thus, where the defendant agreed to pay the sum of 70*l.* for a warm-air apparatus, it was held that, if the apparatus was altogether unfit for the purpose, the defendant was not bound to pay for it; but that, if the apparatus was in the main effective, but not quite so complete as it ought to have been, the action was maintainable for the price, and that the jury might deduct from the full price such a sum as would enable the defendant to do that which was required to make it perfectly effective (*t*).

Effect of non-performance of building contracts by time specified.—In the case of a contract to build a house, where the employer furnishes the land, which is the principal material for the work, if the house is not built by the time specified, but is afterwards completed, the employer who has got the house, and has had the value of his land increased by its erection thereon, can never be permitted to free himself from his obligation to pay for it by alleging that the work was not done by the time appointed (*u*).

Penalties for non-performance of building contracts by time

(*q*) *Davis* v. *Hedges*, L.R. 6 Q.B. 687; 40 L.J. Q.B. 276.

(*r*) *Tye* v. *Gwynne*, 2 Campb. 347.

(*s*) *Thorn* v. *London* (*Mayor*), 1 App. Cas. 120; 45 L.J. Ex. 62.

(*t*) *Cutler* v. *Close*, 5 C. & P. 338; *Chapel* v. *Hickes*, 2 Cr. & M. 214; 3 L.J. Ex. 38.

(*u*) Tindal, C.J., *Lucas* v. *Godwin*, 4 Sc. 509; 6 L.J. C.P. 205; *Littler* v. *Holland*, 3 T.R. 590; *Maryon* v. *Carter*, 4 C. & P. 295; *Kingdom* v. *Cox*, 2 C.B. 661; 15 L.J. C.P. 95.

specified.—Where, by articles of agreement for the altering and repairing of a warehouse for a fixed sum, it was stipulated that, in the event of the work not being fully completed in three months, the builder should "forfeit and pay" to the employer 5*l.* every week he should be engaged in such work beyond the three months, such penalty or forfeiture to be deducted from the amount which might remain owing on the completion of the work, it was held, in an action brought for extra work, that the employer was entitled to set off the penalty against the price of such extra work, and that he had a double remedy, either to set it off as payment, or to deduct it from the contract price (*x*). If performance by the time specified has been prevented by the ordering of extra work, or by the interference of the employer or his agent, the claim to the penalties cannot be enforced (*y*), unless there is an express stipulation that it may be (*z*).

Security for due performance of contract.—If security is to be given by the workman for the due performance of his contract, it is a condition precedent, unless the condition has been waived by the workman's being required to proceed with the work, or the work having been executed, without security (*a*).

Destruction of work before payment—Loss of materials and of price of work.—If the contract is entire for the performance of a specific work for a specified sum, so that the performance of the whole of the work is a condition precedent to the right to payment for any part of it, the workman will be deprived of all legal right to remuneration if the work is destroyed by accident before it has been completed (*b*); but, if the workman is entitled to payment from time to time as the work proceeds, the destruction of the work before its completion will not deprive the workman of his hire. Thus, if the contract is an entire and indivisible contract for the building of a house for a specific sum to be paid on its completion, and the edifice is destroyed by lightning, fire, or tempest, during the progress of the work, the contractor must stand to the loss, and be himself at the expense of repairing the damage. But, if the contract price of the building is to be paid by instalments on the completion of certain specified portions of the work, each instalment becomes a debt due to the builder, as the particular

(*x*) *Duckworth* v. *Alison*, 1 M. & W. 412; 5 L.J. Ex. 171; *Fletcher* v. *Dyche*, 2 T.R. 32; *Legge* v. *Harlock*, 12 Q.B. 1015; 18 L.J. Q.B. 45.

(*y*) *Westwood* v. *Secretary for India*, 11 W.R. 261; 7 L.T. 736; *Russell* v. *Da Bandiera*, 13 C.B. N.S. 149; 32 L.J. C.P. 68; *Dodd* v. *Churton*, (1897) 1 Q.B. 562; 66 L.J. Q.B. 477.

(*z*) *Jones* v. *St. John's College, Oxford*, L.R. 6 Q.B. 115; 40 L.J. Q.B. 80.

(*a*) *Roberts* v. *Brett*, 6 C.B. N.S. 635; 28 L.J. C.P. 323; aff., 11 H.L.C. 337; 34 L.J. C.P. 241; *Kingston* v. *Preston*, cited 2 Doug. 689.

(*b*) *Appleby* v. *Myers*, L.R. 2 C.P. 651; 36 L.J. C.P. 331.

portion specified is completed; and, if the house is destroyed by accident, the employer would be bound to pay the instalments then due, but would not be responsible for the intermediate work and labour and materials (*c*).

When the contract is entire and indivisible for the manufacture out of materials furnished by the employer of a particular chattel for a specific sum, to be paid on the completion and delivery of the chattel to the employer, and the chattel is destroyed by inevitable accident whilst it remains unfinished in the hands of the workman, the employer must stand to the loss of his materials, and the workman to the loss of the value of his labour. Thus, if a printer is employed to print a book at so much per sheet, the value of the printing to be paid for on the completion of the work, and, before the whole impression has been worked off and made ready for delivery, an accidental fire consumes the work, the employer must stand to the loss of his paper, and the printer to the loss of the value of his labour (*d*). But, if the work has been completed, and the copies have been printed and made ready for delivery, and placed at the disposal of the employer, they remain at his risk; and, if an accidental fire then consumes them, he must stand to the loss, and pay the printer his hire (*e*).

If a shipwright is employed to repair a ship, the accessorial materials supplied by him for the work become the property of the employer, as soon as they are attached to the vessel under repair, upon the principle that *omne accessorium sequitur suum principale*; and, if the completion of the work is not made, either by agreement or by custom, a condition precedent to the payment, and the ship is accidentally burnt, the loss of such materials, as well as of the value of the work employed upon them, is the loss of the employer and not of the workman, and the employer, consequently, must pay the fair value of the labour and materials, although he can reap no benefit from what has been done (*f*). But, where a man contracts to expend materials and labour on buildings belonging to and in the occupation of the employer, to be paid for on completion of the whole, and before completion the buildings are destroyed by accidental fire, the contractor is excused from completing the work, but is not entitled to any compensation for the work already done, which has perished without any default of the employer (*g*). Where the plaintiff, a British subject, engaged to serve on board a foreign ship, and before the completion of the voyage the foreign Government declared war on

(*c*) *Menetone* v. *Athawes*, 3 Burr. 1592; *Tripp* v. *Armitage*, 4 M. & W. 699; 8 L.J. Ex. 107, *ante*, p. 545.
(*d*) *Gillett* v. *Mawman*, 1 Taunt. 140.
(*e*) *Adlard* v. *Booth*, 7 C. & P. 108.
(*f*) *Menetone* v. *Athawes*, 3 Burr. 1592.
(*g*) *Appleby* v. *Myers*, L.R. 2 C.P. 651; 36 L.J. C.P. 331.

another foreign Government, and the plaintiff thereupon refused to complete the voyage, it was held that, the voyage having been altered into one of increased risk, the plaintiff was justified in refusing to continue to serve, and was entitled to recover his wages for the entire voyage (*h*).

Where a contract for the building of a ship vests the general property in the ship in the employer as the materials are put together (*i*), and the ship is destroyed by fire, the loss of the materials and workmanship will fall on the employer; but, if the property in the thing destroyed remains with the workman, the loss will fall upon the latter. And where tug-owners contracted to tow a vessel for a fixed sum to a certain place, and when near their destination through inevitable accident the vessel stranded and could not be got off, it was held that the contract was indivisible, and that they could not recover for any portion of the towage (*k*).

Deviations from building contracts—Extras.—If work has been agreed to be done, and materials supplied, under a building contract for certain estimated prices, and there has subsequently been a deviation from the original plan by consent of the parties, the contract is not on that account excluded, but is to be the rule of payment, as far as the contract can be traced to have been followed, and the excess only is to be paid for according to the usual rates of charging; but if the original plan has been so entirely abandoned that it is impossible to trace the contract, and to say to what part of it the work shall be applied, the workman may charge for the whole work by measure and value, as if no contract at all had ever been made. But there must be a total deviation, so that the terms of the original contract are not applicable to the new work (*l*). For all work done beyond the contract, under subsequent or antecedent directions, the plaintiff may recover, just as if no special contract had ever been made (*m*). But the mere fact of the defendant having assented to certain alterations is not sufficient to make him liable to pay for them as extras not covered by the contract, unless the alterations are of such a nature that he cannot fail to be aware that they must increase the expense, and cannot be done for the contract price (*n*). If extras have been done by the plaintiff without any authority from the defendant, the latter is not bound to pay for them (*o*). If they are, to be done only on the direc-

(*h*) *O'Neill* v. *Armstrong*, (1895) 2 Q.B. 418; 65 L.J. Q.B. 7.

(*i*) *Clarke* v. *Spence*, 4 Ad. & E. 470; 5 L.J. Q.B. 161; *ante*, p. 546; *Wood* v. *Bell*, 25 L.J. Q.B. 153, 321; 6 E. & B. 355.

(*k*) *The Madras*, (1898) P. 90; 67 L.J. P. 53.

(*l*) *Pepper* v. *Burland*, Peake, 139; *Robson* v. *Godfrey*, Holt, N.P.C. 236; *Ellis* v. *Hamlen*, 3 Taunt. 52.

(*m*) *Thornton* v. *Place*, 1 Moo. & R. 218; *Fletcher* v. *Gillespie*, 3 Bing. 637; 4 L.J. (O.S.) C.P. 202.

(*n*) *Lovelock* v. *King*, 1 Moo. & R. 60.

(*o*) *Dobson* v. *Hudson*, 1 C.B. N.S. 652; 26 L.J. C.P. 153.

tion in writing of the architect, a direction in writing must be obtained (*p*). And where it is provided that all extras shall be paid for at the price fixed by the employer's surveyor, his certificate is conclusive both as to the extras and the amount due for them (*q*). In cases of variation set up by the way of defence, the courts look to the subsequent conduct of the parties, for this obvious reason, that, as the parties intend the contract to remain in force, so far as it is not varied, it is only by comparing the conduct of the parties subsequently to the making of the alleged variation with the terms originally agreed upon that the court can determine with certainty upon oral evidence that such variations were mutually intended to take effect.

Prevention of performance of building contracts.—Where it was agreed that the plaintiff should pull down the walls of three houses and erect for the defendant, on the site thereof, a malt-house and other buildings, and the plaintiff offered to do the work, but the defendant prevented him, it was held that the plaintiff had done all that was necessary to be done to enable him to sue the defendant for a breach of contract. The builder or workman is not in such a case entitled to recover the full stipulated remuneration as if the buildings had been actually erected (*r*).

Right of lien of workmen and artificers.—Every workman to whom a chattel has been delivered by the owner to be mended, repaired, or altered for hire, and who has bestowed his labour upon it, has a lien upon the chattel for his hire. This right of lien is a mere right of retainer until the pecuniary claim has been satisfied, and carries with it no right of sale (*s*). A workman who has detained a chattel in the exercise of a right of lien is not entitled, in the absence of any usage of trade, to charge warehouse rent or the expense of keeping the chattel (*t*).

Wherever a workman has bestowed labour or skill in repairing or improving a chattel at the request, or by the employment of the owner, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if a price has been fixed by agreement (*u*). Thus the artificer to whom goods are delivered to be worked up, the shipwright to whom a vessel has been delivered to be repaired (*x*),

(*p*) *Myers* v. *Sarl*, 30 L.J. Q.B. 9; 3 E. & E. 306; *Russell* v. *Sa Da Bandiera*, 13 C.B. N.S. 149; 32 L.J. C.P. 68.

(*q*) *Richards* v. *May*, 10 Q.B.D. 400; 52 L.J. Q.B. 272.

(*r*) *Peters* v. *Opie*, 1 Ventr. 177; 2 Saund. 350; *Collins* v. *Price*, 5 Bing. 132; 6 L.J. (O.S.) C.P. 244; *Ferry* v. *Williams*, 8 Taunt. 70; 1 Moore, 498.

(*s*) *Thames Iron Works Co.* v. *Patent Derrick Co.*, 29 L.J. Ch. 714; 1 Jo. & H. 93.

(*t*) *Somes* v. *Brit. Emp. Shipping Co.*, 30 L.J. Q.B. 229; 8 H.L.Cas. 338.

(*u*) *Chase* v. *Westmore*, 5 M. & S. 180.

(*x*) *Franklin* v. *Hosier*, 4 B. & Ald. 341; *Williams* v. *Allsup*, 10 C.B. N.S. 417; 30 L.J. C.P. 353. As to a maritime lien, see *The Two Ellens*, L.R. 4 P.C. 161; 41 L.J. Adm. 33; *The Henrich Bjorn*, 11 App.Cas. 270; 55 L.J. P. 80; *Westrup* v. *Great Yarmouth Co.*, 43 Ch.D. 241; 59 L.J. Ch. 111.

the printer to whom paper has been delivered to be printed (*y*), the miller who has ground corn or meal at his mill (*z*), the horse-breaker or trainer by whose skill a horse is trained (*a*), the stallion-keeper who has received a mare to be covered by his stallion, have each a lien for their hire, or the customary charges for their services, unless there be some express or tacit understanding between the parties to the particular contract inconsistent with the exercise of such a right. But where no work is to be done upon the chattel to improve its value, or to carry it from one place to another for hire, no lien attaches upon it. Thus, if a power of attorney, or an authority to receive money, is intrusted to a bailee in order that he may exhibit it as a voucher, he has no lien upon the document for money due to him from the bailor. Where a mortgage deed was delivered to an auctioneer in order that he might obtain payment of the principal and interest due thereon, and the auctioneer made several applications for the money, it was held that he had no lien upon the deed for his charges (*b*).

The lien of the manufacturer and workman extends only to the principal chattels placed in his hands to be worked up, and not to the accessorial materials which may have been furnished by the employer, and left upon the premises of the manufacturer or workman unused (*c*). Where a stereotype printer received stereotype plates from his employer to print from, it was held that his lien for printing was confined to the paper, and did not extend to the plates from which he printed; but such a lien may be established by custom and the usage of trade, or by agreement of the parties (*d*).

Liabilities of taskworkmen.—Every person who has entered into a contract for the performance of a particular task or job is bound to enter upon his employment without delay; to be active, careful, and diligent in the performance of the work; to do it according to orders given and assented to (*e*); and to complete it within a reasonable period, if no precise time has been agreed upon for its fulfilment. If the work is to be performed under the direction of a surveyor to be appointed by the employer, the appointment is a condition precedent; and, if the surveyor is not appointed within a reasonable period, the workman is released from his engagement to do the work (*f*). In ordinary cases, the workman may accomplish the work through the medium of inferior agents and work-

(*y*) *Blake* v. *Nicholson*, 3 M. & S. 167.
(*z*) *Chase* v. *Westmore*, *ante*, p. 819.
(*a*) *Beavan* v. *Waters*, 3 C. & P. 520; *Jacobs* v. *Latour*, 2 M. & P. 201; 6 L.J. (O.S.) C.P. 243; *Scarfe* v. *Morgan*, 4 M. & W. 284; 7 L.J. Ex. 324.
(*b*) *Sanderson* v. *Bell*, 2 Cr. & M. 304; 3 L.J. Ex. 66.
(*c*) *Cumpston* v. *Haigh*, 2 Sc. 684; 5 L.J. C.P. 99.
(*d*) *Bleaden* v. *Hancock*, M. & M. 465.
(*e*) *Streeter* v. *Horlock*, 7 Moore, 287.
(*f*) *Coombe* v. *Greene*, 11 M. & W. 483; 12 L.J. Ex. 291.

men; but, if the work is a work of art and genius, and the contract is founded upon the personal talent of the artist, he impliedly undertakes to perform the work himself, and may not intrust it to an inferior agent of less skill (*g*).

Implied obligation to do work well—Skilled workmen.—Every person who professes to be a skilled workman impliedly undertakes to do his work in a workmanlike manner, and according to the rules of his art. "When a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if he cannot succeed; and he should know whether he will or not" (*h*). The public profession of an art is a representation, to all who require the services of the professed artisan, that the latter is possessed of the ordinary amount of skill incident to his particular art (*i*). If, therefore, an accountant is employed to make out an account, and he miscalculates the amounts and carries wrong balances to the injury of the employer, he is responsible in damages to the latter (*k*). If a carpenter undertakes to roof a barn, and employs defective materials, or does his work so negligently and unskilfully that the thatch sinks and lets in the wet, he is liable for the injury to the building so occasioned (*l*). Where a carpenter undertook to build a booth on a race-course, and the booth fell down in the middle of the races from bad materials and bad workmanship, it was held that the carpenter was responsible for the damage that had been sustained (*m*). Clockmakers, jewellers, opticians, and all kinds of skilled workmen and all persons belonging to the learned professions (except barristers), are responsible in damages if they profess to accomplish more than they are able to perform, and undertake works of skill without being possessed of sufficient skill, or apply less than the occasion requires (*n*). So a chemist was held liable for negligence in compounding hair wash, by which the plaintiff's wife was injured (*o*); and a patent agent will be liable for negligence in not being aware of a legal decision which made an important change in the practice of obtaining patents (*p*).

Work rendered useless by negligence or incompetence of workman.—Whenever the work contracted to be done is a work of skill, and

(*g*) *Robson* v. *Drummond*, 2 B. & Ad. 308; *British Waggon Co.* v. *Lea*, 5 Q.B.D. 149; 49 L.J. Q.B. 321.

(*h*) Bayley, J., *Duncan* v. *Blundell*, 3 Stark. 7, cited 5 M. & P. 548.

(*i*) *Harmer* v. *Cornelius*, 5 C.B. N.S. 236; 28 L.J. C.P. 85.

(*k*) *Story* v. *Richardson*, 8 Sc. 291; 9 L.J. C.P. 43.

(*l*) *Basten* v. *Butter*, 7 East, 479; *Moneypenny* v. *Hartland*, 2 C. & P. 378.

(*m*) *Broom* v. *Davis*, 7 East, 480, n. (*a*); *Francis* v. *Cockrell*, L.R. 5 Q.B. 501; 39 L.J. Q.B. 291.

(*n*) *Seare* v. *Prentice*, 8 East, 352; *Slater* v. *Baker*, 2 Wils. 359; *Lanphier* v. *Phipos*, 8 C. & P. 479; *Hancke* v. *Hooper*, 7 C. & P. 81.

(*o*) *George* v. *Skivington*, L.R. 5 Ex. 1; 39 L.J. Ex. 8.

(*p*) *Lee* v. *Walker*, L.R. 7 C.P. 121; 41 L.J. C.P. 91.

the undertaker, being charged with the bare work, executes it so negligently and unskilfully as to render it utterly useless to the employer, he cannot call upon the latter for payment of it. Thus, where a builder contracted with the defendant to re-build the front of his house, and built it out of the perpendicular, so that it was in danger of falling, and required to be taken down, it was held that the builder could not maintain an action in respect of such defective execution of the work (*q*). And, where a man undertook to erect a stove in a shop, and to lay a tube under the floor, which would carry off the smoke, and the plan entirely failed, and the stove could not be used, it was held that he was not entitled to an action in respect of his work and labour in the erection of the stove (*r*). "If a man contracted with another to build him a house for a certain sum, it would surely not be sufficient for him to show that he had put together such a quantity of brick and timber; he ought to be prepared to show that he had done the stipulated work according to his contract" (*s*). When a building is so negligently constructed as to be dangerous and unfit for use, the employer may require the builder to take down the structure and rebuild it; and, if the builder neglects so to do, and refuses to fulfil his part of the contract, the employer may give him notice to remove his materials from off the land, and may resist payment of any portion of the price of the work. If he retains the materials, and makes use of them, he will be bound to pay their fair value; but, if the materials are altogether useless, or the employer has suffered from the breach of contract on the part of the workman more damage and injury than they are worth, he is not bound to pay anything (*t*).

Useless and unskilful professional services.—If a surgeon requires his patient to undergo an operation which turns out to have been altogether unnecessary, he cannot make it the subject of a pecuniary claim. If a medical man unskilfully administers improper medicines, and the patient, consequently, derives no benefit from his attendance, the medical man is not entitled to any remuneration; but, if he has employed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure being then attributable to some peculiarity in the constitution of the patient, for which the medical man is not

(*q*) *Farnsworth* v. *Garrard*, 1 Camp. 38; *Denew* v. *Daverell*, 3 Camp. 451.

(*r*) *Duncan* v. *Blundell*, 3 Stark. 6; *Hayselden* v. *Staff*, 5 Ad. & E. 161; 6 L.J. K.B. 67.

(*s*) Le Blanc, J., *Basten* v. *Butter*, 7 East, 484.

(*t*) Tindal, C.J., *Hill* v. *Featherstonehaugh*, 5 M. & P. 544, 548; *Farnsworth* v. *Garrard*, *supra*.

responsible (*u*). If a surveyor, engineer, or architect, from negligence or want of skill, gives his employers a grossly incorrect estimate of the cost of certain works, and thereby leads them into unnecessary expenses, he is not entitled to be paid for his plans, estimates and specifications (*x*). But, if the incorrectness of the estimate arises from the inherent difficulties in the work itself, the employer will not be relieved from the obligation of payment.

Actions against solicitors for negligence.—Every solicitor employed by a purchaser of property impliedly undertakes to exercise reasonable skill in the investigation of the title of the vendor. If his client has purchased leasehold property under conditions that he is to have no abstract of the vendor's title, and that the lessor's title is not to be objected to, or gone into, this will not exonerate the solicitor from the duty of investigating the vendor's title so far as to ascertain that there is a lease to him creating the interest he professes to sell, and that it has been duly registered where registration is necessary (*y*). But a solicitor is not liable to an action for negligence, at the suit of one between whom and himself the relation of solicitor and client does not exist, for giving, in answer to a casual enquiry, erroneous information as to the contents of a deed (*z*). A solicitor is liable for the negligence of his agent (*a*), partner (*b*), or clerk (*c*). The obligation of the solicitor is towards his client and not towards a stranger (*d*). Yet, if he undertakes without authority to act for any person he is liable for negligence (*e*).

The solicitor having accepted the retainer is in general bound to prosecute the matter intrusted to him to its termination, but not if he cannot obtain his fees or security for them, and he gives reasonable notice of throwing up the retainer (*f*). The retainer is at an end when judgment is recovered (*g*), but it may be renewed (*h*). A solicitor who has been retained to conduct an action, and who, after judgment in favour of his client, is authorised to do his best

(*u*) *Kannen* v. *McMullen*, Peake, 83; *Hupe* v. *Phelps*, 2 Stark. 480.

(*x*) *Moneypenny* v. *Hartland*, 2 C. & P. 378.

(*y*) *Allen* v. *Clark*, 11 W.R. 304; as to the receipt of money for investment by one of several solicitors in partnership, see *ante*, p. 785.

(*z*) *Fish* v. *Kelly*, 17 C.B. N.S. 194.

(*a*) *Simmons* v. *Rose*, 31 Bea. 11.

(*b*) *Norton* v. *Cooper*, 3 Sm. & Giff. 375; *Dundonald* v. *Masterman*, L.R. 7 Eq. 504; 38 L.J. Ch. 350; *Bickford* v. *Darcy*, L.R. 1 Ex. 354; 35 L.J. Ex. 202.

(*c*) *Floyd* v. *Nangle*, 3 Atk. 568; *Prestwich* v. *Poley*, 18 C.B. N.S. 806; 34 L.J. C.P. 189.

(*d*) *Fish* v. *Kelly*, *supra*.

(*e*) *Westaway* v. *Frost*, 17 L.J. Q.B. 286.

(*f*) *Wadsworth* v. *Marshall*, 2 Cr. & J. 665; 1 L.J. Ex. 250; *Hoby* v. *Built*, 3 B. & Ad. 350; *Van Sandau* v. *Browne*, 9 Bing. 402; 2 L.J. C.P. 34; *Underwood* v. *Lewis*, (1894) 2 Q.B. 306; 64 L.J. Q.B. 60; *Court* v. *Berlin*, (1897) 2 Q.B. 396; 66 L.J. Q.B. 714.

(*g*) *Flower* v. *Bolingbroke*, 1 Str. 639; *Brackenbury* v. *Pell*, 12 East, 588; *Macbeath* v. *Ellis*, 4 Bing. 578.

(*h*) *Butler* v. *Knight*, L.R. 2 Ex. 109; 36 L.J. Ex. 66.

for the purpose of obtaining the fruits of the judgment, has control over the process of execution so far as such purpose is concerned, and may consent to the withdrawal of a *fi. fa.* (*i*). He may also accept payment of the debt by instalments if it is for the client's advantage to do so, but he has no implied authority to enter into an agreement on his behalf to postpone execution (*k*). A solicitor is not liable upon points of new occurrence, or of nice or doubtful construction (*l*), but he must show himself acquainted with the ordinary practice of his profession (*m*).

It is the duty of every solicitor to act with fidelity to his client, and to keep the secrets of the latter; for "if a man, being intrusted in his profession, deceive him who intrusted him, or if a man retained of counsel become afterward of counsel with the other party in the same cause, or discover the evidence or secrets of the cause; or if an attorney act deceptively, to the prejudice of his client, or make default by collusion with others whereby his client is injured, an action lies for damages" (*n*). If a solicitor, when his client's deeds are put into his hands, for the purpose of raising money, discloses defects of title to the person who was about to lend, and the client sustains damage therefrom, the attorney is responsible for neglect of duty, and cannot shelter himself from the consequences by showing that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him; for whenever a solicitor finds that he has a conflicting duty to discharge towards his several clients, he must at once withdraw from the inconsistent employment, and decline to act in the matter. Whenever the solicitor has his client's title-deeds put into his hands for any purpose whatever, he is "to consider his lips sealed with a sacred silence as to the whole of their contents" (*o*).

It is also the duty of every solicitor, by reason of the emolument he receives for the exercise of his professional skill, to take care that his client does not enter into any covenant or stipulation that may expose him to a larger responsibility than the nature of the business he is instructed to transact may, in the ordinary course of practice, require. If the stipulations are more onerous in their consequences than usual, the matter should be fully explained

(*i*) *Levi* v. *Abbott*, 4 Exch. 588; 19 L.J. Ex. 62.

(*k*) *Lovegrove* v. *White*, L.R. 6 C.P. 440; 40 L.J. C.P. 253.

(*l*) *Godefroy* v. *Dalton*, 6 Bing. 468; 8 L.J. (O.S.) C.P. 79; *Laidler* v. *Elliott*, 3 B. & C. 738; 3 L.J. (O.S.) K.B. 96.

(*m*) *Hunter* v. *Caldwell*, 10 Q.B. 69, 83; 16 L.J. Q.B. 274.

(*n*) Com. Dig. Action on the Case for Deceit, A. 5. As to their duty to keep accounts, see *Neville, Ex parte*, L.R. 4 Ch. 43. No agreement between an attorney and his client as to the former's remuneration made in pursuance of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), will absolve such attorney from the consequences of his negligence: see sect. 7.

(*o*) Tindal, C.J., *Taylor* v. *Blacklow*, 3 Bing. N.C. 235, 248; 6 L.J. C.P. 14.

to the client, and the unusual extent of liability be made known to him (*p*). If a solicitor conducting a suit is guilty of misconduct and negligence, by reason whereof all the previous steps taken in the cause become useless, he cannot recover his charges for any part of the business he has done; but, if the suit fails from causes over which the solicitor has no control, the case is otherwise (*q*). If a solicitor issues a writ and proceeds thereon in a court of special and peculiar jurisdiction, he is bound to acquaint himself with the machinery and practice of the court, and to see that it is adequate for the purposes of the suit; and, if the suit fails from the ignorance of the solicitor in this respect, he cannot recover his costs of the abortive proceedings (*r*).

If a solicitor conducting a suit neglects to comply with the practice or orders of the court, and neglects to take some necessary step in the cause, by means whereof all the previous proceedings become useless, he will be responsible in damages to his client (*s*). And the same consequences follow if he brings an action for his client, within a limited jurisdiction, on a cause of action manifestly arising out of the jurisdiction (*t*), or negligently suffers judgment to go by default when he is retained to defend an action (*u*); or fails to instruct counsel properly, and to deliver briefs in sufficient time to enable his counsel effectively to perform the duty intrusted to him; or if he is not present in person, or by his agent at the trial, to see that the witnesses are forthcoming when called upon (*x*). When present at the trial, it is the duty of the solicitor not to suffer the case to be called on, unless he has previously ascertained that all the necessary witnesses are in attendance (*y*); but he is not bound to search after his counsel, nor is he answerable for the non-attendance or neglect of the latter (*z*). If he has received instructions from his client not to compromise an action he is retained to prosecute, he will be guilty of a breach of duty if he does compromise, and cannot shelter himself from an action by showing that it was done under the advice of counsel (*a*), although that circumstance might go in reduction of damages. But in the absence of a distinct prohibition to compromise, the general autho-

(*p*) *Stannard* v. *Ullithorne*, 4 M. & Sc. 376; 3 L.J. C.P. 317.

(*q*) *Bracey* v. *Carter*, 12 Ad. & E. 373; *Long* v. *Orsi*, 18 C.B. 610; 26 L.J. C.P. 127; *Stokes* v. *Trumper*, 2 K. & J. 232; *Chapman* v. *Van Toll*, 8 E. & B. 396; 27 L.J. Q.B. 1.

(*r*) *Cox* v. *Leech*, 1 C.B. N.S. 617; 26 L.J. C.P. 125.

(*s*) *Bracey* v. *Carter*, *supra*; *Frankland* v. *Cole*, 2 Cr. & J. 590; 1 L.J. Ex. 189; *Pitt* v. *Yalden*, 4 Burr. 2063.

(*t*) *Williams* v. *Gibbs*, 6 N. & M. 788.

(*u*) *Godefroy* v. *Jay*, 5 Moo. & P. 297; 8 L.J. (O.S.) C.P. 230.

(*x*) *Hawkins* v. *Harwood*, 4 Exch. 503; 19 L.J. Ex. 33; *De Roufigny* v. *Peale*, 3 Taunt. 483; *Swannell* v. *Ellis*, 8 Moore, 340; 2 L.J. (O.S.) C.P. 8.

(*y*) *Reece* v. *Rigby*, 4 B. & Ald. 202.

(*z*) *Lowry* v. *Guildford*, 5 C. & P. 234.

(*a*) *Fray* v. *Voules*, 1 E. & E. 839; 28 L.J. Q.B. 232; *Butler* v. *Knight*, L.R. 2 Ex. 109; 36 L.J. Ex. 66.

rity of a solicitor is sufficient for that purpose (*b*). A solicitor retained to bring an action has no implied authority to compromise the claim before action brought (*c*).

"It would be extremely difficult," observes Tindal, C.J., "to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded. . . . The cases, however, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession." But "he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law," unless he has thought fit to act upon his own judgment and opinion respecting matters which ought to have been laid before counsel (*d*).

If a solicitor is employed to investigate the title to an estate, or to obtain good security for money advanced, and the title is obviously defective, or the security is manifestly bad or insufficient, the attorney will be responsible for his negligence (*e*). But he is not responsible for an advance on a mortgage which turns out a deficient security, if he has taken the opinion of a competent surveyor as to the value of the property (*f*). He is not justified in relying upon an extract from a will furnished to him by his client, unless the latter agrees to take the entire responsibility upon himself; but he ought to search for and examine the original will (*g*). If he relies upon his own judgment as to the legal operation of documents, he does so at his peril; he ought, therefore, to lay them before counsel, if he wishes to avoid the responsibility of acting upon his own judgment respecting them (*h*).

(*b*) *Prestwich* v. *Poley*, 18 C.B. N.S. 806; 34 L.J. C.P. 189; *Butler* v. *Knight*, *supra*; *Lee* v. *Walker*, L.R. 7 C.P. 121; 41 L.J. C.P. 91, *ante*, p. 821.

(*c*) *Macaulay* v. *Polley*, (1897) 2 Q.B. 122; 66 L.J. Q.B. 665.

(*d*) *Godefroy* v. *Dalton*, 6 Bing. 467; 8 L.J. (O.S.) C.P. 79; *Purves* v. *Landell*, 12 Cl. & Fin. 91, 98; *Shilcock* v. *Passman*, 7 C. & P. 292; *Kemp* v. *Burt*, 4 B. & Ad. 431; 2 L.J. K.B. 69; *Long* v. *Orsi*, 18 C.B. 610; 26 L.J. C.P. 127; *Cox* v. *Leech*, 1 C.B. N.S. 617; 26 L.J. C.P. 125; *Ireson* v. *Pearman*, 3 B. & C. 812, 813; 3 L.J. (O.S.) K.B. 119; *Townley* v. *Jones*, 8 C.B. N.S. 289; 29 L.J. C.P. 299; *Elkington* v. *Holland*, 9 M. & W. 661; 11 L.J. Ex. 273; *Laidler* v. *Elliott*, 3 B. & C. 738; 3 L.J. (O.S.) K.B. 96.

(*e*) *Knights* v. *Quarles*, 4 Moore, 532; 2 B. & B. 102; *Whitehead* v. *Greetham*, 10 Moore, 183; 2 Bing. 464; *Howell* v. *Young*, 5 B. & C. 259; 4 L.J. (O.S.) K.B. 160; *Chapman* v. *Chapman*, L.R. 9 Eq. 276.

(*f*) *Chapman* v. *Chapman*, *supra*. As to his duty to get the best price for the property entrusted to him for sale, see *Morgan* v. *Steble*, L.R. 7 Q.B. 611; 41 L.J. Q.B. 260.

(*g*) *Wilson* v. *Tucker*, 3 Stark. 156.

(*h*) *Ireson* v. *Pearman*, 3 B. & C. 813; 3 L.J. (O.S.) K.B. 119.

If when retained by a client who is about to advance his money on the security of a mortgage, he has reason to suspect that the intended mortgagor has been insolvent, or in embarrassed circumstances, he will be responsible for a breach of duty if he neglects to make searches in the proper quarter to ascertain whether his suspicions were correct (*i*), or to make inquiry whether there are any existing incumbrances on the property (*k*).

By the Solicitors Act, 1870 (*l*), agreements may be made between solicitors and their clients with respect to the remuneration of the former; but, by sect. 7, a provision in any agreement (*m*) that the solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such solicitor, is wholly void. By sect. 8, no action can be brought upon any such agreement, but the agreement may be enforced in the manner indicated in the section (*n*). It has been held that this section only applies to prevent actions to recover sums in lieu of costs after the work is done, and not to an action for refusing to allow a solicitor to do the work (*o*). By sect. 11, an agreement for payment only in the event of success is void; but it has been held that an agreement to charge nothing if the action was lost, and to take nothing for costs out of any money recovered in such action, is not void, and need not be in writing (*p*). An agreement within sect. 4 must be signed by both parties (*q*); and a verbal agreement is not binding (*r*). The above statute does not apply to conveyancing or non-contentious business, agreements as to which are regulated by the Solicitors' Remuneration Act, 1881 (*s*).

Negligence of barristers.—There is no instance of any action having been successfully brought against a barrister for neglect of duty; but if a barrister intentionally does a wrong, and acts with malice, fraud, or treachery in the discharge of his professional duties, he will be responsible, like every other wrongdoer, for the mischief thereby occasioned (*t*).

Negligence of surveyors or valuers.—Where the plaintiff undertakes to perform work to the satisfaction of the defendants' sur-

(*i*) *Cooper* v. *Stephenson*, 21 L.J. Q.B. 292.

(*k*) *Hopgood* v. *Parkin*, L.R. 11 Eq. 74; see *Ratcliffe* v. *Barnard*, L.R. 6 Ch. 652; 40 L.J. Ch. 777.

(*l*) 33 & 34 Vict. c. 28.

(*m*) As to what constitutes an agreement, see *Pontifex* v. *Farnham*, 62 L.J. Q.B. 344; as to effect of subsequent bankruptcy of client, see *Pollitt, In re*, (1893) 1 Q.B. 445; 62 L.J. Q.B. 236; *Charlwood, In re*, (1894) 1 Q.B. 643; 63 L.J. Q.B. 344.

(*n*) But the agreement must be fair and reasonable in regard to the work done: *Cathcart, Ex parte, Stuart, In re*, (1893) 2 Q.B. 201; 62 L.J. Q.B. 623.

(*o*) *Rees* v. *Williams*, L.R. 10 Ex. 200; 44 L.J. Ex. 116.

(*p*) *Jennings* v. *Johnson*, L.R. 8 C.P. 425.

(*q*) *Lewis, In re*, 1 Q.B.D. 724; 45 L.J. Q.B. 816.

(*r*) *Russell, Son and Scott, In re*, 30 Ch.D. 114; 54 L.J. Ch. 948.

(*s*) 44 & 45 Vict. c. 44, ss. 8, 9.

(*t*) *Swinfen* v. *Chelmsford* (*Lord*), 5 H. & N. 918; 29 L.J. Exch. 382.

veyor, payment to be made only on the certificate of such surveyor, if the defendants and the surveyor collude to withhold the giving of the certificate, the defendants cannot shelter themselves by means of any such misconduct (*r*). But a declaration against the defendant, that his surveyor wrongfully neglected and refused to give his certificate, discloses no cause of action, for that would be to substitute the opinion of a jury for a certificate of the surveyor, which it was the very object of the contract to prevent (*s*). Where two persons were employed to value between the incoming rector and the representatives of the deceased incumbent, and the defendant, through ignorance of the true principle to be applied to the valuation of ecclesiastical dilapidations, valued so favourably to the opposite party and adversely to the plaintiff, that his valuation was accepted, it was held that he was liable for the results of his ignorance (*t*).

Negligence of bankers.—It has never been decided whether there is any legal obligation on a banker not to disclose the state of his customer's account except upon a reasonable occasion; but, assuming that such an obligation exists, the question what is a reasonable occasion is clearly one for the jury to decide, and if the customer sustain any special damage by the banker having disclosed the state of his account, the banker would, it seems, be responsible (*u*). A banker is not liable for the loss of a box left under his care by a customer for safe custody, of which the customer keeps the key, and for which no payment is made, if it be stolen by one of the clerks of the bank, unless the loss was occasioned by gross negligence on the part of the banker (*x*). But if a banker or banking company undertake the custody of securities for a customer and charge a commission for the receipt of the dividends from them, they would, it seems, be liable for negligence, if they left the securities in the uncontrolled power of their clerk or manager, who fraudulently disposed of them (*y*).

If the customer of a banker, who is desired to keep his cheque-book locked up, nevertheless negligently leaves it on his table, and thereby enables his servant to get possession of it, and tear out a cheque and forge his master's signature to it, and commit a fraud upon the bankers, this will not enable the bankers to throw the loss upon their customer, as being the result of his negligent keeping of his cheque-book, for it could not reasonably have been

(*r*) Erle, C.J., *Clarke* v. *Watson*, 34 L.J. C.P. 148; 18 C.B. N.S. 278.

(*s*) *Clarke* v. *Watson*, *supra*.

(*t*) *Jenkins* v. *Betham*, 15 C.B. 168; 24 L.J. C.P. 94.

(*u*) *Hardy* v. *Veasey*, L.R. 3 Ex. 107; 37 L.J. Ex. 76.

(*x*) *Giblin* v. *McMullen*, L.R. 2 P.C. 317; 38 L.J. P.C. 25, *ante*, p. 779.

(*y*) *United Service Co., In re*, L.R. 6 Ch. 212; 40 L.J. Ch. 286.

anticipated that the power of obtaining a cheque would induce a servant to commit a forgery (*z*). Where a clerk of the plaintiff forged signatures of the drawer, and procured the acceptances of the plaintiff, and then forged indorsements of a firm, and presented the bills across the counter to the Bank of England, who paid them across the counter contrary to their usual custom in cases of such large amounts, it was held that the plaintiff and not the bank had under all the circumstances been guilty of negligence (*a*).

Negligence of public officers.—Public officers in respect of their judicial or discretionary duties are not liable for negligence, but they are liable for negligence in respect of their ministerial duties. Where they perform duties for reward at the request of individuals, they are liable for negligence and are not protected, merely because they act *bonâ fide* and to the best of their skill and judgment, but they are bound to conduct themselves in a skilful manner (*b*). Public officers who are servants of the Government, are not responsible for the negligence of their subordinates; but public officers who act in a *quasi* public capacity at the request of individuals, are liable for the acts of those whom they employ. Thus commissioners appointed by the Crown are liable for the negligent acts of persons employed by them (*c*).

Negligence of surgeons, &c.—After due allowance has been made for the difficult nature of the duty undertaken by a medical man, any negligence upon his part becomes a serious matter, both because he has by undertaking a difficult duty promised to use great skill, and because the consequences of his negligence may be most disastrous. To render a medical man liable for negligence, it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he has himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result (*d*). Where an action for negligence was brought against a surgeon, and it was proved that the plaintiff's mother sent for the defendant, and that the plaintiff's father paid him, it was held that the

(*z*) *Bank of Ireland* v. *Evan's Charity Trustees*, 5 H. L. C. 389, 411; *Swan* v. *North Brit. Austr. Co.*, 2 H. & C. 175; 32 L.J. Ex. 273; *Taylor* v. *Gt. Ind. Penins. Ry.*, 23 L.J. Ch. 709; 4 De G. & J. 559; see *Donaldson* v. *Gillott*, L.R. 3 Eq. 274; *Johnston* v. *Renton*, L.R. 9 Eq. 181; *United Service Co., In re*, *ante*, p. 828.

(*a*) *Vagliano Brothers* v. *Bank of England*, (1891) A.C. 107; 61 L.J. Q.B. 145; see this case, p. 1110.

(*b*) *Jones* v. *Bird*, 5 B. & Ald. 837.

(*c*) *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 111; 35 L.J. Ex. 225. See also *Reg.* v. *Treasury*, L.R. 7 Q.B. 387; 41 L.J. Q.B. 178.

(*d*) *Rich* v. *Pierpont*, 3 F. & F. 35.

plaintiff's submitting to the defendant's treatment was no sufficient proof that the defendant had been employed by the plaintiff (*e*). A surgeon, an apothecary, a farrier, a solicitor, or any other professional person, impliedly undertakes for the exercise of ordinary skill and knowledge in the practice of his profession, and is responsible for any injury sustained from his neglect to exercise such skill (*f*). In one case it was ruled by Cockburn, C.J., that surgeons who give their services gratuitously (as at hospitals) were not liable for the negligence of those employed under them (*g*); but it would seem that a surgeon who acts gratuitously ought at least to take ordinary care. Physicians could not at common law recover their fees, unless under a special contract (*h*), but surgeons could (*i*); and now by 49 & 50 Vict. c. 48, s. 6, physicians can recover their fees and need not show any special contract.

An unqualified person who acts as a doctor is equally bound to bring competent skill to the performance of the duty which he has undertaken (*k*).

Wilful selection of unqualified persons.—The employer himself is bound to exercise ordinary caution in the selection of the party he employs. If he selects a common quack or an unauthorized practitioner, the latter is responsible only for a reasonable and *bonâ fide* exertion of his capacity. He is bound to exercise such skill as he actually possesses; and, if he has done his best and failed, he cannot be made responsible for a want of skill; for it was the employer's own fault to trust an unlearned and unskilful person, known not to be regularly and properly qualified (*l*). If the employer "voluntarily employs in one art a man who openly exercises another, his folly," observes Sir William Jones, "has no claim to indulgence; and, unless the latter makes false pretensions or a special undertaking, no more can be fairly demanded of him than the best of his ability."

Arbitrators.—A person who is appointed, and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty intrusted to him a due and reasonable amount of skill, or knowledge, or care, but only to act honestly and *bonâ fide;* and this doctrine applies, not only to an arbitrator, properly so called, but to every person who has taken upon himself to determine a disputed matter between two persons who have

(*e*) *Gladwell* v. *Steggall*, 8 Sc. 67; 8 L.J. C.P. 361.

(*f*) *Seare* v. *Prentice*, 8 East, 352; *Slater* v. *Baker*, 2 Wils. 359; *Hancke* v. *Hooper*, 7 C. & P. 84; *Lanphier* v. *Phipos*, 8 C. & P. 479.

(*g*) *Perionowski* v. *Freeman*, 4 F. & F. 982.

(*h*) *Chorley* v. *Bolcot*, 4 T.R. 317.

(*i*) *Battersby* v. *Lawrence*, Car. & M. 277.

(*k*) *Ruddock* v. *Lowe*, 4 F. & F. 519.

(*l*) But see *Ruddock* v. *Lowe, supra.*

agreed to be concluded by his opinion (*m*). And although, where the matter to be determined by the referee is one of value only, that is not strictly an arbitration (*n*); yet, where in ascertaining the value of property or the amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles of judicial inquiries, by hearing the parties and the evidence of their witnesses, that is an arbitration, and not merely a valuation (*o*). Where two valuers are appointed to ascertain the price to be paid for the goodwill, stock, and fixtures of a business, with a reference to decision of an umpire, if they differ, there is no arbitration until the umpirage takes effect (*p*).

Bailment of materials to workmen to be manufactured or repaired for hire.—When materials for work have been delivered to a workman to be dealt with by him in the way of his trade, he is bound to take all reasonable and ordinary precaution for their protection; and, if a loss has occurred from robbery, or from fire or inundation, or from waste or decay, he must show that he had taken all such precautions as are ordinarily taken by prudent men to guard against the mischief. Where a ship, bailed to a shipwright to be repaired, was put into a dry dock belonging to the shipwright, and whilst she lay there a high tide arose, and pressed against the dock gates; and it appeared that the gates might have been shored up so as to resist the pressure of the water, but nothing was done, and the water at last burst open the gates and dashed the bailor's vessel against another vessel, it was held that the bailee was responsible for the injury, as he might, by proper precautions, have guarded against the accident (*q*). Wherever the loss of the thing bailed arises from the want of the degree of care which, from the nature of the bailment, ought to be exercised, it is immaterial whether the negligence be imputable personally to the bailee or to the servants employed by him (*r*).

Theft by servants.—If the subject-matter of the bailment is secretly purloined by the bailee's servant, the bailee will be responsible for the loss, unless he can show that he could not, by the exercise of the greatest vigilance, have guarded against the theft; but he will not be responsible for a robbery by irresistible violence (*s*). Where a chronometer, bailed to a watchmaker to be

(*m*) *Pappa* v. *Rose*, L.R. 7 C.P. 32, 525; 41 L.J. C.P. 187; *Tharsis Sulphur Co.* v. *Loftus*, L.R. 8 C.P. 1; 42 L.J. C.P. 6; *Stevenson* v. *Watson*, 4 C.P.D. 148; 48 L.J. C.P. 318.

(*n*) *Collins* v. *Collins*, 28 L.J. Ch. 184; 26 Beav. 306; *Bos* v. *Helsham*, L.R. 2 Ex. 72; 36 L.J. Ex. 20.

(*o*) *Hopper, In re*, L.R. 2 Q.B. 367; 36 L.J. Q.B. 97.

(*p*) *Turner* v. *Goulden*, L.R. 9 C.P. 57; 43 L.J. C.P. 60.

(*q*) *Leek* v. *Maestaer*, 1 Campb. 138.

(*r*) Lord Campbell, C.J., *Dansey* v. *Richardson*, 3 E. & B. 169; 23 L.J. Q.B. 228.

(*s*) *Walker* v. *British Guarantee Assoc.*, 21 L.J. Q.B. 257, 260; 18 Q.B. 277.

repaired for hire, was placed by the bailee in a drawer in his shop amongst a variety of common watches, part of which belonged to the bailee, and the rest to his customers, which drawer was locked at night, and in a recess in the same room stood a strong iron chest, in which watches belonging to the watchmaker, of the value of several thousand pounds, were deposited and locked up, and in the night the drawer was broken open by the watchmaker's servant, who slept in the shop, and the chronometer was stolen by him, together with the other watches there deposited, but the watches in the iron chest remained untouched, it was held, that as the watchmaker had taken more care of his own watches, by locking them up in the iron safe, than he had taken of the bailor's chronometer, he was responsible for the loss, and Dallas, C.J., was of opinion that the watchmaker "was bound to protect the property against depredation from those who were within the house" (*t*).

Distinction between robbery and theft.—A very sensible distinction is taken in the civil law between a public palpable robbery by force and violence, when a house is broken into and robbed of its contents, and a theft or secret purloining of goods. In the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery, it being considered that individual care or vigilance could avail but little against the open attack of the determined robber; in the other he was bound to make good the loss, unless he could show that he had taken the greatest care of the thing intrusted to him, and that it had been purloined, notwithstanding every precaution for its safety (*u*). Where an officer in the army, on leaving London, delivered a trunk containing divers articles of value to an upholsterer to be kept for a shilling a week, and the trunk was returned to the officer emptied of its contents, which were supposed to have been stolen by the upholsterer's servant, it was held by Lord Kenyon, that if the upholsterer had taken as much care of the articles as he had taken of his own property, he was not responsible for the theft committed by his servant (*x*); but every depositary of chattels to be kept for hire is *primâ facie* responsible for a theft committed by his own servants within the house (*y*), and can only discharge himself from liability by showing that the theft was committed under such circumstances, or was of such a nature,

(*t*) *Clarke* v. *Earnshaw*, Gow. 30.

(*u*) Abbott, C.J., in *Robinson* v. *Ward*, Ry. & M. 276.

(*x*) *Finucane* v. *Small*, 1 Esp. 315.

(*y*) *Hodgson* v. *Fullarton*, 4 Taunt. 787; Dallas, C.J., in *Clarke* v. *Earnshaw*, Gow, 30; Campbell, C.J., and Coleridge, J., in *Dansey* v. *Richardson*, 3 E. & B. 156—171; 23 L.J.Q.B. 223—229; *De Rothschild* v. *Royal Mail, &c. Co.*, 7 Exch. 734; 21 L.J. Ex. 273.

that the greatest care and vigilance on his part could not have guarded against it.

Liability of bailee for negligence of servant.—The defendant hired a carriage and horse from the plaintiffs; the defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction; while he was thus engaged, the carriage and horse were injured, owing to his negligent driving, and it was held that there had been a breach of the defendant's contract as bailee for which he was liable (*z*).

Losses occasioned by negligence of bailor.—If the owner himself in any way conduces to the loss; if he brings people to the warehouse or place of deposit to look at the goods, opens packages in which they are contained, &c., and the loss is as likely to have arisen from the misconduct of the persons so introduced, or from the carelessness of the owner, as from the neglect of the warehouseman or bailee, the latter is not responsible for the loss (*a*).

Negligence of bailors.—It is the duty of every bailor of dangerous substances, knowing the dangerous nature of them, to take care that the danger is communicated to the bailee; and if the bailor fails to make the necessary disclosure, he is responsible if an accident occurs, and damages are sustained by the bailee or his servant (*b*).

Fraudulent concealment of dangerous nature of articles delivered to bailee to be warehoused or carried.—Every person who conceals in boxes and packages articles known by him to be of a dangerous nature, and delivers them to another to be warehoused or carried with other goods, and fails to disclose the dangerous nature of the articles to the bailee, is guilty of a tortious act, and is responsible for all the consequences of his carelessness, unless the bailee knew of the dangerous nature of the articles, and the danger attendant upon the dealing with them; and it is no answer to aver that the articles were well known in commerce, and that the plaintiff knew what they were, without an express averment that he knew them to be dangerous (*c*).

"It is clearly a tortious act," observes Crompton, J., "for the consequences of which shippers are responsible, to ship goods apparently safe and fit to be carried, and from which the shipowner is ignorant that any danger is likely to arise, without notice of such goods being dangerous, if the shipper is aware of such danger. Such shipment, when the *scienter* is made out, is clearly wrongful and tortious. It does not seem that there is any

(*z*) *Coupé Co.* v. *Maddick*, (1891) 2 Q.B. 413; 60 L.J. Q.B. 676.
(*a*) *Cailiff* v. *Danvers*, 1 Peake, N.P.C. 155; Addison on Torts, 24 (ed. 7).
(*b*) *Farrant* v. *Barnes*, 32 L.J. C.P. 137; 11 C.B. N.S. 553.
(*c*) *Hutchinson* v. *Guion*, 5 C.B. N.S. 149; 28 L.J. C.P. 63.

authority decisive on the point as to whether the shipper is liable for shipping dangerous goods without a communication of their nature, when neither he nor the shipowner is aware of the danger. It seems very difficult to hold that the shipper can be liable for not communicating what he does not know. Lord Ellenborough's dictum (*d*) would tend to show that knowledge of the party shipping is an essential ingredient. I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence as shipper, as by shipping without communicating danger which he had the means of knowing, and ought to have communicated" (*e*).

Deposit of goods under special contract.—In a contract of bailment, the bailee may impose any reasonable terms he pleases upon the bailor, and may make his acceptance of the goods to be kept and his responsibility for the re-delivery of them dependent upon those terms being observed by the parties who deal with him; but if he accepts the goods and takes them into his possession, he will not be allowed to impose terms utterly inconsistent with any contract at all. Where public notice is given of the terms upon which goods are received, or the terms are printed on a paper or receipt delivered to the bailor, and it is sought to hold him to the terms on the ground that he has impliedly assented to them, it should be shown that the terms are reasonable, and not devised for the purpose of fraud or extortion, or for the purpose of exonerating the bailee from responsibility for his own negligence and misconduct (*f*).

Detention of chattels by bailees under claim of lien.—The detention of chattels by a bailee is frequently justified on the ground that the bailee has a right to hold them in his hands until some pecuniary demand in respect of them has been satisfied by the bailor. The right of lien, when once established, is not destroyed by reason of the remedy for the recovery of the debt secured by the lien being barred by the statute of limitations (*g*). And it will exist, although it arises out of an immoral consideration, if the plaintiff cannot recover without relying on the immorality, on the principle of *in pari delicto potior est conditio possidentis* (*h*).

(*d*) *Williams* v. *East India Co.*, 3 East, 192.

(*e*) *Brass* v. *Maitland*, 6 E. & B. 490; 26 L.J. Q.B. 49; *Gibbon* v. *Paynton*, 4 Burr. 2298; *Batson* v. *Donovan*, 4 B. & Ald. 33, 37.

(*f*) Byles, J., *Van Toll* v. *S. E. Ry.*, 12 C.B. N.S. 75; 31 L.J. C.P. 241; *Peek* v. *North Staffordshire Ry.*, 10 H.L.C. 473; 32 L.J. Q.B. 241; this subject is more fully illustrated, *post*, p. 958.

(*g*) *Spears* v. *Hartley*, 3 Esp. 81; *Broomhead, In re*, 16 L.J. Q.B. 355.

(*h*) *Taylor* v. *Chester*, L.R. 4 Q.B. 309; 38 L.J. Q.B. 225.

Right of lien.—If a defendant, having a lien upon goods, refuses to deliver them up on demand, and claims to retain them on grounds quite distinct from a claim of lien, his refusal will be evidence of a conversion, and the existence of the lien will be no answer to an action for the conversion of the property (*i*). But a person does not waive his right of lien merely by omitting to mention it when the goods are demanded; and if he claims a right to detain them, in respect of two separate sums claimed to be due to him, and he has a lien only in respect of one of those sums, his refusal is no evidence of a conversion, unless the sum in respect of which the lien exists is tendered (*k*). Where a person, observes Alderson, B., has no right of property in goods in his possession, but merely a right of lien, he has no right to sell them; and if he does sell the goods he thereby puts an end to his lien (*l*); but where goods have been deposited as security for a loan of money to be repaid on a day certain, there is an implied power of sale in case of default in payment on the day named (*m*). An unauthorised dealing with a pledge will not, it seems, revest the property in the pledgor, though it may give him a right of action for any damage actually caused by such unauthorised proceeding (*n*). And it has been held, that a lender of money on the security of railway stock has no right to realise the security during the currency of the loan, and that, if he does so, the owner may recover from him the price he got for the stock, if it is to his interest to do so (*o*).

Where the plaintiff had agreed to buy of the defendant a stack of hay for 86*l*., to be paid for when taken away, and to be removed by the 31st of May, and part only of the hay was paid for, and removed by the time appointed, whereupon the defendant, in the month of August following, cut up and consumed the residue of the hay, and the plaintiff afterwards tendered the unpaid purchase-money, and demanded the hay, and sued the defendant for converting it to his own use, it was held that the defendant's lien on the hay was determined by the act of conversion; that from the moment the defendant used the hay in a manner inconsistent with his claim of lien, his lien ceased, and a right of possession accrued to the purchaser (*p*). Where, however, some apples which

(*i*) *Cannee* v. *Spanton*, 8 Sc. N.R. 714; 14 L.J. C.P. 23; *Dirks* v. *Richards*, 5 Sc. N.R. 534; 4 M. & Gr. 574; *Weeks* v. *Goode*, 6 C.B. N.S. 367.

(*k*) *Scarfe* v. *Morgan*, 4 M. & W. 281; 7 L.J. Ex. 324; *Kerford* v. *Mondel*, 28 L.J. Exch. 303.

(*l*) *White* v. *Spettigue*, 13 M. & W. 603; 14 L.J. Ex. 99.

(*m*) *Pigot* v. *Cubley*, 15 C.B. N.S. 701; 33 L.J. C.P. 134.

(*n*) *Donald* v. *Suckling*, L.R. 1 Q.B. 585; 35 L.J. Q.B. 232; *Halliday* v. *Holgate*, L.R. 3 Ex. 299; 37 L.J. Ex. 174.

(*o*) *Langton* v. *Waite*, L.R. 6 Eq. 165; 37 L.J. Ch. 345; on appeal, L.R. 4 Ch. 402.

(*p*) *Gurr* v. *Cuthbert*, 12 L.J. Ex. 309.

had been sold by the defendant to the plaintiff at an agreed price, to be paid on a given day, were deposited in a kiln in an outhouse on the defendant's premises, and the key of the kiln was given by the defendant to the plaintiff, but the defendant kept the key of the outer door of the outhouse, and, the day of payment being passed, the defendant gave the plaintiff notice to take and pay for the apples, and, no attention being paid to this notice, the defendant carried them away and resold them, and the plaintiff then brought an action for a conversion of them, it was held that the defendant was entitled to a verdict under a plea denying the plaintiff's right of possession of the apples (*q*).

A person cannot set up a right of lien which is at variance with the terms or conditions or implied understanding, upon which he received the property.—Thus, if a livery-stable keeper takes in a horse to be stabled and fed for hire, upon the understanding that the horse is to be re-delivered to the owner whenever he requires it, the livery-stable keeper has no right of lien upon the horse for his keep (*r*), or for money paid by him to a veterinary surgeon for blistering the horse according to the owner's directions (*s*), the right of the owner to the possession of the horse for the purpose of riding him being deemed inconsistent with the right of lien. The livery-stable keeper, indeed, who holds a horse at the constant disposal of the owner, is the mere servant of the latter, and has nothing more than the bare custody of the animal. This is the case also with the agister of milch cows, who receives them to be depastured, agisted, or fed, the owner having a right to the possession of the cows whenever he requires them for the purpose of milking (*t*). And if a trainer of race-horses holds them on the understanding that the owner may send them to be ridden by a jockey of his own choice at any race he chooses, and the trainer cannot lawfully refuse to deliver them to the owner for such a purpose, that state of things is inconsistent with the existence of a right of lien (*u*). If a policy of insurance is deposited for safe custody only, the depositary cannot set up a lien upon it for an antecedent debt (*x*). If a person receives a bill of exchange to get it discounted, and pay over the proceeds to the owner, or apply them in some specified manner, he has no lien upon the bill for money that may be due to him from the latter (*y*). If a

(*q*) *Milgate* v. *Kebble*, 3 M. & Gr. 100; 10 L.J. C.P. 277.

(*r*) *Judson* v. *Etheridge*, 1 Cr. & M. 743; 2 L.J. Ex. 300; *Yorke* v. *Grenaugh*, 2 Ld. Raym. 868.

(*s*) *Orchard* v. *Rackstraw*, 19 L.J. C.P. 303.

(*t*) *Jackson* v. *Cummins*, 5 M. & W. 342; 8 L.J. Ex. 265; *Chapman* v. *Allen*, Cro. Car. 273.

(*u*) *Forth* v. *Simpson*, 13 Q.B. 685; 13 L.J. Q.B. 263.

(*x*) *Muir* v. *Fleming*, D. & R. N.P.C. 30.

(*y*) *Key* v. *Flint*, 8 Taunt. 23; 1 Moore,

ship-factor receives the certificate of registry of a ship in order to pay the tonnage dues, he has no lien upon it for a debt due to him from the shipowner (*z*). Whenever goods in the hands of a bailee or depositary are, by the terms of the contract, to be redelivered to the owner at some stated period, or, if by the agreement the plaintiff is entitled to have the goods immediately, and the payment in respect of them is to take place at a future day, the bailee cannot set up any lien (*a*). A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or security is to be given the moment the work is completed (*b*). "If a security" (such as bill, note, or bond) "is taken for the debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone" (*c*).

If a person, when goods are demanded of him, rests his refusal to deliver them up on grounds quite distinct from any claim of lien, he cannot afterwards, on finding that those grounds fail him, put forward a claim of lien as a justification for his refusal. Where, therefore, a warehouseman, on being applied to for brandy which had been delivered to him for safe custody, refused to give it up, saying that it was his own property, it was held that he could not afterwards justify his refusal on the ground that warehouse rent was due to him, and was not tendered at the time the brandy was demanded (*d*), "for it would be absurd to offer the expenses of keeping the goods to one who insisted on retaining them as his own property" (*e*). But a person does not, of course, lose his right of lien by merely omitting to mention it when the goods are demanded; and if he claims a right to retain them for two separate charges, and has a lien only in respect of one of them, this will not dispense with the necessity of a tender of the one in respect of which the lien exists (*f*).

Parties against whom lien may be claimed.—A mere trespasser or wrong-doer, who gets possession of property without the consent of the owner, cannot in general deal with it so as to create a right of lien thereon as against the true owner (*g*), unless the person in whose possession the property is placed is a public innkeeper, or common carrier, or common ferryman, or is bound to exercise

451; *Buchanan* v. *Findlay*, 9 B. & C. 749; 7 L.J. (O.S.) K.B. 314.

(*z*) *Burn* v. *Brown*, 2 Stark. 273.

(*a*) *Crawshay* v. *Homfray*, 4 B. & Ald. 52.

(*b*) *Raitt* v. *Mitchell*, 4 Campb. 146.

(*c*) *Hewison* v. *Guthrie*, 3 Sc. 298; 5 L.J. C.P. 283; *Cowell* v. *Simpson*, 16 Ves. 280; *Horncastle* v. *Farran*, 3 B. & Ald. 497. See, however, *Angus* v. *McLachlan*, 23 Ch.D. 330; 52 L.J. Ch. 587.

(*d*) *Boardman* v. *Sill*, 1 Campb. 410, n.; *Weeks* v. *Goode*, 6 C.B. N.S. 367.

(*e*) *White* v. *Gainer*, 9 Moore, 45.

(*f*) *Scarfe* v. *Morgan*, 4 M. & W. 281; 7 L.J. Ex. 324.

(*g*) *Hartop* v. *Hoare*, 3 Atk. 44; *Lempriere* v. *Pasley*, 2 T.R. 485; *Castellain* v. *Thompson*, 13 C.B. N.S. 105; 32 L.J. C.P. 79.

his craft in favour of all who require his services (*h*). Where a chaise, which had been broken by the negligence of a servant, was taken by the latter to a coach-maker's, without the knowledge or sanction of the master, and was there repaired, it was held that the coach-maker had no lien upon the chaise as against the master for the price of the repairs (*i*). It would seem also, from the adjudged cases, that if a servant is directed to take a carriage to *A.* to be repaired, and he by mistake takes it to *B.*, *B.* would have no lien upon it for the price of the repairs, as the servant was not authorised to employ *B.* in the matter. This may be law, but it is hardly just, and opens a wide door to fraud, as it is impossible for the coach-maker to be cognisant of the particular directions given by the master to the servant. If the servant has received general directions to get the carriage repaired, he may then of course give a right of lien to any coach-maker he may employ to do the repairs (*k*). It has been held, that if a person obtains the property in goods by fraud, and pawns them, before the seller has avoided the contract, the pawnee is entitled to a lien upon them for the money advanced as against the seller (*l*). But the possession of the goods by the pawnor must have been obtained by virtue of a contract intended to pass the property to him. If a person pawns with another property to which he has no colour of title, the *jus tertii* may always be set up against the pawnor by the pawnee (*m*).

General lien is a right on the part of the manufacturer, or workman, factor, broker, or commission agent for the sale of goods, warehouseman or wharfinger, into whose hands goods have been placed to be worked up, repaired, improved, sold, or taken care of for hire, in the ordinary course of their trade or employment, to retain possession of them, not only until they have received payment of the hire due to them for their services in the particular employment, but for the general balance due to them from their employer in the ordinary course of dealing for work and services of the like nature bestowed at other times upon other goods of the employer. This right depends either upon the express agreement of the parties, or the custom and usage of the particular trade or business. The onus of making out and establishing the right, whether it exists by agreement or by custom, lies upon the person claiming it. When custom and usage of trade are relied upon as

(*h*) *Buxton* v. *Baughan*, 6 C. & P. 674.
(*i*) *Hiscox* v. *Greenwood*, 4 Esp. 174.
(*k*) *Weldon* v. *Gould*, 3 Esp. 268.
(*l*) *Parker* v. *Patrick*, 5 T.R. 175; doubted in *Peer* v. *Humphrey*, 2 Ad. & E. 499; 4 L.J. K.B. 100; but said to be good law by Parke, B., in *Load* v. *Green*, 15 M. & W. 219; 15 L.J. Ex. 113; and by Cresswell, J., in *White* v. *Garden*, 20 L.J. C.P. 168; 10 C.B. 919.
(*m*) *Cheesman* v. *Exall*, 6 Exch. 344; 20 L.J. Ex. 209.

establishing the right, the usage must be shown to have governed the parties in their previous dealings together, or to prevail to such an extent that the contracting party must be supposed to be cognisant of it, and to have contracted subject to the usage; but, as the right is an encroachment upon the ordinary rules and principles of the common law, it is regarded with jealousy by the courts, and requires the strongest proof.

Where persons carry on a business in which a general lien is recognised, they cannot claim a general lien in respect of goods or securities which are, by agreement, held for a particular purpose, or under special conditions inconsistent with the claim of a general lien (*n*). A general lien cannot be set up in opposition to the terms and conditions upon which the goods were received. Thus, if a broker or factor receives goods to sell, and applies the proceeds in some particular manner, he cannot set up a lien for his general balance, because a lien of this nature would be utterly inconsistent with the terms upon which he acquired possession of the goods (*o*). And if a debtor deposits a bill of exchange with his creditor, in order that the latter may get the bill discounted and pay over the proceeds to the debtor, the creditor cannot set up a lien upon the bill for the general balance due to him (*p*). In some places, dyers, calico-printers, &c., have been held, in accordance with the proved usage of their several trades in the particular locality, to have a lien on goods sent to them, not only for the work done in respect of the particular goods in their possession, but also for their charges of dyeing, printing, warehousing, &c., other goods which had previously been delivered back to their owners (*q*); and in other places, where no such usage has been shown to exist, they have been held to have no such general lien (*r*). The usage, when it exists, must be shown to be long established, notorious, and reasonable, and not contrary to any established principle of law (*s*). It has been held that a publisher has a lien upon any one or more parts or numbers of a work, for his charges and disbursements for printing or publishing the various numbers, though not consecutive, of an entire work (*t*); also, that an agent who carries on business, in his own name, on behalf of an undisclosed principal, has a lien on the business, the stock employed in it, and the debts owing to

(*n*) *Bock* v. *Gorrissen*, 2 De G. F. & J. 434; 30 L.J. Ch. 39, 42.

(*o*) *Walker* v. *Birch*, 6 T.R. 262.

(*p*) *Key* v. *Flint*, 1 Moore, 451; 8 Taunt. 21.

(*q*) *Savill* v. *Barchard*, 4 Esp. 52; *Naylor* v. *Mangles*, 1 *ib.* 109; *Spears* v. *Hartley*, 3 *ib.* 81; *Rose* v. *Hart*, 8 Taunt. 499; 2 Moore, 547; *Webb* v. *Fox*, 2 Peake, N.P.C. 167.

(*r*) *Green* v. *Farmer*, 4 Burr. 2214; 1 W. Bl. 651; *Holderness* v. *Collinson*, 7 B. & C. 216; 6 L.J. (O.S.) K.B. 17.

(*s*) *Rushforth* v. *Hadfield*, 6 East, 528; *Leuckhart* v. *Cooper*, 3 Bing. N.C. 99; 6 L.J. C.P. 131.

(*t*) *Blake* v. *Nicholson*, 3 M. & S. 167.

it, to the extent of the liability which he has incurred in the management of the business (*u*).

Notice that goods will be held subject to general lien.—The right to retain for a general balance may, with certain exceptions presently noticed, be created by the express contract of the parties. Every workman and artificer not being a public innkeeper, common carrier, or common ferryman, and not being bound to exercise his calling in favour of all persons who may require his services, has a right to prescribe the terms upon which he will receive goods into his possession to be dealt with in the ordinary course of his trade, and may by express notice reserve to himself a general lien (*x*).

General lien by custom of trade—Warehousekeepers—Wharfingers (*y*).—Where certain public warehousekeepers of the city of London claimed a right to retain various bales of wool under an ancient custom of that city, for all public warehousekeepers to have a general lien upon all goods from time to time housed in their warehouses in the name of the merchants or other persons by whom such public warehousekeepers were employed, for all moneys or any balance thereof due from such merchants to such public warehousekeepers for their advances, expenses, and charges, &c., it was held that the custom was bad, as the general lien claimed was not confined to goods the property of the person who employed or retained the warehousekeeper. "The custom," it was observed, "if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehousekeeper for safe custody, liable to a private debt of the factor, for expenses incurred in respect of other goods of third persons which had been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that to an unlimited extent;" which would be unreasonable and unjust, and obviously prejudicial in a very high degree to foreign trade (*z*). Dock companies have no general lien for wharfage charges, and cannot detain the goods of one man to satisfy wharfage dues and charges incurred by another (*a*). If a wharfinger has a general authority to receive all goods directed for A. B., and goods come to his wharf directed by mistake for A. B., the real owner of the goods cannot take them away without paying the charges incident to those particular goods; but it is equally clear that the wharfinger cannot set up a lien on

(*u*) *Foxcraft* v. *Wood*, 4 Russ. 488.
(*x*) *Kirkman* v. *Shawcross*, 6 T.R. 14.
(*y*) As to lien for freight, see 57 & 58 Vict. c. 60, s. 494; as to lien of wharfingers or warehousemen, ss. 495—500.
(*z*) Tindal, C.J., *Leuckhart* v. *Cooper*, 3 Bing. N.C. 99; 6 L.J. C.P. 131; Bro. Abr. tit. Customs, 205, pl. 5, 35, H. 6, cited *Rex* v. *Humphery*, M'Clel. & Y. 181.
(*a*) *Dresser* v. *Bosanquet*, 32 L.J. Q.B. 374; 4 B. & S. 686.

such goods for a general balance of accounts due from A. B. to him (*b*).

Extinguishment of lien by abandonment of possession.—If a bailee who has a right of lien upon property in his possession voluntarily parts with the possession of such property, the lien is gone; so that if he afterwards recovers possession of the property, his right of lien does not revive (*c*); but if it is stolen or taken away by a trespasser or by fraud, and he gets it back again, his right of lien is not extinguished (*d*). Possession of goods and chattels may be given up, and the right of lien extinguished, although the goods and chattels are never actually removed from the premises of the party having the lien (*e*). And, on the other hand, as the possession of the servant is the possession of the master, it follows that a depositary or bailee who has a right of lien upon goods in his possession does not lose his right by placing the goods in the hands of his servant or agent for custody, who is to hold them at his disposal. Warehousekeepers and wharfingers to whom goods have been delivered by masters of ships for safe custody have been held to be the servants of such masters, holding the goods at their disposal, so as to preserve the shipmaster's lien for the freight after the goods have been taken out of the ship (*f*).

The right of lien being a mere personal right, which cannot be parted with, it follows that a bailee who has got a lien cannot sell his right to another, nor can he transfer, as we have just seen, the property over which the lien extends, to another, without losing his right of lien (*g*), unless the property has been pledged to secure the repayment of money advanced, with an express or implied power of sale (*h*), for there is a clear distinction in this respect between a lien, which is a mere personal right of detention, and a pledge deposited to secure the re-payment of money (*i*). An innkeeper, consequently, cannot sell the horse of his guest for the expense of his keep, except within the city of London (*k*). A sheriff cannot sell an interest of this description, and he cannot, consequently, seize property covered by the lien under an execution against the party claiming the lien (*l*); but if the execution is against the owner of the goods, he is entitled then to seize them, after tendering the amount of the debt for which they are a security. A person may, as we have before seen, reserve to himself,

(*b*) *Richardson* v. *Goss*, 3 Bos. & P. 123.
(*c*) *Sweet* v. *Pym*, 1 East, 4.
(*d*) *Wallace* v. *Woodgate*, R. & M. 193.
(*e*) *Jacobs* v. *Latour*, 2 Moo. & P. 201; 6 L.J. (O.S.) C.P. 243.
(*f*) *Reeves* v. *Capper*, 5 Bing. N.C. 136.
(*g*) *Clark* v. *Gilbert*, 2 Bing. N.C. 357; 5 L.J. C.P. 61.
(*h*) See *Johnson* v. *Stear*, 33 L.J. C.P. 130; 15 C.B. N.S. 330.
(*i*) *Donald* v. *Suckling*, L.R. 1 Q.B. 585; 35 L.J. Q.B. 232.
(*k*) *Jones* v. *Pearle*, 1 Str. 556.
(*l*) *Legg* v. *Evans*, 6 M. & W. 42; 9 L.J. Ex. 102; see *Young* v. *Lambert*, L.R. 3 P.C. 142; 39 L.J. P.C. 21.

by express contract, a right to take and to hold goods as a security for the payment of a debt, so that he will be entitled to resume possession of the goods after he has parted with them, and to re-establish his lien, provided the rights of no third person have intervened.

Statutory power of sale in discharge of right of lien.—By the Merchant Shipping Act, 1894, power is given to wharf or warehouse owners, in certain cases, to sell by public auction goods placed in their custody, and apply the proceeds of the sale in satisfaction and discharge of the charges upon them (*m*).

Tender of debt in extinguishment of right of lien.—Wherever a person has a lien upon goods for the payment of money due upon them, whether he be an unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a debt, the lien may be at once extinguished, and a right to the possession of the goods created, by a tender of the money due upon them (*n*). Where a lease was deposited with the defendants as a security for the repayment of 150*l.* on a promissory note payable on demand, and the defendants agreed that they would not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what might from time to time be due to them for beer, and if he failed in any of these respects, the defendants were to be at liberty, after notice, to sell the lease and to deduct the expenses of the sale, the principal money and interest, and any account then due from the plaintiff to the defendant, it was held that the moment the amount of the note was paid or tendered, there was an end of all the stipulations as to what should be done with the lease in the event of the non-payment of the note and interest, and that the plaintiff had a right to maintain an action of detinue to recover back his lease (*o*).

Transfer of the bailment.—In all cases of bailment of chattels for hire or reward, it is essential that the bailee should preserve his control over the property, and his power of restoring it to the owner. If, therefore, he parts with the possession of the chattel, and places it under the control of a stranger, the bailment is determined, and the owner has a right of action for the recovery of the thing bailed (*p*). Where, after a bailment of chattels, the bailor has transferred all his interest in the chattels to another, the bailee is

(*m*) 57 & 58 Vict. c. 60, ss. 497—499.
(*n*) *Ratcliff* v. *Davies*, Cro. Jac. 244.
(*o*) *Chilton* v. *Carrington*, 24 L.J. C.P. 10; 16 C.B. 206; but in cases of mortgage, see *Bank of New South Wales* v. *O'Connor*, 14 App.Cas. 273; 58 L.J. P.C. 82.
(*p*) *Cooper* v. *Willomat*, 1 C.B. 682; 14 L.J. C.P. 219.

entitled to have an order or authority from the bailor to deliver them to his transferee, or a reasonable time to make inquiry and ascertain the validity of the new title of the claimant before he can be made responsible in damages for the non-delivery of the chattels to the latter (*q*). Where, for example, goods have been bailed by the owner to a warehousekeeper, to be kept, and the owner has subsequently sold the goods to a purchaser, the warehousekeeper is not responsible for refusing to deliver the goods to the purchaser without the production of a delivery-order from the bailor, or some documentary evidence of title to the goods on the part of the stranger who demands them; but he may, if he pleases, at once attorn to the purchaser, and rely upon the title of the latter (*r*).

If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorised by him to receive them, a *bonâ fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and in case of the refusal of the latter to deliver them to him within a reasonable time after the demand, may maintain an action for the conversion or detention of the property (*s*), the bill of sale or mortgage, signed by the bailor, being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee; but if there be a mere oral agreement of sale, and no warrant, or authority, or direction from the bailor for the delivery of the goods, the refusal of the bailee to deliver them to the stranger would be no proof of a conversion or of a wrongful detainer. It is to a case of this sort, where there has been a mere oral transfer of chattels by a bailor, without any warrant or authority from the latter to the bailee to deliver them to the transferee, that the dictum of Holt, C. J., must be taken to apply, that if A. bails goods to C., and afterwards give his whole right to them to B., B. cannot maintain detinue for them against C., because the special property that C. acquires by the bailment is not thereby transferred to B. (*t*). If the right of property in the subject-matter of the bailment has been transferred by devise, the devisee may sue for the detention or loss of the property; and it is no answer to the action

(*q*) Addison on Torts, 505 (ed. 7); *Lee* v. *Bayes*, 18 C.B. 599; 25 L.J. C.P. 249; *Solomons* v. *Dawes*, 1 Esp. 82.

(*r*) *Ogle* v. *Atkinson*, 5 Taunt. 762; *Cheesman* v. *Exall*, 6 Exch. 344; 20 L.J. Ex. 209; Addison on Torts, 505 (ed. 7).

(*s*) *Franklin* v. *Neate*, 13 M. & W. 484; 14 L.J. Ex. 59; 1 Roll. Abr. Detinue, c. 2, 3; Addison on Torts, 505 (ed. 7).

(*t*) *Rich* v. *Aldred*, 6 Mod. 216.

to show that the subject-matter of the bailment was lost in the lifetime of the devisor, and has not been in the possession of the bailee since the accrual of the title of the devisee (*u*). So, if the right of property in title-deeds, or an heirloom, comes to the heir-at-law by descent, the heir is the proper person to sue for their detention (*x*).

If the bailor is not himself the owner of the goods, but has some special property therein, or is himself a bailee of them, and answerable over to the real owner, he is entitled to maintain an action for damage done to them, or for the loss of them (*y*).

A bailee is not estopped, as we have seen, from showing that the bailor had a defeasible title, and that his title has been defeated by matter subsequent to the bailment or to the recognition of the title by the defendant (*z*). He may refuse to re-deliver the goods to the bailor on the ground that they are the property of another person who has demanded and received them, or who has forbidden the bailee to part with the possession of them (*a*); but the bailee cannot, if the possession of the bailor was a lawful possession, and the bailment was not founded in fraud, of his own accord set up the *jus tertii* (*b*). He can set up the title of another only "if he defends upon the right and title and by the authority of that person" (*c*). But if the bailor was a trespasser or a thief in possessing himself of the goods, or the bailment was made with intent to defraud, the bailee may justify his refusal to deliver them up to the bailor, whether the true owner has or has not interposed to prevent delivery.

Where the plaintiff in an action for the detention of plate proved that he had pawned the plate with the defendant, and afterwards sought to redeem it, and tendered the amount due upon it, but the defendant refused to deliver it up, it was held that the defendant might, under a plea alleging that the plate was not the property of the plaintiff, show that the plaintiff had, prior to the deposit of the plate with the defendant, transferred it by a bill of sale to a purchaser, who, nevertheless, allowed the plaintiff to continue in possession of it; that the plate had been deposited with the defendant in fraud of such purchaser, and that the defen-

(*u*) *Goodman* v. *Boycott*, 2 B. & S. 1; 31 L.J. Q.B. 69; *Bristol Bank* v. *Midland Ry.*, (1891) 2 Q.B. 653; 61 L.J. Q.B. 115.

(*x*) Bro. Abr. Detinue, pl. 30, 45.

(*y*) *Freeman* v. *Birch*, 3 Q.B. 483; 1 N. & M. 420; *Nicolls* v. *Bastard*, 2 C. M. & R. 660; 5 L.J. Ex. 7.

(*z*) *Thorne* v. *Tilbury*, 3 H. & N. 534; 27 L.J. Ex. 407.

(*a*) *Shelbury* v. *Scotsford*, Yelv. 22; *Biddle* v. *Bond*, 6 B. & S. 225; 34 L.J. Q.B. 137; *ante*, p. 782.

(*b*) *Armory* v. *Delamirie*, 1 Str. 505.

(*c*) Pollock, C.B., *Thorne* v. *Tilbury*, *supra*; Blackburn, J., *Biddle* v. *Bond*, *supra*; *Bourne* v. *Fosbrooke*, 34 L.J. C.P. 164; 18 C.B. N.S. 515; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187.

dant detained the plate by the order and under the authority of the latter (*d*).

If the owner of goods has delivered them to a bailee to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee, and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of a conversion (*e*). In an action for a conversion of chattels, it was held by Lord Kenyon that where the demand of the things for which the action is brought is not made by the owner who deposited them with the defendant, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know whether the things belong to him or not, and therefore keeps them till that is ascertained, or that the person who applies is not properly empowered to receive them, or until he is satisfied by what authority he applies, that is not such a refusal as is evidence of a conversion (*f*); and if the defendant has a *bonâ fide* doubt as to the title of the claimant, it must be shown that reasonable time was given him for clearing up that doubt (*g*). But if he sets up the title of his bailor, and affirms him to be the owner, or gives an absolute unqualified refusal to deliver up the chattels, there is evidence of a conversion (*h*). Where a pony-chaise was delivered to a workman to be painted, and the latter deposited it in the hands of a person who refused to deliver it up to the owner, unless the latter either produced the person who placed the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property without doing either one or the other (*i*).

Joint and separate rights of action.—If a chattel has been deposited by two or more joint-owners of it in the hands of a bailee, who has agreed to keep it for them, it is not in the power of one of them to take it out of his hands without the consent of the others. If that were not so, each might demand the chattel, and have an action for its non-delivery, and so the bailee might be harassed with as many actions as there were joint-owners (*k*). But if the bailee thinks fit to deliver up the goods to one of the joint-bailors, a joint-action by all of them cannot afterwards be main-

(*d*) *Cheesman* v. *Exall*, 6 Exch. 344; 20 L.J. Ex. 209.

(*e*) *Lee* v. *Bayes*, 18 C.B. 607; 25 L.J. C.P. 249; *European & Austral. R. M. Co.* v. *R. M. St. P. Co.*, 30 L.J. C.P. 246; *Sheridan* v. *New Quay Co.*, 4 C.B. N.S. 618; 28 L.J. C.P. 58.

(*f*) *Solomons* v. *Dawes*, 1 Esp. 82.

(*g*) *Pillot* v. *Wilkinson*, 32 L.J. Ex. 201; 2 H. & C. 72; affirmed, 34 L.J. Ex. 22; 3 H. & C. 345.

(*h*) *Pillot* v. *Wilkinson*, *supra*; *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L.J. Ex. 185.

(*i*) *Buxton* v. *Baughan*, 6 C. & P. 674.

(*k*) *Atwood* v. *Ernest*, 13 C.B. 889; 22 L.J. C.P. 225.

tained against him, for the one who has got the goods cannot join with the others in suing for the non-delivery of them (*l*). If several joint-owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals (*m*). Where two persons were severally entitled to separate portions of the contents of a box delivered by their agent to a railway company, to be carried for both of them, and the box was lost, it was held that they might sue jointly for damages (*n*).

Re-delivery of materials furnished by employer.—If the bailor, before the work has been done, countermands the order for it, he has a right to the immediate return of the chattel, although by his having countermanded the order, he may render himself liable to an action for a breach of contract (*o*). If the bailee by mistake, or in obedience to a forged order, returns the chattel to the wrong person, and the article is lost, he is responsible for the loss (*p*).

Contracts for performance of work—Building contracts—Prevention of performance—Damages.—Where a contract has been entered into for the building of a house, and the owner refuses to permit the building to be completed, and prevents the workman from earning the stipulated remuneration, the measure of damages in respect of so much of the contract as remains unperformed would seem to be the difference between what the performance would have cost the plaintiff and the price which the defendant agreed to pay (*q*). And in all cases of prevention of performance, where the plaintiff has been deprived by the defendant of the benefit of the contract, the plaintiff is entitled to recover what he has lost by the act of the defendant (*r*).

When a contract for the performance of work and labour has not been fully carried out by the workman, but the employer retains the benefit of a part performance, and the contract is apportionable, or the plaintiff has been discharged from his liability to complete the portion unperformed, the measure of the damages is the residue of the full sum agreed to be paid, after deducting such an amount as will enable the defendant to get the contract completed according to the original intention of the contracting parties (*s*). If the plaintiff has contracted to do the

(*l*) *Brandon* v. *Scott*, 7 E. & B. 237; 26 L.J. Q.B. 163.

(*m*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 851; 22 L.J. Ex. 355; *Broadbent* v. *Ledward*, 11 Ad. & E. 209.

(*n*) *Metcalfe* v. *L. B. & S. C. Ry.*, 4 C.B. N.S. 317; 27 L.J. C.P. 333.

(*o*) *Lilley* v. *Barnsley*, 1 C. & K. 344.

(*p*) *Wilson* v. *Powis*, 11 Moore, 543; 4 L.J. (O.S.) C.P. 192; *Lubbock* v. *Inglis*, 1 Stark. 104.

(*q*) *Masterton* v. *Brooketurye* (*Mayor*), 7 Hill, N.Y. Rep. 61.

(*r*) *Planché* v. *Colburn*, 1 M. & Sc. 51; 1 L.J. C.P. 7; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15; *ante*, p. 134.

(*s*) *Ante*, pp. 809—819; *Cutler* v. *Close*, 5 C. & P. 335.

work and supply materials for a fixed sum, and the defendant afterwards finds some of the material, the defendant is entitled to deduct the fair value of his materials from the contract price (*t*). Where a judgment had been recovered by the plaintiff against a relation of the defendant, and the latter promised the plaintiff that, if he would forbear to issue execution upon the judgment, the defendant would erect and finish a substantial house, and cause a lease thereof to be granted to the plaintiff, and the plaintiff promised that such lease, when granted, should be in full satisfaction of the judgment, it was held that the measure of damages arising from the breach of the defendant's promise was the value of the house, if it had been erected, and of the lease thereof, and not the difference between the value of the judgment and the value of the house and lease (*u*).

SECTION II.

MASTER AND SERVANT.

Contracts of hiring and service.—The contract of letting and hiring relates as frequently to human labour as to property; the services of workmen being daily hired in a great variety of affairs. In order to constitute a contract of hiring and service, there must either be an express or an implied mutual engagement binding one party to employ and remunerate, and the other to serve, for some determinate term or period (*ante*, p. 5). It has been said that, if the employer merely covenants to pay so long as the servant continues to serve, leaving it optional, either with the servant to serve, or with the employer to employ, there is no contract of hiring and service (*a*). But this decision has been doubted (*b*).

Where the plaintiff covenanted that his son should serve and continue with the defendant as his assistant in the art of a surgeon-dentist for five years, and should execute and perform such work and service in the art as the defendant should direct, and the

(*t*) *Newton* v. *Forster*, 12 M. & W. 772.
(*u*) *Strutt* v. *Farlar*, 16 M. & W. 249; 16 L.J. Ex. 84.
(*a*) *Williamson* v. *Taylor*, 5 Q.B. 175; 13 L.J. Q.B. 81.
(*b*) *Emmens* v. *Elderton*, 4 H.L.C. 624; 13 C.B. 495; *Whittle* v. *Frankland*, 2 B. & S. 49; 31 L.J. M.C. 81.

defendant covenanted with the plaintiff that he would, during the term of five years, in case the son should well and faithfully serve, &c., pay him certain weekly wages, it was held that, as there was no express covenant on the part of the defendant to employ or retain the son in the defendant's service for five years, the defendant was at liberty to dismiss him whenever he pleased, and discontinue the payment of the weekly wages (*c*). But this decision is not reconcileable with other authorities; and it is apprehended that, wherever one party covenants to serve for a particular period, and the other covenants to pay him a salary or wages for the service during the term, there is an implied covenant on the part of the latter to retain the servant in his service during the term, provided the latter serves faithfully, and is guilty of no misconduct warranting a dismissal. Where it was agreed between the plaintiff and a joint-stock company that the plaintiff should be the permanent solicitor of the company, and should receive and accept a salary of 100*l.* a year in lieu of his annual bill of costs, and should for such salary advise and act for the company on all occasions, it was held that there was an implied contract on the part of the company to retain the solicitor in their service for one year at least, and pay him the salary he had agreed to accept, but that the word "permanent" did not confer any durable appointment beyond the year, so as to prevent the employer from withdrawing the retainer (*d*). Where a firm agreed to employ a person as representative salesman for a fixed period and he agreed to devote the whole of his time to the business of the firm, it was held that there was no obligation on the firm to find him employment as representative salesman (*e*).

Whenever one party agrees to retain or hire, and another agrees to serve for a certain term, at a specified salary, there is a contract of hiring and service, although the servant may never be called upon or required to do any work. There are many cases of hiring and employment of parties to serve in some particular character or capacity where the servant is bound to serve if called upon, and is entitled to his salary by holding himself in readiness to serve, although his services are not called into requisition by the employer. In these cases there is a continuous hiring or retainer; and the readiness and willingness to serve on the part of the servant are equivalent to actual service.

(*c*) *Dunn* v. *Sayles*, 5 Q.B. 685; 13 L.J. Q.B. 159.

(*d*) *Emmens* v. *Elderton*, 4 H.L.C. 645; 13 C.B. 495; *Reg.* v. *Welch*, 2 E. & B. 362; 22 L.J. M.C. 145; *Rust* v. *Nottidge*, 1 E. & B. 99; 22 L.J. Q.B. 73; *Hartley* v. *Cummings*, 17 L.J. C.P. 84; 5 C.B. 247; *Pilkington* v. *Scott*, 15 M. & W. 660; 15 L.J. Ex. 359; *M'Intyre* v. *Belcher*, 32 L.J. C.P. 254; 14 C.B. N.S. 654.

(*e*) *Turner* v. *Sawdon*, (1901) 2 K.B. 653; 70 L.J. K.B. 897.

In the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation on the servant that he shall honestly and faithfully serve his master, and that he shall not abuse his confidence in matters appertaining to his service (*f*).

Authentication and proof of contract (*g*).—A contract of hiring and service need not be authenticated by writing, unless the hiring exceeds a year in duration (*ante*, p. 32); and, if reduced into writing, it need not be stamped, if it is a contract for the hire of "labourers, artificers, manufacturers, or menial servants," and not a contract of apprenticeship (*post*, p. 868). In the absence of an express contract between the parties, a hiring may be presumed from the mere fact of the service, unless the service has been with near relations. If a man, for example, serves a stranger in the capacity of a menial servant for a continued period, the law presumes that the service has been rendered in fulfilment of a contract of hiring and service; and, if the party has served without anything being said as to wages, the law presumes that there was a contract for customary and reasonable wages (*h*). But, if the service has been with a near relation of the party serving, a hiring cannot be presumed from it, but an express hiring must be proved in order to support a claim for wages; for the law regards services rendered by near relations to one another as gratuitous acts, and does not presume that they are to be paid for, unless there is an express contract to that effect (*i*). And, if a poor person is taken out of charity and provided with food, lodging, clothes, and necessaries, and set to work, no contract of hiring and service is implied therefrom, however long the party may continue to serve (*k*).

Yearly hirings.—When the employment of a servant is of a permanent nature, and annual wages are reserved, the hiring is a yearly hiring; and, when the servant is not a household or domestic servant, the hiring cannot be put an end to by either party without the consent of the other, before the termination of the current year (*l*). Service by a husbandman for a year is strong presumptive evidence of a yearly hiring (*m*). A general hiring of a clerk, foreman, journeyman, or traveller, at annual

(*f*) *Robb* v. *Green*, (1895) 2 Q.B. 315; 64 L.J. Q.B. 593.

(*g*) As to agreements between the master of a ship and the crew, see 57 & 58 Vict. c. 60, ss. 113—125; as to power of Court to rescind such agreements, see sect. 168.

(*h*) Lord Ellenborough, C.J., 15 East, 454; *Phillips* v. *Jones*, 1 Ad. & E. 333.

(*i*) *Davies* v. *Davies*, 9 C. & P. 87; *Gregory Stoke* v. *Pitminster*, 2 Bott. P.L.C. 206, case 269; *Rex* v. *Sow*, 1 B. & Ald. 178; *R.* v. *St. Mary, Guildford*, 2 Bott. 209, case 273; Cald. 521; *R.* v. *Stokesley*, 6 T.R. 757.

(*k*) *R.* v. *Weyhill*, 1 W. Bl. 206; 2 Bott. 207, case 271.

(*l*) *Emmens* v. *Elderton*, 4 H.L.C. 645; 13 C.B. 495, *ante*, p. 848.

(*m*) *R.* v. *Lyth*, 5 T.R. 337.

wages, "with board in the house," is, in general, a yearly hiring, which can only be put an end to by consent, or at the expiration of the current year (*n*); and so also is a general hiring of a governess at annual wages, with board in the house (*o*); but the duration of the term of hiring will be regulated and controlled by custom and usage and the surrounding circumstances of the case (*p*). A general hiring of a warehouseman, the employer engaging "to pay 12*l.* 10*s.* per month for the first year, and an advance of 10*l.* per annum until the salary is 180*l.*," is a yearly hiring (*q*); so also a general hiring of editors, sub-editors, reporters, and other persons regularly employed upon old-standing and permanently-established newspapers and periodicals (*r*). Reservations of quarterly, monthly, or weekly wages are not inconsistent with a yearly hiring. "Whether the wages be to be paid by the week or the year cannot make any alteration in the duration of the service, if the contract were for a year" (*s*); but, if there has been no continued service for a lengthened period, and there is nothing in the nature of the employment, and no particular custom or usage leading necessarily to the conclusion that the hiring was for a year, the payment of weekly or monthly wages raises a presumption in favour of a weekly or monthly hiring (*t*). A "hiring for twelve months certain, and to continue from time to time until three months' notice in writing be given by either party to determine the same," is a hiring for a year certain only; and either party is at liberty to put an end to it at the expiration of the first year, by giving three months' previous notice (*u*). It has also been held that an agreement "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice," can be determined at the end of the twelfth month without notice (*x*). A custom that either master or servant may determine domestic service at the end of the first month by notice given at or before the expiration of the first fortnight, is not in itself unreasonable; but inasmuch as such a custom has not yet been so fully established that judicial notice can be taken of it, it must be proved in each case as a question of fact (*y*).

(*n*) *Beeston* v. *Collyer*, 12 Moore, 552; 5 L.J. (O.S.) C.P. 180; *R.* v. *Batheaston*, Burr. Set.Cas. 823, No. 257; *Turner* v. *Robinson*, 5 B. & Ad. 789; 2 N. & M. 829; *Davis* v. *Marshall*, 9 W.R. 520.

(*o*) *Todd* v. *Kerrich*, 8 Exch. 151; 22 L.J. Ex. 1.

(*p*) *Fairman* v. *Oakford*, 5 H. & N. 636; 29 L.J. Ex. 459; *Creen* v. *Wright*, 1 C.P.D. 591.

(*q*) *Fawcett* v. *Cash*, 5 B. & Ad. 908; 3 L.J. K.B. 113.

(*r*) *Holcroft* v. *Barber*, 1 Car. & K. 4; *Baxter* v. *Nurse*, 7 Sc. N.R. 801; 13 L.J. C.P. 82; *Williams* v. *Byrne*, 7 Ad. & E. 177; 6 L.J. K.B. 239.

(*s*) Kenyon, C.J., *Rex* v. *Birdbrooke*, 4 T.R. 246; *R.* v. *Seaton*, Cald. 440.

(*t*) *R.* v. *Pucklechurch*, 5 East, 384; *Baxter* v. *Nurse*, 7 Sc. N.R. 801; 13 L.J. C.P. 82.

(*u*) *Brown* v. *Symons*, 8 C.B. N.S. 208; 29 L.J. C.P. 251.

(*x*) *Langton* v. *Carleton*, L.R. 9 Ex. 57; 43 L.J. Ex. 54.

(*y*) *Moult* v. *Halliday*, (1898) 1 Q.B. 125; 67 L.J. Q.B. 451.

Indefeasible and defeasible yearly hirings—Domestic service—Month's warning or a month's wages.—If by the custom or usage of trade the hiring may be put an end to and the contract dissolved, by notice given by either of the parties, the hiring is a conditional or defeasible yearly hiring, determinable by giving the customary notice at any time during the term. By the custom of particular trades a general hiring of a commercial traveller is a hiring for a year, subject to an implied understanding that either party may determine the engagement by giving three months' notice (*z*). A general hiring of menial or household servants, such as cooks, scullions, housemaids, footmen, butlers, coachmen, grooms, where no time is mentioned for the duration of the service, is a hiring for a year, and so on from year to year, defeasible by custom and usage, at the option of either of the parties, on giving a month's warning, or on the part of the master by paying or tendering a month's wages. If the contract is put into writing, the customary power of defeasance is impliedly annexed to the express terms of the written agreement, unless the custom is excluded by express words (*a*). A servant may be a menial servant, and as such clothed with this implied power of defeasance, although he does not reside within the walls of the master's house. This has been held to be the case with a head gardener hired for a year at 100*l.* wages, with a house in the master's grounds, and the privilege of taking in apprentices for a year at 15*l.* premium (*b*); also with a huntsman engaged at a salary of 100*l.* a year, with a house to live in and perquisites (*c*).

When a power of defeasance is vested in the parties, either by custom or special agreement, or the contract is made defeasible upon the happening of a given event, the hiring is nevertheless a yearly hiring; so that, if the power of defeasance is not exercised, and the contract is permitted to run on, and the service to continue for a year, there is a year's hiring and service (*d*). "It is a yearly hiring, notwithstanding the power of determining it, if that is not exercised before the expiration of the year. The contingency not having happened, and the contract not having been defeated during the year, it enures after the year's service as a yearly hiring" (*e*). A servant may engage himself to serve for a certain determinate period, but may give the employer the option of determining the

(*z*) *Metzner* v. *Bolton*, 9 Exch. 518; 23 L.J. Ex. 130.

(*a*) *Johnson* v. *Blenkensop*, 5 Jur. 870.

(*b*) *Nowlan* v. *Ablett*, 2 Cr. M. & R. 54; 4 L.J. Ex. 155.

(*c*) *Nicoll* v. *Greaves*, 17 C.B. N.S. 27; 33 L.J. C.P. 259.

(*d*) *Rex* v. *Atherton*, Burr. Set.Cas. 203, No. 71; *Rex* v. *Birdbrooke*, 4 T.R. 246; *Rex* v. *Farleigh Wallop*, 1 B. & Ad. 340, 342; 9 L.J. (O.S.) M.C. 9; *Rex* v. *New Windsor*, Burr. Set.Cas. 22, No. 7; *Rex* v. *Gt. Yarmouth*, 5 M. & S. 114; *Rex* v. *Northwold*, 2 D. & R. 790.

(*e*) *Rex* v. *Sandhurst*, 7 B. & C. 562; 6 L.J. (O.S.) M.C. 15; *Rex* v. *Byker*, 3 D. & R. 336; 2 B. & C. 119; *Rex* v. *Lidney*, Burr. Set.Cas. 1.

contract, and dismissing him at any period of the service. Where the engagement of a clerk or a superintendent was to be for three years, "at the option" of the employer, at a yearly salary, it was held that this was a contract binding the servant to serve three years, and giving the employer the option of determining the contract at the end of each year by a proper notice, but not of dismissing the servant at any time; that the option to be exercised by the employer was whether the servant was to remain for one, two, or three years, and that, if he was dismissed in the middle of a current year, he was entitled to compensation (*f*).

Hiring by month and week.—Where a journeyman miller was hired "at monthly wages, with liberty to depart at a month's wages or a month's warning," the hiring was held to be a hiring by the month (*g*); but, when the wages are reserved weekly with a proviso for a month's warning, the presumption is in favour of a defeasible yearly hiring. If there be anything in the contract to show that the hiring was intended to be for a year, then a reservation of weekly wages will not control that hiring. But, if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring (*h*). "The mere arrangement," observes Bayley, J., "that the wages shall be at one rate in the summer and at another in the winter does not show that the parties contemplated a service to endure through the summer and winter, and therefore that they intended hiring for a year; but shows only that they intended that, if the servant, being hired at weekly wages, should remain till the summer, he should then have so much per week. The true meaning of such an arrangement is merely this: that the servant's wages as a weekly servant are to be regulated by the seasons" (*i*). But, if the nature of the employment or the terms of the contract are inconsistent with a weekly hiring, the reservation of weekly wages will be regarded merely as a mode of payment, and not as an indication of the duration of the contract (*k*). Thus, the presumption of a weekly hiring resulting from a reservation of weekly wages is rebutted by a stipulation for a fortnight's or a month's notice to quit (*l*).

(*f*) *Down* v. *Pinto*, 9 Exch. 327; 23 L.J. Ex. 103.

(*g*) *R.* v. *Clare*, 2 Bott. 229, pl. 295.

(*h*) Ellenborough, C.J., *Rex* v. *Dodderhill*, 3 M. & S. 245; Burr. Set.Cas. 280, No. 93; *Rex* v. *Pucklechurch*, 5 East, 384; *Rex* v. *Hanbury*, 2 East, 425; *Rex* v. *Mitcham*, 12 East, 352; Ashurst, J., *Rex* v. *Newton Toney*, 2 T.R. 455; *Rex* v. *Odiham*, *ib.* 622; *Baxter* v. *Nurse*, 7 Sc. N.R. 801; 13 L.J. C.P. 82; *Rex* v. *Elstack*, 2 Bott. 227, pl. 292; *Rex* v. *Dedham*, 2 Bott. 227, pl. 292; *Rex* v. *Warminster*, 6 B. & C. 77; 5 L.J. (O.S.) K.B. 12; *Evans* v. *Roe*, L.R. 7 C.P. 138.

(*i*) *R.* v. *Rolvendon*, 1 M. & R. 691; *R.* v. *Dodderhill*, 3 M. & S. 243; *R.* v. *Lambeth*, 4 *ib.* 315.

(*k*) *Davis* v. *Marshall*, 9 W.R. 520.

(*l*) *R.* v. *Hampreston*, 5 T.R. 208; *R.* v. *St. Andrew, Pershore*, 8 B. & C. 679; 7 L.J. (O.S.) M.C. 23; *R.* v. *Birdbrooke*, 4 T.R. 246; *R.* v. *Gt. Yarmouth*, 5 M. & S. 117.

Service at will.—A boy was employed to work "for meat, drink, and clothes, as long as he had a mind to stop," and served for two years upon these terms; and the service was held to be a mere service at will (*m*). So, where an assistant workman was "to come and go when he liked," and an ostler and his master were "to be at liberty to separate when they pleased," the service was held to be a service at will (*n*). In these cases there is in truth no contract of hiring at all (*o*). The transaction amounts merely to an authority to serve upon certain terms. If the work is actually performed and accepted, the law raises an implied promise of remuneration from the employer to the workman; but the former is not bound to provide the work, nor is the latter bound to execute it.

Rights and liabilities of master and servant.—It is the first duty of the master, after the contract of hiring and service has been entered into, to take the servant into his employ, and enable him to earn the wages agreed to be paid; and, if he neglects so to do, he renders himself liable forthwith to an action for a breach of contract. The master is bound to provide for the safety of his servant in the course of his employment to the best of his judgment; but the law does not imply, from the mere relation of master and servant, an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself (*p*). If the servant sustains injury in the course of his employment from the negligence of the master, the latter will be responsible in damages (*q*), although there is no implied agreement by the master in an ordinary contract of hiring and service not to expose the servant to extraordinary risks in the course of his employment (*r*). The master, however, is not liable for surgical attendance and medicine rendered to a servant who has been injured in the execution of his master's service, but not through the master's negligence, unless the surgeon has been called in by the master's orders (*s*); nor for injuries sustained from the unseaworthiness of a vessel in which the servant is employed (*t*); nor for injuries which one servant has sustained through the negligence of another servant of the same employer (as we shall presently see),

(*m*) *R.* v. *Christ's Parish, York*, 3 B. & C. 459; 5 D. & R. 314.

(*n*) *R.* v. *Gt. Bowden*, 7 B. & C. 249; 6 L.J. (O.S.) M.C. 17.

(*o*) *R.* v. *St. Matthew's, Ipswich*, 3 T.R. 449.

(*p*) *Riley* v. *Baxendale*, 6 H. & N. 445; 30 L.J. Ex. 87; *Priestley* v. *Fowler*, 3 M. & W. 5; 7 L.J. Ex. 42; *Paterson* v. *Wallace*, 1 Macq. 748; *Davies* v. *England*, 33 L.J. Q.B. 321. As to injuries from unfenced machinery, see *Clarke* v. *Holmes*, 7 H. & N. 937; 31 L.J. Ex. 356.

(*q*) *Ashworth* v. *Stanwix*, 30 L.J. Q.B. 183; 3 E. & E. 701; *Clarke* v. *Holmes*, *supra*; *Weems* v. *Matthieson*, 4 Macq. 215; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L.J. Q.B. 333.

(*r*) *Riley* v. *Baxendale*, 6 H. & N. 445; 30 L.J. Ex. 87.

(*s*) *Wennell* v. *Adney*, 3 B. & P. 247; *Cooper* v. *Phillips*, 4 C. & P. 581.

(*t*) *Couch* v. *Steel*, 23 L.J. Q.B. 121; 3 E. & B. 402.

provided the master provides proper machinery (*u*), and takes care that his servants are persons of competent skill and ordinary carefulness (*x*); for a servant, when he engages to serve a master, undertakes as between him and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant, when he is acting in "the discharge of his duty as servant of him who is the common master of both" (*y*).

The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred he is just as likely to be acquainted with the probability of it as the master. The master, therefore, is not responsible for injuries sustained by his servant through the viciousness of the horse which the servant is employed to groom, or through the breaking down of a carriage in which the servant is directed by the master to drive, or from the employer's keeping an insufficient staff of servants for the performance of the work he has to do (*z*), or through the use of dangerous machinery, with the use of which the servant is, or professes to be, acquainted, and which he has voluntarily undertaken to use (*a*), or for the dangers attendant upon the mounting of scaffolds, or unfinished staircases and landings, which the workman has voluntarily undertaken to mount, with as much knowledge of the attendant risk as the person who employs him (*b*).

Where the master's coach broke down through the negligence of a coach-maker who had contracted with the master to furnish the latter with sound roadworthy coaches, and repair them, and keep them in good working order, and the coachman was mutilated and maimed for life, it was held that he had no remedy for the injury since the law did not permit him to recover damages from his own master and employer, nor could he sue the coach-maker, whose negligence occasioned the injury. "It is no doubt a hardship upon the plaintiff," observes Rolfe, B., "to be without a remedy, but by that consideration we ought not to be influenced" (*c*).

(*u*) *Searle* v. *Lindsay*, 11 C.B. N.S. 429; 31 L.J. C.P. 106.

(*x*) *Potter* v. *Faulkner*, 1 B. & S. 800; 31 L.J. Q.B. 30; *Senior* v. *Ward*, 1 E. & E. 385; 28 L.J. Q.B. 139.

(*y*) *Hutchinson* v. *York, Newc. & Berw. Ry.*, 5 Exch. 343; 19 L.J. Ex. 296; *Wigmore* v. *Jay*, 5 Exch. 354; 19 L.J. Ex. 300; *Seymour* v. *Maddox*, 20 L.J. Q.B. 327; 16 Q.B. 326; *Lovegrove* v. *L. B. & S. C. Ry.*, 16 C.B. N.S. 669; 33 L.J. C.P. 329; *Walker* v. *S. E. Ry.*, 3 H. & C. 102; 32 L.J. Ex. 205; *Murphy* v. *Caralli*, 3 H. & C. 462; 34 L.J. Ex. 14; *Tunney* v. *Midland Ry.*, L.R. 1 C.P. 291. As to who are fellow-servants, see *Hall* v. *Johnson*, 3 H. & C. 589; 34 L.J. Ex. 222; *Feltham* v. *England*, L.R. 2 Q.B. 33; 36 L.J. Q.B. 14; *Warburton* v. *G. W. Ry.*, L.R. 2 Ex. 30; 36 L.J. Ex. 9.

(*z*) *Skipp* v. *East. Counties Ry.*, 9 Exch. 223; 23 L.J. Ex. 23.

(*a*) *Dynen* v. *Leach*, 26 L.J. Exch. 221.

(*b*) *Assop* v. *Yates*, 2 H. & N. 770; 27 L.J. Ex. 156; *Griffiths* v. *Gidlow*, 3 H. & N. 648; 27 L.J. Ex. 404; *Potts* v. *Plunkett*, 9 Ir. C.L.R. 290.

(*c*) *Winterbottom* v. *Wright*, 10 M. & W. 115; 11 L.J. Ex. 415; *Priestley* v. *Fowler*, 3 M. & W. 6; 7 L.J. Ex. 42;

"There would be no end of actions if we were to hold that a person, having once done a piece of work carelessly, should, independently of honesty of purpose" (or contract), "be fixed with liability in this way by reason of bad materials or insufficient fastening" (*d*).

If a man employs ignorant, inexperienced workmen in dangerous employments, and exposes them improperly to risks, of which he is cognizant, and which are not known to the ignorant workman, he will be liable for the consequences of his misconduct (*e*). For personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable (*f*). And where rules are framed by employers for the purpose of regulating the exercise of a dangerous employment, and these rules are carelessly framed, so as to cause dangers which might be prevented by proper rules, the employers will be responsible for the consequences of their negligence (*g*). Where statutory regulations exist for the management of a colliery (*h*), and these rules are culpably neglected with the knowledge of the owner of the mine, the latter will be responsible for the consequences of his neglect of duty, unless the person injured has brought the mischief upon himself by his own negligence (*i*). And the same rules apply where machinery is required by Act of Parliament to be protected, and the master will be responsible for the want of such protection, unless the accident has been caused by the negligence of the servant himself (*k*). Where the dangerous nature of the employment is obvious the servant must necessarily be taken to have known it; but even if it be known to the servant, yet that does not make him a "volunteer" so as to exonerate his masters from their liability for breach of a statutory duty to protect the servant from the dangerous thing (*l*).

If a rule established for securing the safety of workmen in a dangerous employment is habitually violated, to the knowledge of the workman himself, the latter has no ground to recover damages

Riley v. *Baxendale*, 6 H. & N. 455; 30 L.J. Exch. 87; *Potts* v. *Port Carlisle, &c. Ry.*, 2 L.T. N.S. 283; *Heaven* v. *Pender*, 11 Q.B.D. 503; 52 L.J. Q.B. 702. See Addison on Torts, 20 (ed. 7).

(*d*) Per Willes, J., *Collis* v. *Selden*, L.R. 3 C.P. 498; 37 L.J. C.P. 233.

(*e*) *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 295; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L.J. Q.B. 333; *Weems* v. *Matthieson*, 4 Macq. 215; *Farrant* v. *Barnes*, 31 L.J. C.P. 137; 11 C.B. N.S. 553; *Williams* v. *Clough*, 3 H. & N. 258; 27 L.J. Ex. 325.

(*f*) *Ashworth* v. *Stanwix*, 30 L.J. Q.B. 183; 3 E. & E. 701.

(*g*) *Vose* v. *Lanc. and York. Ry.*, 2 H. & N. 728; 27 L.J. Ex. 249; 50 & 51 Vict. c. 58.

(*h*) As to ventilation of collieries, see *Brough* v. *Homfray*, L.R. 3 Q.B. 771; 37 L.J. M.C. 177; as to statutory regulations under the Factory Acts, see 41 & 42 Vict. c. 16; 54 & 55 Vict. c. 75; 58 & 59 Vict. c. 37. All these Acts are repealed as from Jan. 1, 1902, and the Factory Act now in force is 1 Edw. 7, c. 22.

(*i*) *Caswell* v. *Worth*, 5 E. & B. 855; 25 L.J. Q.B. 121; *Senior* v. *Ward*, 1 E. & E. 385; 28 L.J. Q.B. 139.

(*k*) *Post*, p. 857.

(*l*) *Britton* v. *G. W. Cotton Co.*, L.R. 7 Ex. 130; 41 L.J. Ex. 99. See Employers' Liability Act, 43 & 44 Vict. c. 42; Addison on Torts, 109 (ed. 7).

from the employer for injuries sustained from the non-observance of the rule (*m*).

If hidden and secret dangers exist upon the master's premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions against them (*n*). If a master was to order his servant to take a lighted candle amongst packages known by him, but not known by the servant, to contain gunpowder, the master would be responsible for any injury sustained by the latter from the unknown danger and unexpected risk to which he had been exposed. So if a servant be employed to cut up diseased cattle (*o*). It is otherwise if the servant accepts of the employment knowing of the risk he runs (see *infra*). If the danger is unknown to the master, and there is no negligence on his part, he cannot be made responsible in damages (*p*); as where a floor of a warehouse gave way and injured a workman who was thereon (*q*). So if a railway company employs workmen upon its tunnels, sidings, or stations, it is guilty of negligence if it conducts its traffic so as to expose the workmen to unexpected dangers, which they had no means of guarding against (*r*).

Exemption of the master from liability when the danger is known to the servant.—But the master is not responsible for the dangerous state of his premises, if those dangers are known to the servant, and the latter has accepted the employment knowing of the attendant risks, and having an opportunity of guarding against them by his own vigilance and care. Where the plaintiff alleged that he had been hired by the defendant to perform at the defendant's theatre, and that on part of the stage there was a hole in the floor, along which the plaintiff had to pass in the discharge of his duty as a performer, and that it was the duty of the defendant to light the floor sufficiently, so as to prevent accidents to those who passed along it, it was held that no such duty was cast upon the defendant. If the servant wishes the premises to be kept in any particular state with respect to lighting and fencing, he must provide for it by express contract (*s*). The maxim *volenti non fit injuria* has been much discussed in recent cases. It was at one time thought that by reason of sect. 1, sub-sect. (1) of the Employers' Liability Act,

(*m*) *Senior* v. *Ward*, 1 E. & E. 385; 28 L.J. Q.B. 139.

(*n*) *Williams* v. *Clough*, 3 H. & N. 258; 27 L.J. Exch. 325; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L.J. Q.B. 333; *Ashworth* v. *Stanwix*, 30 L.J. Q.B. 183; 3 E. & E. 701.

(*o*) *Davies* v. *England*, 33 L.J. Q.B. 321.

(*p*) *Potts* v. *Port Carlisle Ry.*, 2 L.T. N.S. 283; 8 W.R. 524.

(*q*) *Brown* v. *Accrington Cotton Co.*, 34 L.J. Exch. 208; 3 H. & C. 511.

(*r*) *Vose* v. *Lanc. and York. Ry.*, 2 H. & N. 728; 27 L.J. Exch. 249.

(*s*) *Seymour* v. *Maddox*, 16 Q.B. 332; 20 L.J. Q.B. 327; *Bolch* v. *Smith*, 7 H. & N. 736; 31 L.J. Q.B. 201.

1880 (*t*), which makes a master liable where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with his business, the master could no longer rely on the defence that the servant knew of the danger; it was however held, that where a servant voluntarily did work with a full knowledge of the risk he ran, the master was not liable (*u*). There is therefore in every case a question as to the servant's knowledge of the extent of the danger (*x*), and a further question as to how far he voluntarily incurred it (*y*).

Where the workman is employed in the use of dangerous machinery furnished by the employer, and is, or professes to be, acquainted with the use of the machinery, and the care necessary to be taken to guard against accident, and, notwithstanding this, sustains injury from his own want of care in the use of it, he has, of course, no ground of action against the employer (*z*). But if an Act of Parliament requires machinery to be fenced, and it is left unfenced, and the servant complains, and the master induces him to continue his work by telling him that proper protection shall be afforded, the master takes upon himself the responsibility of any accident that may occur (*a*).

Injuries to workmen from defective hoisting-tackle in mines and insecure scaffolding and ladders.—It has been held, in a Scotch case in the House of Lords, that the owner of a mine is bound to exercise ordinary care and vigilance to keep the shaft of the mine in a safe state, and the machinery for lifting people from the mine, and lowering them into it, in secure condition (*b*). And it is in all cases the master's duty to be careful that his workman be not induced to work under the notion that the tackle, scaffolding, or rope with which he works is secure, when the master knows, or has reasonable ground for believing, that it is unsafe and dangerous. If he interferes in the conduct and management of the work him-

(*t*) 43 & 44 Vict. c. 42.

(*u*) *Thomas* v. *Quartermaine*, 18 Q.B.D. 685; 56 L.J. Q.B. 340; *Membery* v. *G. W. Ry.*, 14 App.Cas. 179; 58 L.J. Q.B. 563.

(*x*) *Yarmouth* v. *France*, 19 Q.B.D. 647; 57 L.J. Q.B. 7. See *Osborne* v. *L. & N. W. Ry.*, 21 Q.B.D. 220; 57 L.J. Q.B. 618.

(*y*) *Thrussell* v. *Handyside*, 20 Q.B.D. 359; 57 L.J. Q.B. 347. In *Membery* v. *G. W. Ry.*, *supra*, Lord Bramwell was of opinion that where a man was not physically constrained, but had the option to do a thing or not, the maxim *volenti non fit injuria* applied if he did it and was thereby injured. See *Smith* v. *Baker*, (1891) A.C. 325; 60 L.J. Q.B. 618; *Williams* v. *Birmingham Battery Co.*, (1899) 2 Q.B. 338; 68 L.J. Q.B. 918.

(*z*) *Dynen* v. *Leach*, 26 L.J. Ex. 221; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 294. See *Watling* v. *Oastler*, L.R. 6 Ex. 73; 40 L.J. Ex. 43.

(*a*) *Clarke* v. *Holmes*, 31 L.J. Ex. 356; 7 H. & N. 937; *Weems* v. *Matthieson*, 4 Macq. 215. See also *Britton* v. *G. W. Cotton Co.*, L.R. 7 Ex. 130; 41 L.J. Ex. 99; 41 & 42 Vict. c. 16; 54 & 55 Vict. c. 75; 58 & 59 Vict. c. 37; 1 Edw. 7, c. 22; *Birtwistle* v. *Hindle*, (1897) 1 Q.B. 192; 66 L.J. Q.B. 173.

(*b*) *Brydon* v. *Stewart*, 2 Macq. 34.

self, he is bound to select sound and safe materials; and if he knowingly allows rotten timber, rotten poles, or rotten ropes to be used in the construction of a scaffold, and injury is sustained therefrom by his servants or workmen, he will be responsible in damages (*c*).

Injuries to servant from negligence of fellow-servant.—Where several servants are employed by the same master in one common employment, the master was not at common law responsible for injury resulting to one of them from the negligence of another, provided that he had taken due care not to expose his servant to unreasonable risks (*d*), and had been guilty of no want of care in the selection of proper servants (*e*). The principle laid down was that a servant, when he engaged to serve a master, undertook, as between him and his master, to run all the ordinary risks of the service; and that this included the risk of negligence on the part of a fellow-servant, whenever he was acting in discharge of his duty as servant of him who was the common master of both (*f*). Thus it has been held that a railway company was not responsible for an injury occasioned to one of their own servants by a collision on their railway, caused by the negligence of another of their servants, in respect of which injury they would undoubtedly have been liable if the person injured had been a stranger travelling as a passenger for hire (*g*). But the servants must have been fellow-servants, engaged in a common service (*h*); for if a farmer's servant, delivering corn at the warehouse of a corn merchant, was injured by the negligence of the corn merchant's servant in taking in the sacks, the corn merchant would be answerable for the injury (*i*). And it was held to be not enough that the servant injured, and the servant causing the injury, should be servants of the same master; they must be employed in the same work: for if a gentleman's coachman was to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stranger (*k*). Nor was it sufficient that they were temporarily subject to the same superintendent, if they were not in fact the servants of the same master (*l*). The circumstances must be such as to show con-

(*c*) *Roberts* v. *Smith*, 26 L.J. Ex. 319; 2 H. & N. 213; *Senior* v. *Ward*, 28 L.J. Q.B. 139; 1 E. & E. 385; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L.J. Q.B. 333.

(*d*) *Hutchinson* v. *York Ry.*, 5 Exch. 343; 19 L.J. Ex. 296.

(*e*) *Tarrant* v. *Webb*, 18 C.B. 805; 25 L.J. C.P. 261. See *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326.

(*f*) See *Morgan* v. *Vale of Neath Ry.*, L.R. 1 Q.B. 149; 35 L.J. Q.B. 123.

(*g*) *M'Enivy* v. *Waterford*, 8 Ir. C.L.R. 312; *Tunney* v. *Midland Ry.*, L.R. 1 C.P. 291, in which case the plaintiff, a labourer, was being carried on the line, in pursuance of his contract of service with the company; *Hando* v. *L. C. & D. Ry.*, L.R. 2 Q.B. 439, n.

(*h*) *Lovegrove* v. *L. B. & S. C. Ry.*, 33 L.J. C.P. 329; 16 C.B. N.S. 669.

(*i*) *Abraham* v. *Reynolds*, 5 H. & N. 143, 149; *Waller* v. *S. E. Ry.*, 32 L.J. Ex. 203; 2 H. & C. 102.

(*k*) Lord Cranworth, *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 294, 307.

(*l*) *Warburton* v. *G. W. Ry.*, L.R. 2 Ex. 30; 36 L J. Ex. 9.

clusively that the person injured submitted himself either expressly or by implication to the control of the master whose workmen caused the injury (*m*). If a fellow-workman in a mine was also a co-proprietor in the mine, and therefore one of the plaintiff's masters, the common master was then responsible for injury caused by the negligence of such fellow-workman (*n*). But a certificated manager of a mine was held to be a fellow-servant with the miners (*o*). A foreman was held to be a servant, as much as the other servants, whose work he superintended (*p*). The master of a ship is a fellow-servant to a seaman employed on the ship so as to be engaged in common employment with him (*q*); but the master and crew of a ship are not in the common employment with the master and crew of another ship belonging to the same owner (*r*). A sub-contractor and his servants engaged in doing the common work of a particular contract, under a contractor, were held to be all fellow-servants, engaged in one common employment, and they all were held to undertake, as between themselves and the contractor, to run all the ordinary known risks of the service, including the risk of negligence of the other servants (*s*). Where a shipping company employ a contractor to unload their ship, and appoint certain of the crew to assist in the unlading, it is a question of fact whether such members of the crew were under the orders and control of the contractor's foreman or not, and whether, therefore, the company are liable to one of the contractor's workmen who receives injuries through the negligence of such members of the crew (*t*). So a carpenter in the service of a railway company could not sue the company for the negligence of a porter in their employ (*u*).

By the Employers' (*x*) Liability Act, 1880 (*y*), the master in some cases is made liable for injuries caused to a workman by the negligence of a fellow-workman having superintendence entrusted to him (*z*), or to whose orders the workman was bound to conform, and did conform, or by any act or omission of any fellow-workman in obedience to the rules or bye-laws, or particular instructions of the master. The amount of compensation recoverable is limited (*a*),

(*m*) *Johnson* v. *Lindsay*, (1891) A.C. 371; 61 L.J. Q.B. 90; *Cameron* v. *Nystrom*, (1893) A.C. 308; 62 L.J. P.C. 85.

(*n*) *Ashworth* v. *Stanwix*, 30 L.J. Q.B. 183; 3 E. & E. 701.

(*o*) *Howells* v. *Landore Steel Co.*, L.R. 10 Q.B. 62; 44 L.J. Q.B. 25.

(*p*) See *Wilson* v. *Merry*, *ante*, p. 858.

(*q*) *Hedley* v. *Pinkney & Sons' Steamship Co.*, (1894) A.C. 222; 63 L.J. Q.B. 419.

(*r*) *The Petrel*, (1893) P. 320; 62 L.J. P. 92.

(*s*) *Wiggett* v. *Fox*, 11 Exch. 832; 25 L.J. Ex. 188, explained in *Johnson* v. *Lindsay*, *supra*.

(*t*) *Union Steamship Co.* v. *Claridge*, (1894) A.C. 185; 63 L.J. P.C. 56.

(*u*) *Morgan* v. *Vale of Neath Ry.*, L.R. 1 Q.B. 149; 35 L.J. Q.B. 23.

(*x*) The Act only applies to workmen as defined by 38 & 39 Vict. c. 90, s. 10.

(*y*) 43 & 44 Vict. c. 42, s. 1. The whole subject is fully treated in Addison on Torts, 109 (ed. 7).

(*z*) See sect. 8.

(*a*) Sect. 3.

and the action is to be brought in the first instance in the County Court (*b*), and notice of the injury given in writing (*c*).

Workmen's Compensation.—By the Workmen's Compensation Act, 1897 (*d*) (which by the Workmen's Compensation Act, 1900 (*e*), is extended to workmen engaged in agriculture), every employer to whom the Act applies is liable to pay certain compensation to any workman who sustains personal injury in the course of his employment under conditions defined by the Act.

The Act applies to employment on, in, or about a railway, factory, mine, quarry, or engineering work, or any building which exceeds thirty feet in height which is either being constructed or repaired by means of scaffolding, or which is being demolished, or on which machinery is being used for these purposes (*f*).

Every dock is a factory within the meaning of the Act, and persons in actual use or occupation of the dock are liable to pay compensation to a workman injured in the course of his employment (*g*).

The personal injury must be caused by an accident (*h*), and must arise out of and in the course of the employment (*i*).

The expression "workman" includes every person engaged in an employment to which the Act applies whether by way of manual labour or not (*k*), including workmen in the service of the Crown (*l*). The injury must, however, disable the workman from earning full wages for at least two weeks (*m*), and if it is due to the wilful misconduct of the workman the compensation will be disallowed (*n*). Notice of the accident must be given within six months in a specified manner (*o*).

(*b*) Sect. 6.

(*c*) Sect. 4. As to workman contracting himself out of the Act, see *Griffiths* v. *Dudley* (*Earl*), 9 Q.B.D. 357; 51 L.J. Q.B. 543, *ante*, p. 74.

(*d*) 60 & 61 Vict. c. 37. This Act being germane to the Employers' Liability Act, comes more properly within Addison on Torts, in the next edition of which it will therefore be fully treated. It is conceived to be sufficient here to give an outline of the Act, and to refer the reader to some of the principal of the very many decisions on its rather complicated and ill-drawn provisions.

(*e*) 63 & 64 Vict. c. 22.

(*f*) 60 & 61 Vict. c. 37, s. 7 (1). As to what is employment on railway, see *Milner* v. *G. N. Ry.*, (1900) 1 Q.B. 795; 69 L.J. Q.B. 427. As to buildings to which the Act applies, see *Mellor* v. *Tomkinson*, (1899) 1 Q.B. 374; 68 L.J. Q.B. 214. As to scaffolding, see *Hoddinott* v. *Newton, Chambers & Co.*, (1901) A.C. 49; 70 L.J. K.B. 150.

(*g*) *Merrill* v. *Wilson*, (1901) 1 K.B. 35; 70 L.J. K.B. 97; *Raine* v. *Jobson*, (1901) A.C. 404; 70 L.J. K.B. 771; *Cattermole* v. *Atlantic Transport Co.*, (1902) 1 K.B. 204; 71 L.J. K.B. 172. See also *Bartell* v. *Gray*, (1902) 1 K.B. 225; 71 L.J. K.B. 115. As to lighters, see *Hennessy* v. *M'Cabe*, (1900) 1 Q.B. 491; 69 L.J. Q.B. 173.

(*h*) 60 & 61 Vict. c. 37, s. 1. See *Hensey* v. *White*, (1900) 1 Q.B. 481; 69 L.J. Q.B. 188; *Boardman* v. *Scott*, (1902) 1 K.B. 43; 71 L.J. K.B. 3.

(*i*) *Smith* v. *Lanc. and York. Ry.*, (1899) 1 Q.B. 141; 68 L.J. Q.B. 51; *Lowe* v. *Pearson*, (1899) 1 Q.B. 261; 68 L.J. Q.B. 122; *Rees* v. *Thomas*, (1899) 1 Q.B. 1015; 68 L.J. Q.B. 539; *Whitehead* v. *Reader*, (1901) 2 K.B. 48; 70 L.J. K.B. 546; *Armitage* v. *Lanc. and York. Ry.*, (1902) 2 K.B. 178; 71 L.J. K.B. 778.

(*k*) 60 & 61 Vict. c. 37, s. 7 (2). As to dependants of workman where death results, see Sched. I. (a); *Main Colliery Co.* v. *Davies*, (1900) A.C. 358; 69 L.J. Q.B. 755.

(*l*) Sect. 8.

(*m*) Sect. 1 (2) (a); *Chandler* v. *Smith*, (1899) 2 Q.B. 506; 68 L.J. Q.B. 909.

(*n*) Sect. 1 (2) (c).

(*o*) Sect. 2 (1); *Powell* v. *Main Colliery Co.*, (1900) A.C. 366; 69 L.J. Q.B. 758.

Contracts excluding the operation of the Act are only permissible when a scheme of compensation no less favourable to the workmen and their dependants than the provisions of the Act is substituted for it (*p*). All questions arising under the Act are to be settled by arbitration, including the amount and duration of compensation (*q*). The compensation where total or partial incapacity for work results from the injury is to be by weekly payments, the amount of which is to be based on the average weekly earnings of the workman (*r*), and in fixing the amount of the weekly payment regard is to be had to the difference between the amount earned before and after the accident (*s*).

Injuries to volunteers assisting in work of dangerous nature.—If a person comes forward as a volunteer, and offers to assist servants engaged in a dangerous work, and the volunteer is injured through the negligence of one of the servants, the employer is not responsible for the injury; for a person, by volunteering his services, cannot have any greater rights, or impose any greater duties on the employer, than would have existed if he had been a hired servant (*t*).

Duties of servant.—Every servant, on the other hand, impliedly undertakes to obey the just and reasonable commands of the master, and to be careful and industrious in the performance of the work intrusted to him to execute. A servant who professes to be capable of undertaking an office of skill impliedly represents himself to be possessed of the skill requisite for the due discharge of the functions of the office; and, if he does not possess that skill, or if, possessing it, he fails to exercise it, he is responsible for a breach of contract. A servant, in the service of a tradesman, impliedly promises to do no act knowingly and wilfully which may injure his master's trade. He must not attempt to draw away his master's customers; but there is no law which prevents him from soliciting prospective custom from them at some future period when he hopes to be able to set up in business for himself (*u*). His possession of the master's property is, as we have already seen, the master's possession. He has in contemplation of law the mere

(*p*) Sects. 3, 9.

(*q*) Sect. 1 (3). See Sched. II. and Rules made under the Act, May 27, 1898.

(*r*) Sched. I. (1) (b). As to meaning of "average," see *Lysons* v. *Knowles*, (1901) A.C. 79; 70 L.J. K.B. 170. This provision has given rise to much litigation: see *Appleby* v. *Horseley Co.*, (1899) 2 Q.B. 521; 68 L.J. Q.B. 892, 894, and cases there cited; *Hathaway* v. *Argus Printing Co.*, (1901) 1 K.B. 96; 70 L.J. K.B. 12; *Ayres* v. *Buckeridge*, (1902) 1 K.B. 57; 71 L.J. K.B. 28; *Bartlett* v. *Tutton*, (1902) 1 K.B. 72; 71 L.J. K.B. 52.

(*s*) Sched. I. (2). See *Pomphrey* v. *Southwark Press*, (1901) 1 K.B. 86; 70 L.J. K.B. 48, and the cases there cited.

(*t*) *Degg* v. *Midland Ry.*, 1 H. & N. 773; 26 L.J. Ex. 171; *Potter* v. *Faulkner*, 1 B. & S. 800; 31 L.J. Q.B. 30. As to liability of master for negligence of volunteer, see *Gwilliam* v. *Twist*, (1895) 2 Q.B. 84; 64 L.J. Q.B. 474.

(*u*) *Nichol* v. *Martin*, 2 Esp. 734.

custody of it, so that, if he is provided with a house or a lodging by the master, he may be turned out of it at any moment without any notice to quit (*x*). A clerk is under an implied contract not to make public that which he learns in the execution of his duty as clerk (*y*).

Indemnification of master by servant.—If damages have been recovered from the master by reason of the servant's negligence in doing the master's work, or in executing his orders, these damages may be recovered by the master from the servant, and the verdict and judgment in the action against the master are evidence of the amount of these damages, but not of the circumstances under which they were recovered (*z*). If the captain of a ship engages in smuggling transactions, and thereby causes the ship to be forfeited and condemned, he is responsible in damages to the shipowner for causing the latter to lose his property (*a*).

Dismissal of skilled servants for incompetency.—If a labourer, servant, or artisan, professes to be skilled in some particular art, and has been hired as a skilled servant, and is found to be utterly incompetent to do what he has expressly or impliedly undertaken to perform, the employer is not bound to go on employing him to the end of the term, but may at once dismiss him (*b*).

Dismissal for misconduct.—If a servant wilfully disobeys or habitually neglects the reasonable orders of the master; if he absents himself repeatedly from the service, or refuses to perform his work, or to submit to the domestic regulations of the house, or is guilty of gross moral misconduct, or of fraudulent misrepresentation in the discharge of his duties, to the injury of his employer (*c*), the contract may be dissolved by the master, and the servant dismissed. The following instances of misconduct and disobedience have been held to warrant a dismissal of the servant and a dissolution of the contract by the master:—Being frequently absent and often sleeping out without leave (*d*); pregnancy (*e*); assaulting a fellow maid-servant with intent to ravish her (*f*); refusing to work during the customary hours of labour (*g*); habitually neglecting to perform the duties he had undertaken to discharge (*h*); refusing to conform to the hour of dinner (*i*); abusing and insulting the

(*x*) *Mayhew* v. *Suttle*, 4 E. & B. 347; 24 L.J. Q.B. 54, *ante*, p. 666.

(*y*) *Merryweather* v. *Moore*, (1892) 2 Ch. 518; 61 L.J. Ch. 505.

(*z*) *Green* v. *New River Co.*, 4 T.R. 590.

(*a*) *Blewitt* v. *Hill*, 13 East, 12.

(*b*) *Horton* v. *McMurtry*, 5 H. & N. 667; 29 L.J. Ex. 260.

(*c*) *Harmer* v. *Cornelius*, 5 C.B. N.S. 236; 28 L.J. C.P. 85.

(*d*) *Robinson* v. *Hindman*, 3 Esp. 235. As to pleading misconduct, see *Burgess* v. *Beaumont*, 7 M. & Gr. 962; 14 L.J. C.P. 13; *Lush* v. *Russell*, 5 Exch. 203; 19 L.J. Ex. 244.

(*e*) *R.* v. *Brampton*, Cald. 14, 16, 17.

(*f*) *Atkin* v. *Acton*, 4 C. & P. 208.

(*g*) *Lilley* v. *Elwin*, 11 Q.B. 742; 17 L.J. Q.B. 132.

(*h*) *Arding* v. *Lomax*, 24 L.J. Ex. 80; 10 Exch. 734.

(*i*) *Spain* v. *Arnott*, 2 Stark. 256.

master and disturbing the peace of his family (*k*); trespassing unlawfully in game preserves, after having been cautioned and ordered not to enter them (*l*); enticing away the master's servants (*m*); becoming the father of a bastard (*n*); seducing the master's maid-servant; repeatedly coming home intoxicated (*o*); making fraudulent or grossly inaccurate entries in account-books (*p*); absence from the master's dwelling-house for a night to visit a sick mother against the will of the master, and after leave of absence had been asked for and refused (*q*); the setting up of a claim inconsistent with the relation of master and servant, such as a claim to be a partner (*r*); engaging to a large extent in gambling speculations on the Stock Exchange (*s*); or the assertion of rights and privileges not warranted by the contract or the nature of the service, and injurious to the interests of the master (*t*). The forgetfulness of a servant in the performance of an important part of his duty need not be habitual in order to amount to negligence justifying his dismissal without notice; a single act of forgetfulness may, under certain circumstances, be sufficient (*u*). And it is apprehended that the entertaining of guests at the master's expense, without his knowledge and without any express or implied permission so to do, would be a good ground of dismissal. If a justifying cause for the dismissal exists, the master may avail himself of it as a defence to an action, although it may not have formed the ground of dismissal, and although the master may not have known of its existence at the time he discharged the servant (*x*).

The following instances of misconduct and disobedience of orders have been held *not* to constitute a sufficient ground of dismissal and dissolution of the contract of hiring and service without notice:—Temporary absence without leave, producing no serious inconvenience to the employer (*y*); occasional insolence of manners and sulkiness; occasional disobedience in matters of trifling moment, such as neglecting to come on one or two occasions when the bell rang; stopping at one hotel when ordered to stop at another (*z*); temporary absence on customary holidays (*a*), or for the purpose of

(*k*) *Shaw* v. *Chairitie*, 3 C. & K. 25.
(*l*) *Read* v. *Dunsmore*, 9 C. & P. 588.
(*m*) *Lumley* v. *Gye*, 2 E. & B. 216; 22 L.J. Q.B. 463. See *Bowen* v. *Hall*, 6 Q.B.D. 333; 50 L.J. Q.B. 305.
(*n*) *R.* v. *Welford*, Cald. 57.
(*o*) *Wise* v. *Wilson*, 1 C. & K. 662.
(*p*) *Baillie* v. *Kell*, 6 Sc. 379; 7 L.J. C.P. 249.
(*q*) *Turner* v. *Mason*, 14 M. & W. 112; 14 L.J. Ex. 311.
(*r*) *Amor* v. *Fearon*, 9 Ad. & E. 548; 8 L.J. Q.B. 95.
(*s*) *Pearce* v. *Foster*, 17 Q.B.D. 536; 55 L.J. Q.B. 306.
(*t*) *Lacy* v. *Osbaldiston*, 8 C. & P. 80.
(*u*) *Baster* v. *London & County Printing Works*, (1899) 1 Q.B. 901; 68 L.J. Q.B. 622.
(*x*) *Spotswood* v. *Barrow*, 5 Exch. 110; 19 L.J. Ex. 226.
(*y*) *Fillieul* v. *Armstrong*, 7 Ad. & E. 557; 7 L.J. Q.B. 7.
(*z*) *Callo* v. *Brouncker*, 4 C. & P. 518; *Cussons* v. *Skinner*, 11 M. & W. 161; 12 L.J. Ex. 347.
(*a*) *Reg.* v. *Stoke-on-Trent*, 5 Q.B. 303; 13 L.J. M.C 41.

having a severe hurt attended to (*b*), or for the purpose of procuring another situation, such absence being warranted by custom (*c*).

Warning—Notice to leave.—In the case of a yearly hiring, not made defeasible by custom or by the agreement of the parties, reasonable notice must be given on either side of the intention of determining the contract, which notice must expire with the current year of hiring, as in the case of a tenancy from year to year; but the same length of notice is not required in the case of a yearly hiring of a servant as is required in the case of a yearly hiring of land. A quarter's notice, given a quarter of a year before the expiration of the current year of hiring, would in all cases be amply sufficient; and a month's notice is often all that is required by custom and usage to determine the contract and entitle the servant to leave (*d*). So also an indefinite hiring is determinable by a reasonable notice in the absence of any agreement or custom to the contrary (*e*).

Payment of wages.—If the contract of hiring and service leaves the amount of salary to be fixed by a third party, an application by the clerk or servant to such third party to fix the salary is a condition precedent to the liability of the employer (*f*).

Disability from sickness.—If a household servant, hired for a year or any aliquot portion of a year, is hurt or temporarily disabled, or falls sick, whilst doing his master's business, the master is not entitled to make any deduction from the agreed wages for the time that the servant was incapacitated for the performance of his ordinary work (*g*); but, if he has been struck down with disease and permanently disabled, so that he can never be expected to return to his work, the contract of hiring is dissolved, and the master may dismiss him (*h*).

Wrongful dismissal.—If, after having taken the servant into his service, the master improperly dismisses him, or prevents him by a continued system of persecution from continuing in the service, he is bound to make compensation to the servant for all the damages sustained by the latter; for the law implies, from a person who contracts to pay a salary for services for a certain term, a contract to permit those services to be performed (*i*). If the servant is improperly dismissed, he ought not to keep himself

(*b*) *Chandler* v. *Grieves*, 2 H. Bl. 606, n.

(*c*) *R.* v. *Islip*, 1 Str. 422; *R.* v. *Polesworth*, 2 B. & Ald. 483.

(*d*) *Williams* v. *Byrne*, 7 Ad. & E. 177; 6 L.J. K.B. 239; *Brown* v. *Symons*, 8 C.B. N.S. 208; 29 L.J. C.P. 251.

(*e*) *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L.J. Ex. 459; *Creen* v. *Wright*, 1 C.P.D. 591.

(*f*) *Owen* v. *Bowen*, 4 C. & P. 93.

(*g*) *R.* v. *Sudbrooke*, 1 Smith, 59; *Chandler* v. *Grieves*, 2 H. Bl. 606, n.

(*h*) *Cuckson* v. *Stones*, 1 E. & E. 248; 28 L.J. Q.B. 25. See, as to effect of Workmen's Compensation Act, *Elliott* v. *Liggins*, (1902) 2 K.B. 84; 71 L.J. K.B. 483.

(*i*) *Emmens* v. *Elderton*, 4 H.L.C. 624; 13 C.B. 495, *ante*, p. 848.

in a state of readiness to serve during the residue of the term of hiring, but should endeavour to find another situation, and should sue on the special contract for the damage he has sustained by reason of the wrongful dismissal (*k*). Where a traveller hired a courier to travel with him on the continent from the 1st of June, 1852, and the traveller renounced the contract before the time arrived, declaring that he should not go abroad, and had no occasion for the courier's services, it was held that the courier was not bound to wait for the 1st of June and then tender his services, but that he might at once sue for the breach of contract (*l*). There is an absolute power in the Crown, in the absence of statutory provision to the contrary, to dismiss at pleasure a person employed in the civil service of the Crown (*m*).

Month's wages in lieu of month's warning.—When a defeasible yearly hiring has been dissolved by the dismissal of the servant without notice, the month's wages payable by custom (*ante*, p. 851), are not, in contemplation of law, wages for services, but a sum to be paid as a compensation to the servant for being turned away without notice (*n*).

Damages for wrongful dismissal—Dissolution of contract—Wages pro ratâ.—Whenever one party has absolutely refused to perform his part of the contract, he puts it in the power of the other party, either to sue for a breach of it, or to treat the contract as rescinded or abandoned, and sue on a *quantum meruit* for the work actually done (*o*). If the party elects to treat the contract as a subsisting contract, and to sue for a breach of it, he cannot afterwards go on a *quantum meruit* as for an abandoned contract. If, for example, a servant hired by the year at yearly wages, payable quarterly, brings an action upon the contract, and recovers damages for a wrongful dismissal, he cannot afterwards maintain an action for wages *pro ratâ* up to the time of his dismissal. The damages, therefore, in the action on the special contract should be assessed so as to include the wages up to the time of the dismissal (*p*). When the contract is for a year's service, at wages payable yearly, the contract is entire and indivisible, and the servant or workman cannot recover from the employer wages *pro ratâ*, unless the

(*k*) Parke, B., *Emmens* v. *Elderton*, *supra*; *Fewings* v. *Tisdal*, 1 Exch. 295; 17 L.J. Ex. 18; Erle, J., *Goodman* v. *Pocock*, 15 Q.B. 583; 19 L.J. Q.B. 410; *Yelland*, *Ex parte*, L.R. 4 Eq. 350; *Clarke*, *Ex parte*, L.R. 7 Eq. 550; 38 L.J. Ch. 562; *Logan*, *Ex parte*, 9 Eq. 149.

(*l*) *Hochster* v. *De La Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455; and see *Frost* v. *Knight*, L.R. 7 Ex. 111; 41 L.J. Ex. 78, *ante*, p. 129.

(*m*) *Dunn* v. *Reg.*, (1896) 1 Q.B. 116; 65 L.J. Q.B. 279; see *Gould* v. *Stuart*, (1896) A.C. 575; 65 L.J. P.C. 82.

(*n*) *Fewings* v. *Tisdal*, *supra*.

(*o*) *De Bernardy* v. *Harding*, 8 Exch. 822; 22 L.J. Ex. 340; *Prickett* v. *Badger*, 1 C.B. N.S. 296; 26 L.J. C.P. 33.

(*p*) *Goodman* v. *Pocock*, 15 Q.B. 576; 19 L.J. Q.B. 410.

contract has been rescinded or abandoned, or has been put an end to by the exercise of a power of defeasance vested in the parties; so that, if the servant dies in the middle of the year, his personal representatives will not be entitled to recover a proportionate part of the salary in respect of the time he actually served (*q*); and, if he is himself guilty of such misconduct as entitles the master to dissolve the contract and dismiss him from his service, he will lose all right to wages in respect of the portion of the year he has actually served (*r*). But, if the contract is put an end to by virtue of a power of defeasance vested in either of the parties by custom or by agreement, the wages are apportionable, and the servant must be paid *pro ratâ* up to the time of his departure. If, however, the contract is dissolved by mutual consent, and nothing is said of bygone services or wages not due at the time of the dissolution of the contract, no new contract arises by implication of law to pay wages *pro ratâ* (*s*).

Amount of wages recoverable—Deductions.—If the amount of wages to be paid has not been settled by the terms of the contract, there is an implied promise on the part of the employer to pay wages according to the customary and reasonable rate of remuneration. The master cannot deduct from wages money paid by him to effect the servant's cure from a dangerous illness (*t*). The wages in certain trades, moreover, cannot in general be lawfully paid otherwise than in the current coin of the realm (*ante*, p. 106).

Presumption of payment of wages.—If a servant has left a considerable time without claiming wages, the presumption is that all the wages have been paid (*u*). And, if it is usual, in the case of particular classes of servants and workmen, to pay the wages weekly or monthly, and many weeks or months have elapsed without any claim or demand on the part of the servant, there is a *primâ facie* presumption of payment (*x*).

Jurisdiction of County Court and of justices.—The Acts empowering justices to deal with disputes between various sorts of servants and their master having been repealed by the Conspiracy and

(*q*) *Plymouth* (*Countess*) v. *Throgmorton*, Salk. 65; 3 Mod. 153; *Cutter* v. *Powell*, 6 T.R. 326.

(*r*) Bro. Abr. fol. 57 (Laborer), pl. 58; *ib.* fol. 170, pl. 31; Apportionment, 26, pl. 13; Vin. Abr. (Apportionment), 8 and 9; *Spain* v. *Arnott*, 2 Stark. N.P. 256; *Huttman* v. *Boulnois*, 2 C. & P. 512; *Turner* v. *Robinson*, 5 B. & Ad. 789; *Ridgway* v. *Hungerford M. Co.*, 3 Ad. & E. 171; 4 L.J. K.B. 157; *Lilley* v. *Elwin*, 11 Q.B. 742; 17 L.J. Q.B. 132.

(*s*) *Lamburn* v. *Cruden*, 2 Sc. N.R. 534; 10 L.J. C.P. 121. *Aliter*, if there was no hiring for a year, or the master sends the servant away: *Bayley* v. *Rimmell*, 1 M. & W. 506; 5 L.J. Ex. 192; *Phillips* v. *Jones*, 1 Ad. & E. 333. See *Maw* v. *Jones*, 25 Q.B.D. 107; 59 L.J. Q.B. 542.

(*t*) *Sellen* v. *Norman*, 4 C. & P. 80.

(*u*) *Sellen* v. *Norman*, 4 C. & P. 81; *Evans* v. *Birch*, 3 Campb. 10; Parke, B., *Gough* v. *Findon*, 7 Exch. 50; 21 L.J. Ex. 58.

(*x*) Abbott, C.J., *Sellen* v. *Norman*, 4 C. & P. 81, n.

Protection of Property Act, 1875 (*y*), an Act was passed in the same session (*z*), giving power to county courts and justices to deal with them (*a*).

Breach of contract of service involving injury to others.—A wilful breach of contract to supply gas or water is subject to a penalty, and so is a wilful breach of any contract of service the probable consequence of which will be to do injury to others or their property (*b*).

Dissolution of contract by death of parties.—A contract of hiring and service is dissolved by the death of the master or servant (*c*). If the contract is made with a firm in partnership to serve the firm for a certain term, the contract is dissolved by the death of one of the partners (*d*).

Seamen's wages.—By the Merchant Shipping Act, 1894 (*e*), a summary remedy is provided for the recovery of seamen's wages, which are not to be dependent on the ship's earning freight (*f*), and, in case of the death of the seaman, are to be apportioned and paid in manner therein provided (*g*). The master is liable, the ship is liable, and the owner is liable for the mariner's wages (*h*). When seamen enter into articles to serve for a voyage or for a certain term, a contract by the master to pay increased wages for the services they are by the articles bound to render, is nugatory and void (*i*). A seaman's contract of service may be terminated either by final abandonment of the ship, or by discharge given by the master (*k*). By the Merchant Shipping Act, 1894 (*l*), in every contract of service between the owner of a ship and the master or any seaman, and in every instrument of apprenticeship, there is to be implied an obligation on the owner and master, that the owner, master, and agents, and every agent, shall use all reasonable means to insure the seaworthiness of the ship.

Contracts of apprenticeship.—When the employer exercises some trade, and it is made a term of the contract that he shall teach as well as employ and remunerate the servant for some specific period

(*y*) 38 & 39 Vict. c. 86, s. 17.

(*z*) 38 & 39 Vict. c. 90. On the interpretation of the statute, see the cases of *Warburton* v. *Heyworth*, 6 Q.B.D. 1; 50 L.J. Q.B. 137; *Grainger* v. *Aynsley*, 6 Q.B.D. 182; 50 L.J. M.C. 48; *Jackson* v. *Hill*, 13 Q.B.D. 618; *Great Northern Fishing Co.* v. *Edgehill*, 11 Q.B.D. 225.

(*a*) See also Employers' Liability Act, *ante*, p. 859.

(*b*) 38 & 39 Vict. c. 86, ss. 4, 5.

(*c*) *Farrow* v. *Wilson*, L.R. 4 C.P. 744; 38 L.J. C.P. 326; *Phillips* v. *Hull Alhambra Palace Co.*, (1901) 1 K.B. 59; 70 L.J. K.B. 26.

(*d*) *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L.J. Ex. 207. See 53 & 54 Vict. c. 39, s. 33.

(*e*) 57 & 58 Vict. c. 60, s. 164.

(*f*) Sect. 157.

(*g*) Sects. 169—181.

(*h*) *The Stephen Wright*, 12 Jur. 732.

(*i*) *Ante*, p. 4; *Harris* v. *Carter*, 23 L.J. Q.B. 295; 3 E. & B. 559.

(*k*) *The Warrior*, 1 Lush. 476.

(*l*) 57 & 58 Vict. c. 60, s. 458. See *Thompson* v. *Farrer*, 9 Q.B.D. 372; 51 L.J. Q.B. 534; *Hedley* v. *Pinkney & Sons' S.S. Co.*, (1894) A.C. 222; 63 L.J. Q.B. 419.

in return for the service rendered, the contract amounts to an apprenticeship. Every contract to serve on the one hand, and to employ and teach on the other, amounts to a contract of apprenticeship, and must be duly stamped (*m*). If there is an engagement on the part of the servant to serve and to learn, but no express or implied engagement on the part of the employer to *teach*, so that no action can be maintained upon the contract against the latter for neglecting to teach, the contract is a contract of hiring and service only, and not a contract of apprenticeship (*n*). It is not necessary that the words "to learn" and "to teach" should be used by the parties in framing their contract; for an agreement to take and maintain a person "after the manner of an apprentice" will constitute an apprenticeship. Nor need the word "apprentice" be used; for, wherever it appears to have been the intention of the parties that the one was to teach and the other to learn, the contract will be a contract of apprenticeship (*o*). As the contract is always made to last for more than one year, it must be authenticated by writing, signed by the party to be charged therewith (*ante*, p. 32). By 5 Eliz. c. 4, s. 25 (repealed), the binding of an apprentice for the purpose of exercising trades was required to be made by indenture; but now, by 54 Geo. 3, c. 96, s. 2, it is enacted that it shall be lawful for any person to take or retain or become an apprentice, though not according to sects. 25, 30, and 41 of the statute of Elizabeth, and that indentures, deeds, and agreements in writing entered into for that purpose, which would be otherwise invalid and ineffectual, shall be valid and effectual; but it is provided that the enactment shall not affect the immemorial customs of towns or bye-laws of corporations. An indenture of apprenticeship is sufficiently executed by the apprentice desiring a bystander to write his name for him opposite the seal, and by his then taking the deed and delivering it to his master (*p*). A contract of apprenticeship may be entered into with a corporation as master (*q*).

Rights and liabilities of parties to indentures of apprenticeship.—An infant above the age of fourteen, and unmarried, is by the custom of London responsible upon covenants contained in indentures of apprenticeship executed by him just the same as if he were of full age (*r*); but he is by the common law, where the apprenticeship is not within the city of London, exempt from all liability *ex contractu*, by reason of his minority (*ante*, p. 376) (*s*).

(*m*) *R.* v. *Nether Knutsford*, 1 B. & Ad. 726.

(*n*) *R.* v. *Shinfield*, 14 East, 541; *R.* v. *Burbach*, 1 M. & S. 370.

(*o*) *R.* v. *Wishford*, 5 N. & M. 540.

(*p*) *R.* v. *Longnor*, 4 B. & Ad. 649; 2 L.J. M.C. 62.

(*q*) *Burnley Equitable Society* v. *Casson*, (1891) 1 Q.B. 75; 60 L.J. M.C. 59.

(*r*) *Burton* v. *Palmer*, 2 Bulstr. 192.

(*s*) As to his liability on a covenant by him in the indenture to pay the premium, see Co. Litt. 172, A.; *Walter* v. *Everard*, (1891) 2 Q.B. 369; 60 L.J. Q.B. 738.

Therefore it is that his friends ordinarily become bound for his faithful service and good conduct during the period of the apprenticeship. The parties who covenant for the continued service and good conduct of an infant apprentice are not responsible upon their covenants for trifling instances of misconduct, such as staying out on Sunday evenings half-an-hour beyond the time allowed (*t*), or for temporary absence and disobedience of orders, unattended by substantial injury to the master. But for all gross misconduct, and repeated or lengthened absence producing substantial injury to the master, they will be held responsible; and, if an infant apprentice avoids the contract on his coming of age, and refuses to continue in the service of his master, they are bound to make good whatever damage is sustained by the latter by reason of such repudiation of the contract (*u*). The sickness of the apprentice, or his incapacity to serve and to learn by reason of ill-health or an accident, does not discharge the master from his covenant to provide for him and to maintain him, inasmuch as the latter takes him for better and for worse, and must minister to his necessities in sickness as well as in health (*x*). If the master has covenanted to teach three trades, and ceases to carry on one of them, he is guilty of a breach of contract, and the apprentice may, if he pleases, refuse to continue to serve (*y*).

Profits acquired by a servant or apprentice in the course of or in connection with his service belong to the master. Where the apprentice of a waterman had been impressed and put on board a King's ship, where he earned two tickets, it was held that the tickets belonged to the master (*z*).

Where the contract is silent as to the place where the trade is to be carried on, there is an implied stipulation that the contract is to be performed at the place where the business was carried on at the date of the indenture (*a*).

Misconduct of apprentice—Dissolution of contract.—The same amount of misconduct which, in the case of a contract of hiring and service, would authorise the master to dissolve the contract and discharge the servant, will not release him from liability upon his covenant in an indenture of apprenticeship (*b*), unless the contract in express terms gives the master power to dismiss the apprentice (*c*). But, if the apprentice is guilty of such an

(*t*) *Wright* v. *Gihon*, 3 C. & P. 583.
(*u*) *Cuming* v. *Hill*, 3 B. & Ald. 59.
(*x*) *R.* v. *Hales Owen*, 1 Str. 99; *Reg.* v. *Smith*, 8 C. & P. 153.
(*y*) *Eden* v. *Topp*, 6 Exch. 424; 20 L.J. Ex. 241.
(*z*) *Barber* v. *Dennis*, 6 Mod. 69; *Anon.*, 12 Mod. 415.
(*a*) *Eaton* v. *Western*, 9 Q.B.D. 636; 52 L.J. Q.B. 41.
(*b*) *Winstone* v. *Lynn*, 1 B. & C. 460; 1 L.J. (O.S.) K.B. 126; *Wise* v. *Wilson*, 1 C. & K. 669; *Phillips* v. *Clift*, 4 H. & N. 168; 28 L.J. Ex. 153.
(*c*) *Westwick* v. *Theodor*, L.R. 10 Q.B. 224; 44 L.J. Q.B. 110.

amount of misconduct as renders it impracticable for the master to maintain, employ, and teach him, according to the terms of the indentures, the master cannot be sued for neglecting to perform his covenants in that behalf, inasmuch as the capability and willingness of the apprentice to be instructed, maintained, and provided for by the master are naturally conditions precedent to the liability of the latter upon such covenants (*d*). If the apprentice deserts the master's service and enlists in the army or contracts another relation which disables him from lawfully returning to his master, the latter is not bound to receive him back and instruct him if he returns (*e*). "By the custom of London it is a sufficient cause for a master to turn away his apprentice if he frequents gaming houses," although gaming may not be expressly prohibited by the indentures (*f*). If the fulfilment of the contract has not been prevented by the wrongful act of the master, the latter is not bound to refund any portion of the premium he has received (*g*). The indentures of apprenticeship of an infant apprentice may be avoided by the infant, so far as regards his own personal liability on the contract, on his coming of age; and the master must trust for the continuance of the service thereunder to the covenants of those who engage for the infant, unless the binding is under the authority of an Act of Parliament (*h*). The contract may also be dissolved by cancelling the indentures, or by giving them up with the consent of all parties *animo cancellandi;* likewise by the death of the master or of the apprentice (*i*), or by the bankruptcy of the master (*k*), or by the dissolution of the master's firm (*l*). If the master dies during the term, his representatives are not bound to return any part of the premium, as there is only a partial failure of consideration (*m*); and, if the apprentice becomes permanently ill, the covenant that he shall serve during the term is discharged (*n*).

Discharge by Court of Summary Jurisdiction.—The court has the same powers in case of a dispute between a master and apprentice as in a case between employer and workman, and as if the instrument of apprenticeship were a contract between employer and workman, and may make an order directing the apprentice to

(*d*) *Mercer* v. *Whall*, 5 Q.B. 447; 14 L.J. Q.B. 267; *Rayment* or *Raymond* v. *Minton*, L.R. 1 Ex. 244; 35 L.J. Ex. 153; *Brown* v. *Banks*, 3 Giff. 190; *Learoyd* v. *Brook*, (1891) 1 Q.B. 431; 60 L.J. Q.B. 373; where the apprentice was an habitual thief.

(*e*) *Hughes* v. *Humphreys*, 6 B. & C. 680; 5 L.J. (O.S.) K.B. 270.

(*f*) *Woodroffe* v. *Farnham*, 2 Vern. 290.

(*g*) *Cuff* v. *Brown*, 5 Pr. 297.

(*h*) *Davis*, *Ex parte*, 5 T. R. 715; *Gill*, *Ex parte*, 7 East, 376.

(*i*) *Baxter* v. *Burfield*, 2 Str. 1266; 32 Geo. 3, c. 57.

(*k*) 46 & 47 Vict. c. 52, s. 41 (1).

(*l*) *Eaton* v. *Western*, *ante*, p. 869.

(*m*) *Whincup* v. *Hughes*, L.R. 6 C.P. 78; 40 L.J. C.P. 104; *Ferns* v. *Carr*, 28 Ch.D. 409; 54 L.J. Ch. 478 (clerk articled to solicitor).

(*n*) *Boast* v. *Firth*, L.R. 4 C.P. 1; 38 L.J. C.P. 1.

perform his duties, and, if he neglects, imprison him or rescind the instrument of apprenticeship, and order the whole or part of any premium to be repaid (*o*).

Damages for refusing to employ, and for wrongful dismissal.—If a master or employer renounces the contract he has made with a workman or servant, and deprives him of the means of earning the stipulated remuneration, or refuses to take him into his employ, the jury, in assessing the damages, are justified in looking to all that has happened, or is likely to happen, to increase or mitigate the loss of the plaintiff down to the time of trial (*p*). If an action is brought by a domestic servant for a dismissal without the customary month's notice, a month's wages are recoverable as the agreed damages (*ante*, pp. 849—853, 865). If the contract is not defeasible by giving a month's notice, but is for a year's service, and the defendant is improperly discharged before the end of the year, he may recover for the work actually done by him up to the time of his dismissal, and for the damage he has sustained by being prevented from continuing his services and earning the stipulated hire (*q*). The action may be brought as soon as the dismissal takes place; and the measure of damages is an indemnity to the plaintiff for the loss he sustains by the breach. If he has found other equally eligible employment, the damages would be small; but, if not, they might far exceed the salary agreed to be paid (*r*); and it is his duty to use diligence to find such employment (*s*). Where the plaintiff's service was terminated by the dissolution of partnership of his employers, but the remaining partners offered him employment on similar terms, which he refused, he was held entitled to recover nominal damages only (*t*).

Damages against apprentices.—Where an action was brought upon a covenant in an apprenticeship deed to recover damages for the loss of the services of the apprentice, it was held that damages were recoverable only up to the time of action brought, as the contract continued in force, and the apprentice might still be compelled to serve (*u*).

Title to clothes by hiring and service.—Where the plaintiff had been hired as a servant by the defendant, at thirty guineas a year and a suit of clothes, and had, on entering the service, been provided with the clothes, it was held that they did not become his

(*o*) 38 & 39 Vict. c. 90, s. 6; *Finley* v. *Jowle*, 12 East, 248; *Gray, In re*, 2 D. & L. 539; 14 L.J. M.C. 26.

(*p*) *Hochster* v. *De La Tour*, 2 E. & B. 678; 22 L.J. Q.B. 455; *Lake* v. *Campbell*, 4 L.T. 582.

(*q*) *Ante*, p. 865; *Cutter* v. *Powell*, 2 Smith's L.C. 1 (ed. 10).

(*r*) *Emmens* v. *Elderton*, 4 H.L.C. 645; 13 C.B. 495.

(*s*) *Beckham* v. *Drake*, 2 H.L.C. 606; *Emmens* v. *Elderton*, *supra*.

(*t*) *Brace* v. *Calder*, (1895) 2 Q.B. 253; 64 L.J. Q.B. 582.

(*u*) *Lewis* v. *Peachey*, 1 H. & C. 518; 31 L.J. Ex. 496.

property, and that he could not sue his master for detaining them until he had served a year (*x*).

SECTION III.

PRINCIPAL AND AGENT.

Agencies and commissions.—Whenever one man undertakes the management of the business of another without hire or reward, and enters upon his task, the contract between the parties is, as we have before seen, a contract of mandate, or a gratuitous commission (*ante*, p. 795). When the person employed is to be paid for his services, the contract is a contract for the letting and hiring of work and labour, care and attention, and belongs to the class *locatio operis faciendi* (*ante*, p. 799). If the services of the party are hired for a term, the contract is a contract of hiring and service (*ante*, p. 847). In either case the party employing is the principal, and the person employed the agent. If a commission-agent is engaged to sell goods for the principal, he paying him a certain sum per quarter, it does not necessarily follow that there is a contract of hiring and service between the parties (*a*).

In all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employer (*b*). Thus, interest made by an agent, by the use of his principal's money, belongs to the principal (*c*); and not only interest, but every other sort of profit or advantage, clandestinely derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. So that, if an agent who has purchased goods according to order, sells them again to advantage with the view of appropriating the gain to himself, although he should have answered the loss, if any; yet his employer is entitled to the profits (*d*). Thus, where the captain of a ship, in letting it to

(*x*) *Crocker* v. *Molyneux*, 3 C. & P. 470.
(*a*) *Butterfield* v. *Marler*, 3 C. & K. 163.
(*b*) Story on Agency, s. 211.
(*c*) *Rogers* v. *Bochin*, 2 Esp. 702.
(*d*) Paley on Principal and Agent, p. 51.

Government for six months, had stipulated with the Government officer by whom the ship was taken up, that a sum of money should be paid to him for his own benefit, in addition to the freight, it was held that the money belonged to the shipowner (*e*). So where the master of a ship in a foreign port claimed to retain for his own benefit the premium upon a bill drawn upon England on account of the ship, on the ground that there had been a usage for masters of ships to appropriate such premiums to their own use, it was held that the money belonged to the owner, and not to the captain (*f*). Where an army agent and contractor, who had been employed by the plaintiff to provide a reasonable outfit for her son, debited the plaintiff with the full amount of the invoice prices charged by the tradesman supplying the outfit, though discount had been allowed him in each instance, it was held that the plaintiff was entitled to the discount (*g*). Where the defendant represented to the plaintiff that he could procure him some shares in a company at 3*l.* a share, and transferred certain shares to the plaintiff, and was paid 3*l.* a share, and the plaintiff subsequently discovered that the defendant was himself the owner of the shares, and had lately purchased them for 2*l.* a share, the defendant was ordered to pay back the difference in the price (*h*). Where the plaintiff authorised the defendant, as his broker, to negotiate for the purchase of a ship, and the defendant, without the knowledge of the plaintiff, received 225*l.* from the vendor out of the purchase-money, it was held that the plaintiff was entitled to recover the 225*l.* from the defendant (*i*). But where a shipowner employed merchants to insure for him, and they charged him full premiums, but were allowed discount by the underwriters beyond brokerage, it was held that, as the allowance was usual, and the shipowner appeared to have accepted the terms, he could not afterwards recover the discount (*k*).

Revocation of authority.—If no term of service has been expressly or impliedly agreed upon, the employer may at any time dispense with the future services of the agent, and revoke the authority delegated to him, so far as it relates to things to be done and remaining unexecuted. If a party is engaged as a "permanent attorney," the word "permanent" does not confer any durable or special appointment as attorney, and the principal is not precluded from withdrawing the retainer; but if he is retained at a yearly

(*e*) *Thompson* v. *Havelock*, 1 Campb. 527.

(*f*) *Diplock* v. *Blackburn*, 3 Campb. 43.

(*g*) *Turnbull* v. *Garden*, 38 L.J. Ch. 331.

(*h*) *Kimber* v. *Barber*, L.R. 8 Ch. 56.

(*i*) *Morison* v. *Thompson*, L.R. 9 Q.B. 480; 43 L.J. Q.B. 215.

(*k*) *Baring* v. *Stanton*, 3 Ch.D. 502; *G. W. Ins. Co.* v. *Cunliffe*, L.R. 9 Ch. 525; 43 L.J. Ch. 741.

salary, he is, in general, entitled to damages, if he is dismissed before the end of the year (*l*). Things actually done by the agent in the execution of his commission will, of course, be binding upon the principal; but the agent cannot, after his authority has been countermanded, enter, as between himself and the principal, into any fresh transaction. If the principal furnishes his agent with a sum of money, to be expended in the purchase of property, the principal may at any time, before the purchase is made and the money expended, revoke the authority, and require the money to be repaid to him (*m*). If goods are intrusted to a commission agent for sale, the principal may, at any time before a sale has been made, require the goods to be returned to him (*n*); and the agent has no right to sell contrary to the express directions or instructions of his employer, for the purpose of repaying himself his advances (*o*). But the right to stop money intrusted to an agent to be paid to a third party, or to stop a sale, or revoke the orders or authority given, is always subject to this limitation, that the agent is merely an agent, and is not himself interested in, or responsible for, the payment of the money according to the directions he received when it was placed in his hands (*p*), and has not done anything to render himself personally liable to the third party in consequence of the orders of the principal (*q*). But mere advances made by a factor do not give him any rights in derogation of the right of the principal to give directions as to the time and manner of sale, unless such rights are conferred upon the factor by some express agreement, or by a known usage of trade (*r*). If an agent agrees to act for a firm in partnership for a term of years, the contract is dissolved by the death of one of the partners during the term (*s*).

When agent's authority is irrevocable.—An authority coupled with an interest cannot be revoked. If a principal employs an agent to do something which by law involves the agent in a legal liability, the principal cannot draw back and leave the agent to bear the liability at his own expense, and even though the contract cannot be enforced at law, yet if, as a matter of business, the agent would be liable to lose character or customers, or to suffer serious pecuniary inconvenience if he did not carry out the contract into

(*l*) *Emmens* v. *Elderton*, 13 C.B. 495; 4 H.L.C. 624.

(*m*) *Fletcher* v. *Marshall*, 15 M. & W. 755, 763.

(*n*) *Raleigh* v. *Atkinson*, 6 M. & W. 670; 9 L.J. Ex. 206.

(*o*) *Smart* v. *Sandars*, 3 C.B. 380; 16 L.J. C.P. 39; *Chinnock* v. *Sainsbury*, 30 L.J. Ch. 409.

(*p*) *Yates* v. *Hoppe*, 9 C.B. 541; 19 L.J. C.P. 180.

(*q*) *M'Ewen* v. *Woods*, 11 Q.B. 13; 17 L.J. Q.B. 207.

(*r*) *De Comas* v. *Prost*, 2 Moo. P.C. N.S. 158.

(*s*) *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L.J. Ex. 207. See 53 & 54 Vict. c. 39. s. 33.

which he has entered on behalf of his principal, the latter will be taken to have impliedly contracted to indemnify him from the consequences which would ensue in the ordinary course of business from the step which he has taken (*t*). Where a debtor handed to his creditor a power of attorney authorising him to sell certain lands of the debtor, and pay the debt out of the proceeds of the sale, it was held that this power of attorney could not be revoked (*u*).

Accounts.—It is the duty of an agent to keep regular accounts and vouchers (*x*); and, if he refuses to account, after demand is made, he will be responsible in damages (*y*). If goods have been intrusted to an agent to sell, and he renders no account of them, it will be presumed *primâ facie* that they have been sold, and the money received (*z*). An agent is bound to produce to his principal the accounts kept for him, and if the principal is abroad, the agent must produce them to any properly appointed agent of the principal, but the principal cannot insist on their production to an improper person (*a*). If an agent mixes up his principal's property with his own, he must show clearly what part of the property belongs to him; and, if he fails in doing so, it will be treated as the property of the principal (*b*). An agent who stands in a fiduciary relation to his principal cannot set up the Statute of Limitation in bar of a suit for an account by his principal (*c*).

Liabilities of brokers, factors, and commission agents to their principals.—All persons are brokers who contrive, make, and conclude bargains and contracts between merchants and tradesmen, for which they have a "fee or reward" (*d*). Every broker and commission agent who is employed to make purchases, or to sell on behalf of his principal, impliedly promises to execute the commission intrusted to him in a careful manner, and to obey the directions he receives. If he is ordered to purchase an article of first-rate quality, and he buys an inferior commodity, he is guilty of a breach of contract, and is responsible to the principal in damages (*e*). He is bound to exercise his discretion to the best advantage for the benefit of his principal, to render just accounts, and to keep the property of his principal unmixed with his own

(*t*) *Seymour* v. *Bridge*, 14 Q.B.D. 460; 54 L.J. Q.B. 347.

(*u*) *Gaussen* v. *Morton*, 10 B. & C. 731; 8 L.J. (O.S.) K.B. 313; *Clerk* v. *Laurie*, 2 H. & N. 200; 26 L.J. Ex. 317.

(*x*) Romilly, M.R., *Stainton* v. *Carron Co.*, 24 Beav. 353; 27 L.J. Ch. 89.

(*y*) *Topham* v. *Braddick*, 1 Taunt. 575.

(*z*) *Hunter* v. *Welsh*, 1 Stark. 224.

(*a*) *Dadswell* v. *Jacobs*, 34 Ch.D. 278; 56 L.J. Ch. 233.

(*b*) Story's Eq. Jur. s. 468.

(*c*) *Burdick* v. *Garrick*, L.R. 5 Ch. 233; 39 L.J. Ch. 369; *Bell, In re*, 34 Ch.D. 462; 56 L.J. Ch. 307; *Lyell* v. *Kennedy*, 14 App.Cas. 437; 59 L.J. Q.B. 268.

(*d*) *Milford* v. *Hughes*, 16 M. & W. 177; 16 L.J. Ex. 40.

(*e*) *Mainwaring* v. *Brandon*, 2 Moore, 125.

property, or the property of other parties (*f*). He has, in general, an implied authority to sell at such time and for such prices as he may think best for his employer; he may sell on credit, if it is customary so to do, or if he acts under a *del credere* commission; and he must account for the produce of all sales effected by him when called upon so to do (*g*). He cannot himself become the purchaser of the property intrusted to him to sell, unless he deals for it with the principal, openly and fairly, "at arm's length," and after a full disclosure of everything he knows concerning it (*h*); nor can he purchase his own goods for his principal (*i*). Where an agent employed to sell land sold it to a company in which he was interested as a shareholder and director, it was held that he was entitled to no commission from his employer in respect of the sale (*k*). If money has been paid by a principal to his brokers to enable them to carry out a contract which he had authorised, and which, at the time of such payment, he believed them to have entered into on his account, whereas, in truth, the authorised contract had never been made, the principal may recover the money from the agents (*l*). A mere forwarding agent is not bound to see whether the quality of goods, which he is employed to ship or to forward, corresponds with a contract which he has been instrumental in negotiating (*m*).

Liability of principals to brokers, factors and agents.—The principal is not bound by the unauthorised acts of his agent, but he is bound where the authority is pursued, or so far as it is distinctly pursued. But the question may often arise whether, in fact, the agent has exceeded what may be deemed the substance of his authority. Where the principal ordered five hundred tons of sugars, and the agent could only get, from several different persons, four hundred tons, it was held that the principal was bound to accept the four hundred tons (*n*).

Del credere *commissions.*—When the agent, in consideration of an additional commission, guarantees to his principal the payment of all debts that become due through his agency to the principal, he is said to act under a *del credere* commission, a phrase derived

(*f*) *Clarke* v. *Tipping*, 9 Beav. 284; *Thom* v. *Bigland*, 8 Exch. 725; 22 L.J. Ex. 243; *Gray* v. *Haig*, 20 Beav. 238.

(*g*) *Crosskey* v. *Mills*, 1 C. M. & R. 298; 3 L.J. Ex. 297; *Boorman* v. *Brown*, 3 Q.B. 515, 527; 11 L.J. Ex. 437; 11 Cl. & F. 1; *Boden* v. *French*, 10 C.B. 886; 20 L.J. C.P. 143.

(*h*) *Murphy* v. *O'Shea*, 2 Jones & Lat. 422; *Trevelyan* v. *Charter*, 9 Beav. 140.

(*i*) *Bentley* v. *Craven*, 18 Beav. 76; *Cape Breton Co., In re*, 29 Ch.D. 795; 54 L.J. Ch. 822. See *Ladywell Mining Co.* v. *Brookes*, 35 Ch.D. 400; 56 L.J. Ch. 684; *Cavendish-Bentinck* v. *Fenn*, 12 App. Cas. 652; 57 L.J. Ch. 552.

(*k*) *Salomons* v. *Pender*, 3 H. & C. 639; 34 L.J. Ex. 95.

(*l*) *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L.J. Ex. 142.

(*m*) *Zuilchenbart* v. *Alexander*, 1 B. & S. 234; 30 L.J. Q.B. 254.

(*n*) *Ireland* v. *Livingston*, L.R. 5 H.L. 395; 41 L.J. Q.B. 201; *Johnston* v. *Kershaw*, L.R. 2 Ex. 82; 36 L.J. Ex. 44.

from the Italian word *credere*, to trust (*o*). Every person accepting and acting under a commission of this sort for the sale of goods makes himself responsible for the solvency of his vendees, and becomes absolutely liable to the principal for the payment of the price of the goods he sells (*p*). Factors and commission-agents for sale, who receive and sell goods for foreign principals, or for parties residing at a distance, usually conduct their agency under a *del credere* commission, guaranteeing the solvency of the buyers or undertaking for the due payment of the parts realised on sales effected by them. Their contract, however, is not a contract or promise, as we have seen (*ante*, p. 30), to answer for the debt or default of another within the meaning of the Statute of Frauds, but an original independent contract, and only another form of selling goods (*q*). Where a factor having a *del credere* commission has made advances to his principal, and has sold goods on account of the latter, he cannot, whether he has received the proceeds of the sale or not, recover from the principal so much of the advances as is covered by the price of the goods, unless there is an express agreement between them, making the advances payable immediately, and postponing the time of payment of the price of the goods (*r*). A person to whom goods are sent to be sold, and who is at liberty to sell them at any price he pleases, he paying a fixed price for them to the owner, is not an agent (*s*).

Liabilities of insurance-brokers to their principals.—If an insurance-broker neglects to attend to the orders of his principal, or is guilty of misconduct and negligence in effecting an assurance, he will be responsible for all the damage that has been sustained by his employer, and may be clothed with all the responsibilities which would have devolved upon the underwriter had the insurance been regularly effected. He may be compelled to pay to his principal the full sum ordered to be insured, or a total or average loss, as the case may be; but, when he is proceeded against for losses by perils which he ought to have insured against, he is, of course, entitled to every benefit and objection of which the underwriter himself could have taken advantage if the assurance had been duly effected, such as fraud, deviation, non-compliance with warranties, or the like (*t*). He is bound, moreover, to exercise a reasonable and proper amount of care, skill, and judgment in the execution of his duty (*u*). If a merchant abroad has effects in the

(*o*) *Grove* v. *Dubois*, 1 T.R. 112.
(*p*) *Mackenzie* v. *Scott*, 6 Bro. P.C. 291.
(*q*) *Couturier* v. *Hastie*, 5 H.L.C. 673; 25 L.J. Ex. 253; *Wickham* v. *Wickham*, 2 Kay & J. 478.
(*r*) *Graham* v. *Ackroyd*, 10 Hare, 202.
(*s*) *White, Ex parte*, L.R. 6 Ch. 397; 40 L.J. Bankr. 73.
(*t*) *Park* v. *Hammond*, 2 Marsh. 191; *Mallough* v. *Barber*, 4 Campb. 150; *Turpin* v. *Bilton*, 6 Sc. N.R. 447; 12 L.J. C.P. 167.
(*u*) *Chapman* v. *Walton*, 10 Bing. 57;

hands of his correspondent here, he has a right to expect that the latter will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases; and, although he has no effects, yet, if the course of dealing between them be such that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless he receives notice to the contrary. If the merchant abroad sends bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction (*x*). If the broker finds that he is unable to effect an insurance upon the terms offered by the principal, it is his duty to give the latter notice of the fact. If he makes the insurance on terms different from those prescribed, he will be responsible to the principal (*y*). But, if insufficient orders are sent, and the agent or broker does all that is usual to get the insurance effected, that is sufficient (*z*). The insurance-broker is agent for both parties: first, for the assured, in effecting the policy, and in everything that is to be done in consequence of it; then he is agent for the underwriter as to the premium, but for nothing else. If he neglects to pay the premium to the underwriter, the latter may maintain an action for its recovery, unless circumstances have occurred entitling the insured to a return of the premium, in which case it is the duty of the broker, if he has notice thereof, to retain the money and return it to the insurer (*a*). The broker and not the assured is liable to the underwriter for the premium on a policy of marine insurance (*b*). If he has acted as the agent of the underwriter in paying the loss upon the policy, the payment by the broker is a payment by the underwriter himself (*c*). It is the usage amongst merchants, insurance-brokers, and underwriters, in the city of London, to set off the general balance of accounts between the broker and the underwriter, at the time of the loss, against the loss, and for the broker then to debit himself to that amount in his account with the assured, and the underwriter is then considered to be discharged of his debt to the assured; and, when the assured is cognizant of this course of dealing, and assents to it, the passing of the accounts between the broker, the underwriter, and the

2 L.J. C.P. 213; *Cahill* v. *Dawson*, 26 L.J. C.P. 253; 3 C.B. N.S. 106.

(*x*) *Smith* v. *Lascelles*, 2 T.R. 189; *Corbett* v. *Gordon*, 3 Campb. 472.

(*y*) *Callender* v. *Oelrichs*, 6 Sc. 761.

(*z*) *Smith* v. *Cologan*, 2 T.R. 188, n.

(*a*) *Shee* v. *Clarkson*, 12 East, 507.

(*b*) *Universo Ins. Co.* v. *Marine Ins. Co.*, (1897) 2 Q.B. 93; 66 L.J. Q.B. 564.

(*c*) *Edgar* v. *Bumstead*, 1 Campb. 411; *Jameson* v. *Swainstone*, 2 *ib.* 547, n.

assured, operates as a payment to the latter, and as an extinguishment of the underwriter's debt (*d*). The broker now keeps two accounts with underwriters, called the credit and the cash accounts, into which the premiums received from the principals of the broker go, and the balance on which is due from the broker to the underwriter, and in no way from the individual assured, whose particular premium has gone into that account (*e*). The authority given to a broker when he is to effect a policy of insurance does not extend to warrant him in cancelling it (*f*).

Share-brokers and stock-brokers.—If a share-broker, directed to buy shares, buys what is ordinarily bought and sold in the stock market as shares, he has fulfilled his commission, and cannot be made responsible for the fraud or misconduct of parties who may have issued the shares without authority. There is no warranty or undertaking, either on the part of a broker employed to buy shares or scrip, or on the part of the principal who employs him, that the article, which merely passes through the broker's or the principal's hands, is anything more than what it purports on the face of it to be, and what it is generally understood to be in the market (*g*). Every principal who employs a stock-broker to transact business for him in the stock market is bound by the rules of the Stock Exchange and the established mode of transacting business, whether he knew of the usage or not (*h*), unless the rules are unreasonable (*i*). If a share-broker sells pursuant to his authority, and the principal neglects to deliver the shares, and the broker is consequently obliged to buy other shares in the market, he is entitled to recover from his employer all the damages, costs, and expenses, besides the customary remuneration for his trouble and loss of time (*k*). And, generally, whenever the share-broker has been compelled by the custom of the Stock Exchange to make good the default of the principal, he has a remedy over against the latter. Therefore, if he pays calls on shares which he has purchased for his principal, he may recover the amount from the

(*d*) *Stewart* v. *Aberdein*, 4 M. & W. 211; 7 L.J. Ex. 292.

(*e*) As to broker's accounts, see *Beckwith* v. *Bullen*, 8 E. & B. 683; 27 L.J. Q.B. 162.

(*f*) *Xenos* v. *Wickham*, L.R. 2 H.L. 296; 36 L.J. C.P. 313.

(*g*) *Lamert* v. *Heath*, 15 M. & W. 486; 15 L J. Ex. 297; *Mitchell* v. *Newhall*, 15 M. & W. 308; 15 L.J. Ex. 292; *Westropp* v. *Solomon*, 8 C.B. 373; 19 L.J. C.P. 1.

(*h*) *Sutton* v. *Tatham*, 10 Ad. & E. 27; *Bowlby* v. *Bell*, 3 C.B. 284; 16 L.J. C.P. 18; *Pollock* v. *Stables*, 12 Q.B. 774; 17 L.J. Q.B. 352; *Coles* v. *Bristowe*, L.R. 4 Ch. 3; 38 L.J. Ch. 81; *Nickalls* v. *Merry*, L.R. 7 H.L. 530; 45 L.J. Ch. 575; *Loring* v. *Davis*, 32 Ch. D. 625; 55 L.J. Ch. 725; see, however, *ante*, p. 65. As to Stock Exchange Rules not being binding upon outside creditors, see *Saffery*, *Ex parte*, 3 App.Cas. 213; 47 L.J. Bankr. 11; *Grant*, *Ex parte*, 13 Ch.D. 667.

(*i*) *Pearson* v. *Scott*, 9 Ch.D. 198; 47 L.J. Ch. 705, and *Robinson* v. *Mollett*, L.R. 7 H.L. 802; 44 L.J. C.P. 362, *ante*, p. 65; *Davis* v. *Howard*, 24 Q.B.D. 691; 59 L.J. Q.B. 133. See *Forget* v. *Baxter*, (1900) A.C. 467; 69 L.J. P.C. 101.

(*k*) *Bayliffe* v. *Butterworth*, 1 Exch. 425; 17 L.J. Ex. 78.

latter (*l*). Where a person buys shares on the Stock Exchange through his broker from a jobber and has them carried over to a future settling day, and in the meantime his broker has been declared a defaulter on the Stock Exchange, a relationship of buyer and seller is established between him and the jobber; and where such a buyer, on his broker's default, refuses the shares at "hammer" price and repudiates the transaction, the jobbers are entitled to sell out the shares and recover from him the whole difference between the price realised and the price at which they were carried over, and are not restricted to the difference between that price and the "hammer" price (*m*). Where a stockbroker who is instructed by a client to carry over for him a specified number of shares for a particular account, purchases in his own name from a jobber a larger number of shares, appropriating in his books the specified number to the client, and the remainder to another person, no such contractual relation is established between the seller of the shares and the broker's client as will entitle the former, upon the failure of the broker, to maintain an action against the client for damages for refusing to accept the shares so appropriated to him (*n*). A broker who, on the refusal of a client to take up shares purchased on his behalf, goes into the market and sells the shares at the proper market price to a jobber, and as part of the same transaction repurchases them from the jobber at a profit to himself, must account to the client for such profit by reason of the fiduciary relation of principal and agent existing between him and his client (*o*). Where a stock-broker wrongfully closes a customer's account which he has agreed to keep open to a certain date, the measure of damages for which he is liable is the highest price the stocks would have realized between the date when he closed the account and the date to which he had agreed to keep it open (*p*).

Solicitors are, as we have already seen, bound, in common with all professional men, to exercise a reasonable degree of care and skill in the conduct and management of the business intrusted to them to execute (*ante*, p. 823). Gifts and purchases by a

(*l*) *Bayley* v. *Wilkins*, 7 C.B. 886; 18 L.J. C.P. 273; *Taylor* v. *Stray*, 2 C.B. N.S. 175; 26 L.J. C.P. 287. See *Davis* v. *Howard*, 24 Q.B.D. 691; 59 L.J. Q.B. 133.

(*m*) *Anderson* v. *Beard*, (1900) 2 Q.B. 260; 69 L.J. Q.B. 610; *Levitt* v. *Hamblet*, (1901) 2 K.B. 53; 70 L.J. K.B. 520; as to liability of defaulting broker to jobber for balance of differences between contract and hammer prices, see *Ratcliff* v. *Mendelssohn*, (1901) 2 K.B. 844; 70 L.J. K.B. 969.

(*n*) *Beckhusen* v. *Hamblet*, (1900) 2 Q.B. 18; 69 L.J. Q.B. 431; dismissed on the facts in the C.A., (1901) 2 K.B. 73; 70 L.J. K.B. 600. As to lumping several orders in one contract, see *Scott* v. *Godfrey*, (1901) 2 K.B. 276; 70 L.J. K.B. 954.

(*o*) *Erskine, Oxenford & Co.* v. *Sachs*, (1901) 2 K.B. 504; 70 L.J. K.B. 978; *Macoun* v. *Erskine, Oxenford & Co.*, (1901) 2 K.B. 493; 70 L.J. K.B. 973.

(*p*) *Per* Wills, J., *Michael* v. *Hart*, (1901) 2 K.B. 867; 70 L.J. K.B. 1000; this point was left open in the C.A., (1902) 1 K.B. 482; 71 L.J. K.B. 265.

solicitor from his client are (*ante*, p. 823) invalid, unless the confidential relationship has been determined as regards the particular transaction, and some disinterested advice has been taken and acted upon by the client (*q*); but the validity of the purchase cannot be impeached by a stranger (*r*). If a solicitor discontinues proceedings in an action which he has commenced by direction of his client, he is bound to show a reasonable ground for such discontinuance; and he must, in general, give due notice to his client of his intention to discontinue; and, if he improperly throws up a cause, he has no right to be paid *pro ratâ* for his work and labour (*s*). If a cause which he is retained to conduct fails through his negligence, he cannot recover from his client money expended by him subsequently to such negligence. "If he is not entitled to charge for his labour, he cannot charge for his money" (*t*). A solicitor is responsible to the client for all sums received by him in the conduct of the business intrusted to him, and must render an account thereof when called upon so to do. Where, on a sale of real estate, the solicitor of the vendor receives the deposit as agent of the vendor, he has not, in the absence of any stipulation to that effect, any duty, like that of an auctioneer, to the vendee, but must pay it over to his principal, the vendor, on demand (*u*). He is responsible also, as we have already seen, for the safe investment of all moneys intrusted to, and accepted by, him for investment (*ante*, p. 796). But the town agent of a country solicitor is not responsible to the clients of the latter for money received whilst conducting their causes or legal proceedings. The privity of contract is solely between the town agent and his principal and employer, the country solicitor; he knows nothing of the clients of the latter, and is bound to account only to his principal (see *post*, p. 892). But the court will, as before mentioned, sometimes interfere summarily for the protection of the client. The solicitor must, in general, one month before action against his client, deliver his bill of costs, signed by him, to his client (*x*); and, when his bill has been paid, he is bound to deliver up, if called upon, all documents in his hands belonging to his client, in good order and properly arranged (*y*).

(*q*) *Holman* v. *Loynes*, 4 De G. M. & G. 270; 23 L.J. Ch. 529; *Simpson* v. *Lamb*, 7 E. & B. 84; 26 L.J. Q.B. 121; *Gibbs* v. *Daniel*, 4 Giff. 1; *Davis* v. *Freethy*, 24 Q.B.D. 519; 59 L.J. Q.B. 318.

(*r*) *Knight* v. *Bowyer*, 26 L.J. Ch. 769.

(*s*) *Nicholls* v. *Wilson*, 11 M. & W. 106; 12 L.J. Ex. 266; *Underwood* v. *Lewis*, (1894) 2 Q.B. 306; 64 L.J. Q.B. 60.

(*t*) *Lewis* v. *Samuel*, 8 Q.B. 685; 15 L.J. Q.B. 218.

(*u*) *Edgell* v. *Day*, L.R. 1 C.P. 80; 35 L.J. C.P. 7.

(*x*) 6 & 7 Vict. c. 73, s. 37; *Phipps* v. *Daubney*, 16 Q.B. 514; 20 L.J. Q.B. 273; *Smith* v. *Pococke*, 22 L.J. Ch. 545; 2 Drew. 197.

(*y*) *L. & N. W. Ry.* v. *Sharp*, 18 Jur. 964.

Sheriff's officers, expressly employed by a solicitor to execute process, may maintain an action against the latter for the recovery of such fees as are usually allowed on the taxation of costs by the practice of the courts, and are not bound to resort to the clients of the solicitor for remuneration (*z*).

Duties of estate and house-agents.—A house-agent employed to procure a tenant for a house is bound to use due care in the letting of the house, and to make all necessary inquiries touching the respectability and solvency of the tenant. If, therefore, he lets the house to a notoriously insolvent person, or to one whom he knows to be insolvent, he will be responsible in damages to his employer (*a*).

Receipt of money and goods by agents on account of their principals.—It is a settled rule that an agent shall not, after accounting with his principal and receiving money in his capacity of agent, afterwards say that he did not do so, and did not receive it for the benefit of his principal, but for some other person (*b*), unless there has been a mistake and a void payment *ab initio*, so that the money never was in truth received for the principal. But, if the agent effects a contract of sale at a high price in consequence of a fraudulent misrepresentation made by him, and receives such price, but is afterwards compelled to refund the money to the purchaser, the principal cannot maintain an action for money had and received against the agent, to recover the price, inasmuch as the sale is avoided by the fraud of the agent, and the money received under it becomes the property of the purchaser, and is not money had and received for the use of the principal (*c*). And although an agent has received goods from his principal to hold on account of the latter, or although he has received goods from a third party, and has agreed to hold them for his principal, he may, under certain circumstances, set up a *jus tertii*. Thus, if an auctioneer has received goods for public sale from a person who is not the owner of them, and has no right to sell them, and the real owner intervenes and forbids the sale, or claims the money realised by the sale, the auctioneer may by the authority of such real owner set up his title against the claims of the fictitious owner from whom he received the goods (*d*). But, although in many cases a bailee may set up the *jus tertii* against a claim by his bailor,

(*z*) *Foster* v. *Blakelock*, 5 B. & C. 328; 4 L.J. (O.S.) K.B. 170.

(*a*) *Heys* v. *Tindall*, 1 B. & S. 296; 30 L.J. Q.B. 362. As to commission, see *post*, p. 888.

(*b*) *Dixon* v. *Hamond*, 2 B. & Ald. 313; *Hawes* v. *Watson*, 2 B. & C. 540; 2 L.J. (O.S.) K.B. 83; *Edgell* v. *Day*, 35 L.J. C.P. 7; L.R. 1 C.P. 80.

(*c*) Parke, B., *Murray* v. *Mann*, 17 L.J. Ex. 256; 2 Exch. 541.

(*d*) *Biddle* v. *Bond*, 6 B. & S. 225; 34 L.J. Q.B. 137; *Hardman* v. *Willcock*, 9 Bing. 382; *Rogers* v. *Lambert*, (1891) 1 Q.B. 318; 60 L.J. Q.B. 187.

yet, if the bailee has accepted the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such a claim as against the bailor (*e*). So, where a wharfinger received notice that goods deposited at his wharf were marked with a fraudulent imitation of a trade-mark, and that the owner of the trade-mark was about to apply to the Court of Chancery for an injunction to prevent the sale of the goods, and, after the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the owner, it was held that he was justified in such refusal (*f*).

Where a managing owner of a ship, or "ship's husband," employed certain agents for general purposes, and amongst others to receive and pay moneys on account of the ship, and kept a general account with them, and also a separate account as managing owner or ship's husband of the ship's disbursements and earnings, and, in order to obtain the freight earned by the vessel from the East India Company, it was necessary that a receipt signed by the managing owner, and by one or more of the other owners also, should be given for the money due, and, upon a receipt of this description, the agents received 2,000*l.*, which was placed by them to the credit of the managing owner in his account with them, it was held that the money was received by the agents as agents of the managing owner, and that the transaction was in effect the same as if the other joint-owners and the managing owner had received the money, and it had been then handed over to the managing owner, who had then placed it in the hands of the agents, as his bankers, on his own account, and that the joint-owners could not treat the agents as their debtors (*g*). But, where the plaintiffs were owners of a ship, and one of them was ship's husband, and the latter instructed the defendant at Quebec to charter the vessel from thence to England, and the defendant effected a charter-party, making the freight payable to himself at Quebec, and received the freight, and claimed to retain it in liquidation of a debt due to him from such ship's husband, it was held that the contract between the ship's husband and the ship agent with respect to the management and chartering of the vessel was a contract which belonged to all the shipowners, and that the defendant was bound to pay over to them the money received under that contract (*h*).

Receipt of money by sub-agents.—Every agent is responsible for money received by a sub-agent employed by him for the purpose

(*e*) *Davies, Ex parte*, 19 Ch.D. 86.
(*f*) *Hunt* v. *Maniere*, 33 Beav. 157; 34 L.J. Ch. 142.
(*g*) *Sims* v. *Brittain*, 4 B. & Ad. 375.
(*h*) *Walshe* v. *Provan*, 8 Exch. 843; 22 L.J. Ex. 355.

of receiving the money, whether the principal had, or had not, reason to suppose that there was any necessity for the employment of a sub-agent. Thus, if the customer of certain bankers hands them a bill, in order that they may receive the money due upon it, and they send the bill to their correspondents at a distant place, and the bill is presented by them, and the amount paid, the payment to the sub-agent employed by the bankers for the purpose of receiving the money is a payment to the bankers to whom the bill was delivered by the customer, and they are responsible to him for the money, although it never reaches their hands and is never passed by them to the credit of the customer (*i*). The sub-agent so employed to receive money is accountable only to the agent, his employer, and cannot be sued for the money by the principal (*k*). But, if he is not strictly a sub-agent, as, for example, if he has received direct instructions from the principal, or is in any respect the agent of the latter, he will be accountable accordingly. Thus, where a creditor employs a country solicitor to recover a debt, and the country solicitor employs a London solicitor to set the legal machinery in motion, and the debt is paid to the London solicitor, the latter is accountable to the client for the money, and cannot retain it in satisfaction and discharge of a debt due to him from his immediate employer, the country solicitor (*l*).

Payment by one agent to another agent.—Where an agent who receives money for his principal pays it over to another agent of that principal, he is bound to pay it in such a way as shall enable the agent to perform his duty to his principal, *i.e.*, he must pay in cash, and not merely settle it in account between that agent and himself; or, if he does so settle it, he takes it on himself to show an authority from his principal, and that there was an account between the principal and that agent, on which the principal was indebted to the latter (*m*).

Purchases by agent with money of principal.—The property of a principal intrusted to his factor or agent belongs to the principal, notwithstanding any change which the property may have undergone in point of form, and even though the agent may have mixed the proceeds with his own money. Where, therefore, a draft for money was intrusted to a broker to buy Exchequer bills for his principal, and the broker received the money and purchased American securities with it, and absconded, and was taken on his

(*i*) *Mackersay* v. *Ramsays*, 9 Cl. & F. 845.

(*k*) *Ireland* v. *Thompson*, 4 C.B. 149; 17 L.J. C.P. 248; *Stephens* v. *Badcock*, 3 B. & Ad. 354; 1 L.J. K.B. 75; *Cartwright* v. *Hately*, 1 Ves. jun. 292; Story's Agency, s. 203.

(*l*) *Hanley* v. *Cassan*, 11 Jur. 1088; *Edwards*, *Ex parte*, 8 Q.B.D. 262; 51 L.J. Q.B. 108.

(*m*) Alderson, B., *Hanley* v. *Cassan*, *supra*.

way to America, and surrendered the securities to his principal, it was held that the principal was entitled to the securities so purchased as against the assignees of the broker, who had become bankrupt (*n*). But the rule does not apply where there is no fiduciary relation between the parties (*o*). If an agent borrows money without the authority of his principal, and the money comes into the possession of the principal who uses it, the latter is liable to the borrower in an action for money had and received (*p*).

Frauds by agents on their principals.—Agents are in a sense trustees, and they owe to their principals a similar duty to that which trustees owe to their *cestui que trust*. Therefore, when two agents concur in a fraud, both are liable in equity, although one of them only has the benefit of the fraud. Where two confidential agents of a partnership conspired together to obtain for themselves the shares of the partners at an undervalue by keeping the accounts of the firm fraudulently so as to conceal from the partners the true value of their shares, it was held that their misconduct might be treated as a breach of trust (*q*). An agent cannot, without the knowledge of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent; and this rule applies with peculiar stringency to the directors of joint-stock companies, who are the agents of the company for effecting the sales or purchases made by the company (*r*).

Payment of commission.—If the amount of commission is named by the principal in his letter of instruction to the agent, and the agent declares that it is quite inadequate, but nevertheless acts upon the instructions, he will be bound by the specified commission. If he accepts the retainer, he must take it in its entirety, and cannot adopt part and repudiate part, and sue for a reasonable remuneration for his services (*s*). A commission-agent, employed to negotiate a sale upon the terms that he is to be paid a commission on the amount of purchase-money, or on the happening of a certain event, will not be entitled to any commission until the purchase-money has been received, or the event has happened,

(*n*) *Taylor* v. *Plumer*, 3 M. & S. 562. See *Hallett's Estate, In re*, 13 Ch.D. 696; *Stenning, In re*, (1895) 2 Ch. 433; *Harris* v. *Truman*, 7 Q.B.D. 340; 9 Q.B.D. 264; *Broad, In re*, 13 Q.B.D. 470; 54 L.J. Q.B. 79; *Dever, Ex parte*, 14 Q.B.D. 740; 54 L.J. Q.B. 390.

(*o*) *New Zealand and Australian Land Co.* v. *Watson*, 7 Q.B.D. 374; 50 L.J. Q.B. 433. See, however, *Kaltenbach* v. *Lewis*, 10 App.Cas. 617; 52 L.J. Ch. 881.

(*p*) *Reid* v. *Rigby*, (1894) 2 Q.B. 40; 63 L.J. Q.B. 451.

(*q*) *Walsham* v. *Stainton*, 33 L.J. Ch. 68; 1 De G. J. & S. 678. As to the remedy of the principal where the agent has been bribed to induce him to enter into a disadvantageous contract, see *Salford* (*Mayor*) v. *Lever*, (1891) 1 Q.B. 168; 60 L.J. Q.B. 39; *Grant* v. *Gold Exploration Syndicate of British Columbia*, (1900) 1 Q.B. 233; 69 L.J. Q.B. 150.

(*r*) *Hay's case*, L.R. 10 Ch. 593; 44 L.J. Ch. 721; *Eden* v. *Ridsdale's Co.*, 23 Q.B.D. 368; 58 L.J. Q.B. 579.

(*s*) *Moore* v. *Maxwell*, 2 C. & K. 554.

unless there has been fraudulent delay or wilful neglect on the part of the employer (*t*). In the ordinary course of commercial dealings a compensation is impliedly understood to be due to every person who undertakes the duties and services of an agent, the amount being generally governed by the usage of trade; but parties who sell as mortgagees or trustees are not entitled to commission, in the absence of any express contract or agreement to pay them for their services (*ante*, p. 805). Where a broker took an assignment of several cargoes in trust to sell on their arrival, and out of the proceeds to repay the amount of his advances, and some of the cargoes were received and sold by him under the power in the deed, whilst the rest were sold under an order made in a suit instituted by him to enforce his security, it was held that in the latter sales he was entitled to his ordinary commission, but not in the former, as he sold, as regarded them, as a trustee (*u*). The fact that a party has agreed to sell goods on commission may be proved by oral evidence, though the terms as to the payment of such commission have been reduced into writing (*x*). An authority to sell upon certain terms and for certain commission is revoked by the death of the principal before the authority has been acted upon and executed; and, if the agent sells after the death of the principal, he will not be entitled to the agreed commission, unless the personal representative has renewed the authority with knowledge of the contract (*y*). If the commission is to be paid on the "net proceeds," it is payable only on the actual sum which reaches the pocket of the principal after deducting all charges and expenses (*z*).

Extra work by agents.—For all work done by the agent in discharge of his business as agent he is paid by his commission, and can make no extra charge; but for work done by order of the principal, beyond his duty as an agent, he is entitled to make an extra charge, provided the work was done under circumstances fairly giving rise to an inference that he was to receive an extra remuneration (*a*).

Rights of ship-brokers to commission.—Ship-brokers are usually entitled, by the custom and usage of trade, to 5*l.* per cent. commission upon the freight payable upon charter-parties obtained and entered into by their aid and exertions; and, if the amount of freight is uncertain, they may, if they think fit, sue for a reasonable remuneration upon a *quantum meruit*. The right to the commission

(*t*) *Bull* v. *Price*, 5 M. & P. 2; 9 L.J. (O.S.) C.P. 28; *Alder* v. *Boyle*, 4 C.B. 635; 16 L.J. C.P. 232.

(*u*) *Arnold* v. *Garner*, 2 Ph. 231; 16 L.J. Ch. 329.

(*x*) *Whitfield* v. *Brand*, 16 M. & W. 282; 16 L.J. Ex. 103.

(*y*) *Campanari* v. *Woodburn*, 15 C.B. 400; 24 L.J. C.P. 13.

(*z*) *Caine* v. *Horsfall*, 1 Exch. 519; 17 L.J. Ex. 25.

(*a*) *Marshall* v. *Parsons*, 9 C. & P. 658.

does not depend upon the fact of the ship's earning freight; and the claim is not liable to be cut down by the loss of the vessel, or her failure to get a cargo (*b*). When a ship-broker has introduced the captain of a ship and a merchant to each other, and they by his means enter into some negotiation for a voyage, the broker is, in general, by usage of trade, entitled to his commission if a charter-party is effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. And, if a broker authorised by both parties, and acting as the agent of each, communicates to the merchant what the shipowner charges, and also communicates to the shipowner what the merchant will give, and he names the ship and the parties, so as to identify the transaction, and a charter-party is ultimately effected for that voyage, this broker is entitled to his commission; but, if he does not mention the names, so as to identify the transaction, he does not get his commission to the exclusion of another broker who afterwards introduces the parties personally to each other: for, if the ship and the parties are not named, the brokers might change the ship, and put in another, pending the negotiation (*c*).

Where a shipowner employed A., a ship-broker, to procure a charter for his ship, and A. employed B., another broker, who procured the charter, evidence of a usage of trade was admitted to show that the second broker, who actually procured the charter, was entitled to his commission from the shipowner (*d*). But to render the shipowner responsible upon an implied contract with the second broker, it must be shown that the shipowner was cognizant of the employment of the latter, and knew, at the time he accepted the charter, that it had been obtained through his instrumentality (*e*). A usage of trade cannot be given in evidence to impose on the party who has entered into the contract a wholly different obligation, and to show that, because he has agreed to consign the ship to the charterer's agents on the outward voyage, he is therefore liable to pay the agent's commission on the homeward cargo (*f*).

Right to commission of policy brokers.—By 30 Vict. c. 23, s. 16, the principal is not to be liable to pay the broker's commission upon effecting a policy of sea insurance, or any premium paid by the broker, unless the policy is duly stamped; and any sums so paid are to be deemed to have been paid without consideration, and are to remain the property of the principal.

(*b*) *Hill* v. *Kitching*, 3 C.B. 306; 15 L.J. C.P. 251.
(*c*) *Burnett* v. *Bouch*, 9 C. & P. 624.
(*d*) *Smith* v. *Boutcher*, 1 Car. & K. 574. But see *Schmaling* v. *Thomlinson*, 6 Taunt. 147; *Boulton* v. *Jones*, 2 H. & N. 564; 27 L.J. Ex. 117.
(*e*) *Smith* v. *Boutcher*, 1 Car. & K. 576.
(*f*) *Phillipps* v. *Briard*, 1 H. & N. 27; 25 L.J. Ex. 233.

Right to commission of travellers for orders.—When a commission agent, employed by a manufacturer to obtain orders, is to receive a commission "on all goods bought" by persons from whom he obtains orders, the commission is earned as soon as a valid bargain of purchase and sale has been made between the manufacturer and the purchaser introduced by such agent, whether the goods are at the time in existence or not in existence, and whether the contract is, or is not, ultimately carried into effect, and whether it turns out to be a bad bargain, productive of loss, or an advantageous transaction (*g*).

Commission of house agents, estate agents, and auctioneers.—If a man having a house or estate to sell or let, places it in the hands of several house agents, with instructions to secure a purchaser or tenant, the successful agent is alone entitled to commission, unless instructions have been given to the other house agents to advertise the house, or render some particular or special services in the matter, entitling them by the custom of the trade to some remuneration (*h*). But if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to his commission, although the actual sale was not effected by him (*i*). Where A. promised to pay B. a sum of money if he would procure him a tenant at a certain rent, it was held that B. was entitled to the money as soon as the party introduced by him had been accepted by A., and a binding agreement for the tenancy had been entered into (*k*). In a great number of instances house agents go to a great deal of trouble on the terms that, if they get no purchaser they shall have no claim; and, if upon the contingencies which have happened nothing was to be paid, nothing can of course be recovered (*l*). Where an auctioneer was employed to sell ground-rents by auction, on the terms of receiving one per cent. commission on the sale, and, after he had advertised the sale, but before the day of sale, the employer sold the rents by private contract, it was held that a notorious custom in the trade, for the auctioneer to receive his full commission in such a case, might be engrafted upon the contract (*m*). But the usage must be so universal that every one in the trade must be taken to know it (*n*).

The right of the agent to be reimbursed upon the revocation of his authority depends upon the terms of the contract by which his services were retained, and the custom of the trade in which he is engaged. When an agent is employed to sell or to let, on the terms that he is to be paid a certain percentage on the price or the

(*g*) *Lockwood* v. *Levick*, 8 C.B. N.S. 603; 29 L.J. C.P. 340.
(*h*) *Prickett* v. *Badger*, 1 C.B. N.S. 296; 26 L.J. C.P. 33.
(*i*) *Green* v. *Bartlett*, 14 C.B. N.S. 681; 32 L.J. C.P. 261.
(*k*) *Horford* v. *Wilson*, 1 Taunt. 15.
(*l*) *Green* v. *Mules*, 30 L.J. C.P. 343.
(*m*) *Rainy* v. *Vernon*, 9 C. & P. 559.
(*n*) *Wood* v. *Wood*, 1 *ib.* 60.

rent, the general understanding is that he takes his chance of a large remuneration in case he finds a purchaser or a tenant, but gets nothing if he fails in so doing; but, if trouble and expense have been properly incurred by the agent in endeavouring to carry into effect the instructions of the principal, and the latter revokes the authority, and prevents the agent from reaping the expected reward, the principal is bound to remunerate him for his trouble and expenses in the matter (*o*).

Where an estate agent, employed to sell at a given price, succeeds in finding a purchaser, but the principal then declines to sell, the agent is entitled to sue for a reasonable remuneration for his services; and the amount of his commission on the price would seem to be the sum to which he is fairly entitled; but, if the authority is revoked before it is executed and a purchaser has been found, it does not follow that he is entitled to sue upon an implied contract for remuneration for his work and labour in endeavouring to find a purchaser or a tenant (*p*). If it is the practice of house agents to charge a fee for entering property to be let or sold in their register book, and the employer has notice of this, or it is proved to be a known custom of the trade, the employer will be bound to pay this fee, although the authority may be revoked, or the agent may have failed to render any beneficial service. This registration fee is all that the house agent is entitled to charge for ordinary services, in the absence of any special instructions for advertisements (*q*).

When a public company employed a broker to dispose of their shares on the terms that he should be paid 100*l.* down, and 400*l.* in addition upon the allotment of the whole of the shares of the company, and the broker disposed of a considerable number of shares when the company was wound up, it was held that the broker was prevented from earning the 400*l.* by the act of the company, and was therefore entitled to sue them for damages (*r*).

Lien of factors and brokers.—Factors and brokers to whom goods are consigned to be sold have a lien for the general balance due to them from their employers or principals in the ordinary course of their business as factors, and for their acceptances on behalf of such employers, upon the goods whilst they are in their possession, and on the moneys realised by the sale of them (*s*). This right exists universally by the custom of the trade. It is

(*o*) *Simpson* v. *Lamb*, 17 C.B. 616; 25 L.J. C.P. 113.

(*p*) *Prickett* v. *Badger*, 1 C.B. N.S. 296; 26 L.J. C.P. 33; *Campanari* v. *Woodburn*, 15 C.B. 407; 24 L.J. C.P. 13.

(*q*) *Simpson* v. *Lamb*, *supra*.

(*r*) *Inchbald* v. *Western Neilgherry Co.*, 17 C.B. N.S. 733; 34 L.J. C.P. 15.

(*s*) *Kruger* v. *Wilcox*, Ambl. 252; *Hudson* v. *Granger*, 5 B. & Ald. 31; *Hammond* v. *Barclay*, 2 East, 227; *Pavy's Patent Felted Co., In re*, 1 Ch.D. 631; 45 L.J. Ch. 318.

part of the law merchant, and as such is judicially taken notice of by the courts, no proof being ever required as a matter of fact that such general lien exists. The lien does not extend to a collateral debt not growing out of the relationship of principal and factor, such as a debt due for rent (*t*), nor to goods which have not actually reached the hands of the factor (*u*), and come into his possession with the consent and direction of the owner; consequently, if goods have been left at the factor's place of business by mistake or inadvertence (*x*), or have been taken possession of by him without the authority of the owner, he cannot set up a lien upon them for his balance (*y*). And, if the party from whom he receives the goods is only an agent, he cannot retain them as against the true owner for a debt that was due to him from the agent at the time the goods were put into his hands, and which was not contracted on the credit of the deposit of the goods; but it is otherwise if he has made advances on the credit of the deposit, not knowing the depositor to be an agent (*z*). The factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance, not as factor, but as an insurance broker, is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor (*a*). A factor does not lose his lien by acting under special instructions from his principal to sell the goods at a particular price, and in the principal's name (*b*).

Lien of packers.—A packer is entitled to a general lien on the goods of his customer which are in his hands (*c*), although they do not now so frequently make advances to their customers as they used to do (*d*).

Lien of insurance brokers.—Insurance brokers have also, by the general usage and custom of trade, a lien for the general balance due to them from their employers upon all policies effected by them for such employers, and left in their hands, and upon all moneys received by them upon such policies from the underwriters, unless the party for whom they effected the policy was himself only an agent in the matter, in which case the extent of the lien will depend upon the disclosure or concealment of the agency, and the degree of credit they may have given to the agent, under the impression that he was the party really interested in the policy.

(*t*) *Houghton* v. *Mathews*, 3 Bos. & P. 485.
(*u*) *Kinloch* v. *Craig*, 3 T.R. 123.
(*x*) *Lucas* v. *Dorrien*, 7 Taunt. 278.
(*y*) *Taylor* v. *Robinson*, 2 Moore, 730.
(*z*) *Pultney* v. *Keymer*, 3 Esp. 181.
(*a*) *Dixon* v. *Stansfeld*, 10 C.B. 398; *Mildred* v. *Maspons*, 8 App.Cas. 474; 53 L.J. Q.B. 33.
(*b*) *Stevens* v. *Biller*, 25 Ch.D. 31; 53 L.J. Ch. 245.
(*c*) *Green* v. *Farmer*, 4 Burr. 2214; *Deeze, Ex parte*, 1 Atk. 228.
(*d*) *Witt, In re*, 2 Ch.D. 489; 45 L.J. Bankr. 118.

The lien does not extend to a collateral debt not incurred in respect of brokerage business. If a policy broker is employed by an agent, and there is no disclosure of the agency, and nothing to lead the broker to think that any third party is interested in the policy, and the assurance is accordingly effected in the name of the agent as owner, and a loss occurs, and the policy is allowed, after the loss, to remain in the broker's hands, and the latter then permits the agent to get into his debt, not knowing him to be an agent, the broker will have a lien as against the principal upon the policy, and upon the money he receives thereon from the underwriters, to the extent of the debt due to him from the agent as well as for his commission and charges for effecting the policy (*e*). But, if there is the slightest indication of the agency to the broker, such as a declaration by a British subject in time of war that the property is neutral (*f*), or a statement that the assurance is to be effected "for a correspondent in the country" (*g*), or that the property to be insured belongs to a merchant abroad, who has consigned it to the agent with full power of disposition over it, and with authority to indorse the bill of lading (*h*), the broker will have a lien only for his commission and charges for the insurance, and not for the balance due to him from the agent.

Lien of solicitors.—Solicitors also have a lien upon all money recovered by them in the actions and suits in which they are employed, and upon all the deeds and papers and other articles of their clients which come to their hands in their professional capacity, for the purposes of business, not only for the costs of the particular cause or matter with which such deeds or papers are connected, but for the costs due to them generally from their clients (*i*). But the lien does not attach while the suit is still pending; and the parties may compromise the dispute and thus deprive the solicitor of his lien, if the compromise is *bonâ fide* (*k*). But if the money paid by way of compromise is in substance the fruit of the action, the lien of the plaintiff's solicitor attaches, and the defendant or his solicitor is not at liberty, after express notice by the plaintiff's solicitor of his claim to a lien for his costs, to pay the sum over to the plaintiff (*l*). By 23 & 24 Vict. c. 127, s. 28,

(*e*) *Mann* v. *Forrester*, 4 Campb. 61; *Westwood* v. *Bell*, *ib.* 354; *Olive* v. *Smith*, 5 Taunt. 56.

(*f*) *Maanss* v. *Henderson*, 1 East, 337.

(*g*) *Snook* v. *Davidson*, 2 Campb. 218.

(*h*) *Lanyon* v. *Blanchard*, *ib.* 597.

(*i*) *Stevenson* v. *Blakelock*, 1 M. & S. 535; *Lambert* v. *Buckmaster*, 2 B. & C. 616; 2 L.J. (O.S.) K.B. 93; *Blunden* v. *Desert*, 2 Dr. & W. 405; *Friswell* v. *King*, 15 Sim. 191; *Robins* v. *Goldingham*, L.R. 13 Eq. 440; 41 L.J. Ch. 813; *Taylor*, *In re*, (1891) 1 Ch. 590; 60 L.J. Ch. 525.

(*k*) *Morrison*, *Ex parte*, L.R. 4 Q.B. 153; *S.C.*, *Sullivan* v. *Pearson*, 38 L.J. Q.B. 65; *Mercer* v. *Graves*, L.R. 7 Q.B. 499; 41 L.J. Q.B. 212; *The Hope*, 8 P.D. 144; 52 L.J. P. 63; *Margetson*, *In re*, (1897) 2 Ch. 314; 66 L.J. Ch. 619.

(*l*) *Ross* v. *Buxton*, 42 Ch.D. 190; 58 L.J. Ch. 442.

the Court may charge the client's property recovered or preserved (*m*) through the instrumentality (*n*) of the solicitor with the payment of his costs (*o*). If the solicitor discharges himself during the suit he loses his lien, so far, at any rate, as relates to papers necessary for the successful prosecution of the suit; but it is otherwise if he is discharged by his client (*p*). Costs paid under the order of the Court, and directed to be refunded by the Court of Appeal, are property recovered within the meaning of this section, and may be charged accordingly (*q*). A solicitor has no lien upon the will of a client for the costs incurred in the preparation of it, and cannot therefore refuse to produce it after his client's death until his costs have been paid. And, where deeds are delivered for a specific purpose, the right of lien is extinguished as soon as the particular purpose has been accomplished; and it may be superseded altogether by the attorney's taking from the client security for his costs (*r*). A solicitor held the title-deeds of a mortgagor; he was also acting for the mortgagee, and continued to hold the deeds; the mortgagor filed a petition for liquidation, and the solicitor acting for the trustee sold the equity of redemption, and received the purchase-money; it was held that he had a lien upon it for costs due to him from the mortgagor (*s*). A solicitor to a former trustee in a bankruptcy has a lien upon documents, the fruits of his own labour or expense, as against a new trustee (*t*). A solicitor cannot set up the lien of his London agent on the papers of his client against the claims of that client, the client having paid his solicitor's bill (*u*). The town agent of a country solicitor has a lien only as against the client upon the money recovered, and upon the papers in his hands in the particular cause in which he is engaged, for the amount due to him by the solicitor in that particular cause. He cannot set up a claim of lien as against the client for the general balance due to him from the country solicitor who employs him, and cannot retain the money or papers of the client to satisfy his general

(*m*) *Baile* v. *Baile, infra; The Heinrich*, L.R. 3 A. & E. 505; 41 L.J. Adm. 68; *Pierson* v. *Knutsford Estates Co.*, 13 Q.B.D. 666; 53 L.J. Q.B. 181; see *Humphreys, In re*, (1898) 1 Q.B. 520; 67 L.J. Q.B. 412.

(*n*) See *Twynam* v. *Porter*, L.R. 11 Eq. 181; 40 L.J. Ch. 30; *Heinrich* v. *Sutton*, L.R. 6 Ch. 865; 40 L.J. Ch. 518; *National Ins. Assoc., In re*, L.R. 7 Ch. 221; 41 L.J. Ch. 341.

(*o*) *Berrie* v. *Howitt*, L.R. 9 Eq. 1; 39 L.J. Ch. 119; *Keane, In re*, L.R. 12 Eq. 115; 40 L.J. Ch. 617; *Baile* v. *Baile*, L.R. 13 Eq. 497; 41 L.J. Ch. 300; *Jones* v. *Frost*, L.R. 7 Ch. 773; 42 L.J. Ch. 47.

(*p*) *Faithfull, In re*, L.R. 6 Eq. 325.

(*q*) *Guy* v. *Churchill*, 35 Ch.D. 489; 56 L.J. Ch. 670.

(*r*) *Genges* v. *Genges*, 18 Ves. 294; *Balch* v. *Symes*, Turn. & R. 92. See *Taylor, In re*, (1891) 1 Ch. 590; 60 L.J. Ch. 525.

(*s*) *Messenger, In re*, 3 Ch.D. 317; 45 L.J. Bankr. 134.

(*t*) *Valden, Ex parte*, 4 Ch.D. 129; 46 L.J. Bankr. 59.

(*u*) *Andrew, In re*, 7 H. & N. 87; 30 L.J. Ex. 403.

debt (*x*). And his lien is limited to the debt actually due from the client to the country solicitor, so that if the country client pays the country solicitor the lien is discharged, for the country solicitor can give the town agent no lien which he does not himself possess (*y*). But the London solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business, and disbursements due from the country solicitor, whether in the particular action or in any other proceedings; but as between the London agent and the client the lien extends only to the costs of the particular action (*z*).

A solicitor cannot set up a general lien for the balance due to him in respect of services not rendered by him as a solicitor; nor can he detain deeds and papers which do not come to him in his professional character. He has no lien, for example, where he acts or holds papers as town clerk (*a*), or steward of a manor (*b*); he cannot set up any lien which is inconsistent with the nature of his employment, or the terms or conditions, or express or implied trust upon which he received the papers (*c*). His right, moreover, is dependent upon the rights of his clients; and he cannot acquire more extensive powers over the papers in his hands than the client himself possessed at the time he deposited them with him (*d*). If a solicitor transacts business for a firm in partnership collectively, and also manages the private business of the members of the firm individually, he has no lien upon the private securities, deeds, and writings of one partner in respect of the business done for the firm (*e*).

A solicitor acting for mortgagee as well as mortgagor thereby loses his lien on the deeds for costs due to him from the mortgagor, unless such lien is expressly reserved, even although the mortgagee may have known that the solicitor had such a lien (*f*). Where the plaintiffs in a suit mortgaged their interest in the estate to the defendants with the sanction of the solicitor, and nothing was said about costs, it was held that the solicitor's charge, under 23 & 24 Vict. c. 127, s. 28 (p. 891), ought not to be postponed to the mort-

(*x*) *White* v. *Roy. Exch. Assur. Co.*, 7 Moore, 249; *Moody* v. *Spencer*, 2 D. & R. 6; *Anon.*, 2 Dick. 802.

(*y*) *Waller* v. *Holmes*, 1 J. & H. 139; 30 L.J. Ch. 24; *Andrew, In re, supra*; *Beatfield* v. *Barlow*, 38 L.J. Ch. 311; *Edwards, Ex parte*, 8 Q.B.D. 262; 51 L.J. Q.B. 108. See *ante*, p. 884.

(*z*) *Lawrence* v. *Fletcher*, 12 Ch.D. 858.

(*a*) *Champernown* v. *Scott*, 6 Mad. 93.

(*b*) *Rex* v. *Sankey*, 5 Ad. & E. 428; 5 L.J. K.B. 255; *Newington Local Board* v. *Eldridge*, 12 Ch.D. 349.

(*c*) *Lawson* v. *Dickenson*, 8 Mod. 307. See *Faithfull, In re*, L.R. 6 Eq. 325; *Simmonds* v. *G. E. Ry.*, L.R. 3 Ch. 797; 38 L.J. Ch. 87.

(*d*) *Hollis* v. *Clarige*, 4 Taunt. 807; *Esdaile* v. *Oxenham*, 3 B. & C. 229; *Lightfoot* v. *Keene*, 1 M. & W. 745; 5 L.J. Ex. 257; *Molesworth* v. *Robbins*, 2 Jones & Lat. 358.

(*e*) *Steadman* v. *Hockley*, 15 M. & W. 553; 15 L.J. Ex. 332; *Turner* v. *Deane*, 3 Exch. 836; 18 L.J. Ex. 343. See *Moss, In re*, L.R. 2 Eq. 345; 35 L.J. Ch. 554.

(*f*) *Snell, In re*, 6 Ch.D. 105; 46 L.J. Ch. 627.

gage, as the defendants must have known of the rights of the solicitor (*g*). A solicitor preparing a marriage settlement on the instructions of the husband has no lien upon it against the trustees for the debts of the husband (*h*). A solicitor cannot embarrass proceedings in a court by keeping papers which belong to an estate which is being administered by the court (*i*), or which are necessary in a suit pending (*k*). Where a solicitor takes from his client a security for costs without explaining that he intends to reserve his lien, the lien is *primâ facie* to be deemed to be abandoned (*l*).

Lien of shipmasters.—An agent cannot in general acquire a lien upon the property of his principal for work done by others whom he has employed and paid. But a shipmaster has, so far as the case permits, the same lien for disbursements and liabilities properly made and incurred by him on account of the ship as he has for the recovery of his wages (*m*); and where he makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses, if the owner adopts the benefit of that contract, he must also bear its burthen (*n*). The shipmaster, however, has no lien on ship or freight for disbursements on account of the ship, but for which he had no authority to pledge the shipowner's credit (*o*). At common law the master has a possessory lien on the cargo, not only for freight, but also for general average (*p*). The captain of a ship or his agent has a lien upon the cargo which he has saved for the expenses of doing so, although such expenditure was not with the owner's consent nor for the purpose of enabling the owner to earn freight, but for the purpose of saving the cargo (*q*).

Lien of ship's husband.—The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer, and not in the nature of a charge on the freight; and therefore, if he is removed from his office before he is in a position to receive the freight, an assignee of his interest cannot maintain a claim to it as against the owners (*r*).

Lien of shipwrights.—A shipwright has a lien on a ship in his

(*g*) *Faithfull* v. *Ewen*, 7 Ch.D. 495; 47 L.J. Ch. 457; *Dallow* v. *Garrold*, 14 Q.B.D. 543; 54 L.J. Q.B. 76; *Cole* v. *Eley*, (1894) 2 Q.B. 350; 63 L.J. Q.B. 682; *The Paris*, (1896) P. 77; 65 L.J. P. 42.

(*h*) *Lawrance, In re*, (1894) 1 Ch. 556; 63 L.J. Ch. 205.

(*i*) *Belaney* v. *Ffrench*, L.R. 8 Ch. 918; *Capital Fire Insurance Association, In re*, 24 Ch.D. 408; 51 L.J. Ch. 20. The principle of these cases is discussed and affirmed in *Hawkes, In re*, (1898) 2 Ch. 1; 67 L.J. Ch. 284.

(*k*) *Galland, In re*, 31 Ch.D. 296; 55 L.J. Ch. 478.

(*l*) *Taylor, In re*, (1891) 1 Ch. 590; 60 L.J. Ch. 525; *Douglas-Norman, In re*, (1898) 1 Ch. 199; 67 L.J. Ch. 85.

(*m*) 57 & 58 Vict. c. 60, s. 167.

(*n*) *Bristow* v. *Whitmore*, 9 H.L.C. 391.

(*o*) *The Castlegate*, (1893) A.C. 38; 62 L.J. P.C. 17; *The Orienta*, (1895) P. 49; 64 L.J. P. 32. See *The Ripon City*, (1897) P. 226; 66 L.J. P. 110.

(*p*) *Cleary* v. *M'Andrew*, 2 Moo. P.C. N.S. 216.

(*q*) *Hingston* v. *Wendt*, 1 Q.B.D. 367; 45 L.J. Q.B. 440.

(*r*) *Beynon* v. *Godden*, 3 Ex.D. 263; 48 L.J. Ex. 80.

dock where he is to be paid in ready money as soon as the repairs are finished and no credit is given (*s*), and so has a contractor who agrees to furnish engines, &c., to a ship, and even if part of the price is paid he retains his lien for the remainder (*t*).

Indemnification of agents.—The principal is bound to indemnify his agent in respect of all payments which may be made by the latter in the due course of his employment (*u*). If the agent has necessarily incurred liabilities and expenses in following out his instructions *bonâ fide*, he may sue the principal upon an implied promise of indemnity (*x*); but he cannot resort to the principal for an indemnity against the consequences of his own default, wrongful act, or want of skill in the execution of his commission (*y*); although a general indemnity against all expenses to which he may be put in executing his commission may have been given to him by his employer (*z*). Nor is he entitled to be indemnified in respect of loss caused not by reason of his having entered into contracts which he was authorised to enter into by his principal, but by reason of his own insolvency (*a*). If the agent, in the execution of his commission, has been compelled to pay money on behalf of the principal, he is entitled to recover the amount from the latter, whether the principal has or has not been relieved from liability by the payment (*b*). If A. employs B. as a broker to buy shares in a company, according to the rules of the Stock Exchange, for a certain account day, and B., in accordance with such rules, pays for and takes a transfer of the shares on that day, A. is bound to repay B. the amount so paid, although before such account day the company is being wound up under 25 & 26 Vict. c. 89, s. 153, which enacts that every transfer of shares shall then be void, unless the court otherwise orders (*c*).

Breach of warranty of authority by agents.—Where an agent pretended to be authorised by a specified firm to purchase a ship on their behalf, and it turned out that he had no authority, and the shipowner was obliged to look out for another purchaser of the vessel, and lost 250*l.* on the re-sale, it was held that the 250*l.* was

(*s*) *Raitt* v. *Mitchell*, 4 Campb. 146; *Franklin* v. *Hosier*, 4 B. & Ald. 341.

(*t*) *Willoughby*, *Ex parte*, 16 Ch.D. 604.

(*u*) *Risbourg* v. *Bruckner*, 3 C.B. N.S. 812; 27 L.J. C.P. 90; *Taylor* v. *Stray*, 2 C.B. N.S. 175; 26 L.J. C.P. 287; *Westropp* v. *Solomon*, 8 C.B. 369; 19 L.J. C.P. 1; *Johnston* v. *Usborne*, 11 Ad. & E. 549.

(*x*) *Adamson* v. *Jarvis*, 4 Bing. 71; 5 L.J. (O.S.) C.P. 68; *Betts* v. *Gibbins*, 2 Ad. & E. 57; 4 L.J. K.B. 1; *Rawlings* v. *Bell*, 1 C.B. 959; 14 L.J. C.P. 265.

(*y*) *Toplis* v. *Grane*, 5 Bing. N.C. 636; 9 L.J. C.P. 180; *Farebrother* v. *Ansley*, 1 Campb. 347.

(*z*) *Ibbett* v. *De la Salle*, 30 L.J. Ex. 44; 6 H. & N. 233.

(*a*) *Duncan* v. *Hill*, L.R. 8 Ex. 242 42 L.J. Ex. 179. See, however, *Hartas* v. *Ribbons*, 22 Q.B.D. 254; 58 L.J. Q.B. 187; *Ellis* v. *Pond*, (1898) 1 Q.B. 426; 67 L.J. Q.B. 345.

(*b*) *Brittain* v. *Lloyd*, 14 M. & W. 762; 15 L.J. Ex. 43; *Pettman* v. *Keble*, 9 C.B. 701; 19 L.J. C.P. 325.

(*c*) *Chapman* v. *Shepherd*, L.R. 2 C.P. 228; 36 L.J. C.P. 113; *Biederman* v. *Stone*, L.R. 2 C.P. 504; 36 L.J. C.P. 198.

the measure of damage in an action against the agent for a breach of an implied undertaking that the authority which he professed to have did in point of fact exist (*d*). Where an agent pretended to be authorized to grant a lease, and it turned out that he had no such authority, it was held that the intended lessee was entitled to recover the value of the lease and all costs paid and incurred by him in endeavouring to enforce specific performance down to the time when the agent disclosed the fact of his want of authority, but not the damages and costs arising out of the re-sale by the intended lessee of his lease (*e*). If a man puts money into the hands of another to purchase goods, and he neglects to make the purchase, and is sued for a breach of his undertaking in that behalf, the proper measure of damages is the value of the goods to the employer if they had been duly purchased, not the value of the money (*f*). Where a principal entrusts an agent with securities, and instructs him to raise a certain sum upon them, and the agent borrows a larger sum, and fraudulently appropriates the difference, the principal cannot redeem the securities without paying all that has been lent, although the agent has obtained the loan by fraud, and the lender, though acting *bonâ fide*, did not know or enquire if the agent had authority to borrow (*g*).

Negligence of bank managers.—It is no breach of duty on the part of the manager of a bank to discount bills for companies in which he is interested, provided the advances are made within the scope of his authority and in the ordinary course of business, and no allegation of *mala fides* can be sustained, nor is he, it seems, under any obligation to disclose to the directors the fact that he is a shareholder in companies keeping accounts with the bank (*h*). So it is the duty of the shareholder who has sold shares to execute a transfer of them, although the company is winding up, and he will be liable to his broker, who has been obliged by the rules of the Stock Exchange to buy other shares for the purpose of delivery to the purchaser accordingly (*i*).

Damages for breach of warranty of authority—Costs of previous legal proceedings.—A defendant is responsible in damages for the

(*d*) *Simons* v. *Patchett*, 7 E. & B. 568; 26 L.J. Q.B. 195; *National Coffee Palace Co., In re*, 24 Ch.D. 367; 53 L.J. Ch. 57; *Meek* v. *Wendt*, 21 Q.B.D. 126; affirmed by C. A., W.N. 1889, p. 14; and see further, as to damages recoverable for false representation of authority by agents, *Collen* v. *Wright*, 8 E. & B. 659; 27 L.J. Q.B. 215; *Hughes* v. *Græme*, 34 L.J. Q.B. 335; *ante*, p. 326; *Pow* v. *Davis*, 1 B. & S. 220; 30 L.J. Q.B. 257; *ante*, p. 326.

(*e*) *Spedding* v. *Nevell*, L.R. 4 C.P. 212; 38 L.J. C.P. 133; *Godwin* v. *Francis*, L.R. 5 C.P. 295; 39 L.J. C.P. 121.

(*f*) *Ehrensperger* v. *Anderson*, 3 Exch. 148; 18 L.J. Ex. 132.

(*g*) *Brocklesby* v. *Temperance Building Society*, (1895) A.C. 173; 64 L.J. Ch. 433.

(*h*) *Bank of Upper Canada* v. *Bradshaw*, L.R. 1 P.C. 479.

(*i*) *Biederman* v. *Stone*, L.R. 2 C.P. 504; 36 L.J. C.P. 198.

ordinary consequences of the wrong done. So where a land agent professed to have authority from a landowner to let land, and signed an agreement for a lease, and the landowner repudiated the lease and denied the authority, and the intended tenant, relying on the representation of the agent, filed a bill in Chancery against the landowner for a specific performance of the agreement, and notice of the suit was given to the agent, and the latter failed to withdraw his assertion of authority, he was held liable to pay the costs of the Chancery suit (*k*). But no person relying on a pretended authority of this sort ought in prudence to take legal proceedings against the supposed principal without giving notice to the pretended agent, and giving him an opportunity of withdrawing or verifying his assertion of authority (*l*).

SECTION IV.

CONTRACTS FOR CARRIAGE.

Contracts for carriage of merchandise.—Every person who accepts goods for conveyance to a particular destination for hire agreed to be paid him for the carriage of them, impliedly lets out his labour and care in return for the hire. Such being the nature of the contract between the parties, the carrier may make a breach by negligently or wilfully omitting to take care, and an action may be brought for the breach of contract; or such negligent or wilful act may be treated as a "tort," regarding it as a breach of duty imposed by law upon the carrier. The cases upon the subject are somewhat conflicting (*a*). Of course the parties may, and in most cases practically do, enter into a specific contract of carriage, and their rights are then governed by the express terms of such contract, and the implied terms which the law will infer; but apart

(*k*) *Collen* v. *Wright*, 7 E. & B. 311; 8 *ib.* 647; 26 L.J. Q.B. 147; 27 *ib.* 215; *Spedding* v. *Nevell*, L.R. 4 C.P. 212; 38 L.J. C.P. 133; *Randell* v. *Trimen*, 18 C.B. 786; 25 L.J. C.P. 307.

(*l*) Wightman, J., in *Collen* v. *Wright*, 26 L.J. Q.B. 151.

(*a*) See *Alton* v. *Midland Ry.*, 19 C.B. N.S. 213; 34 L.J. C.P. 292; *Marshall* v. *Y. & N. Ry.*, 11 C.B. 655; 21 L.J. C.P. 34; *Austin* v. *G. W. Ry.*, L.R. 2 Q.B. 442; 36 L.J. Q.B. 201; *Beringer* v. *G. E. Ry.*, 4 C.P.D. 163; 48 L.J. C.P. 400; *Fleming* v. *M. S. & L. Ry.*, 4 Q.B.D. 81; *Foulkes* v. *Met. Ry.*, 5 C.P.D. 157; 49 L.J. C.P. 361.

from any special contract, there is in every case of carriage for reward a contract between the parties.

Contracts of affreightment—Charter-parties.—When goods are carried by sea from one place to another, they are usually shipped on board a vessel under a charter-party or a bill of lading. A charter-party is a contract whereby the shipowner or the shipmaster covenants or agrees for the use of the ship by the charterer for some specified period of time, or for a particular voyage or adventure. The contract derives its name from the Latin term *charta partita*, there being anciently as many divided parts of the contract as there were parties to it, each party having his part of the contract as a security against fraud or mistake. The customary stipulations on the part of the shipowner or master are, that the ship shall be tight and staunch, and well equipped and manned, and furnished with all the necessaries for the voyage; that she shall be ready by a day appointed to receive the cargo, and shall wait a certain number of days to take it on board, and, after lading, shall sail with the first fair wind for the destined port, and there (*b*) deliver the goods in proper order and condition to the order of the charterer; and, further, that during the continuance of the voyage the ship shall be tight and staunch, and furnished with sufficient men and other necessaries, to the best of the owner's endeavours. The charterer, on the other hand, usually covenants to load the ship after she shall be ready to receive her cargo, and unload her within a certain number of days, and to pay freight at so much per ton according to the tonnage of the vessel, or according to the quantity of goods shipped on board, or according to the time of the ship's employment. *Primâ facie*, the law of the place where a contract is made is that which the parties are to be presumed to have adopted as the footing upon which they dealt; and such law ought to prevail in the absence of circumstances indicating a different intention. But a contract of affreightment made between a charterer and shipowner of different nationalities in a place where they are both foreigners may, under some circumstances, be construed by the law of the nation of the ship (*c*). But where an English merchant insured goods with English underwriters in a French ship, it was held that the policy was not to be construed according to French law (*d*).

Contract operating as demise or bailment of ship.—Although the

(*b*) Sometimes the terms are to proceed to a port or so near thereto as the ship may safely get: see *Capper* v. *Wallace*, 5 Q.B.D. 163; 49 L.J. Q.B. 50; *Dahl* v. *Nelson*, 6 App.Cas. 38; 50 L.J. Ch. 411; *Horsley* v. *Price*, 11 Q.B.D. 244; 52 L.J. Q.B. 603.

(*c*) *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115; 35 L.J. Q.B. 74; *The Gaetano*, 7 P.D. 137; 51 L.J. P. 67.

(*d*) *Greer* v. *Poole*, 5 Q.B.D. 272; 49 L.J. Q.B. 463.

shipowner, by the charter-party, expressly grants the vessel to be used by the charterer, the contract will, nevertheless, not amount in general to a demise or bailment of the ship to the charterer, so as to clothe him with the possession of the vessel, but simply to a contract for the use of the ship, together with the services of the master and crew, for the conveyance of merchandise, *i.e.*, to a contract for the letting and hiring of the work of carrying merchandise. If the end sought to be attained by a charter-party can be accomplished without a transfer of the possession of the vessel to the charterer, the courts will not give effect to the contract as a demise of the ship, although there may be express words of grant and demise (*e*). If, however, the nature of the service and the due attainment of the object sought to be accomplished require the vessel to be absolutely under the control, and subject to the orders and directions, of the charterer; if she is to be employed in warfare, or in the fishing or coasting trade, or as a general ship for the conveyance of merchandise by the charterer for third parties, and is to be at his general disposal to sail upon any service that he may require, the courts will give effect to the contract as a demise of the ship (*f*). The services of the master and crew pass as merely accessorial to the principal subject-matter of the contract; they attorn, as it were, to the charterer, and become temporarily the servants of the latter, bound to obey his orders.

Parties to charter-parties.—If the parties have contracted by deed, the contract is with those who have executed the instrument, and covenanted therein in their own names, or by some known title or description. If the charter-party contains covenants both on the part of the owners and the master for the conveyance of the cargo, and has been executed by both, either the owners or the master are responsible at the election of the covenantee. If it has been entered into and executed by the owners alone, they alone are liable upon it; whilst, if the master is the only executing party, the contract is with him alone, although the deed may be expressed to be made by him for and on behalf of his employers, the shipowners. If the master covenants in his own name, the contract is exclusively the contract of the master. He constitutes himself in such a case the carrier of the goods, and becomes personally responsible upon the express covenants contained in the charter-party, and also upon all such implied covenants and engagements as result from the contract and the nature of the employment (*g*).

When a charter-party of affreightment operates as a demise or

(*e*) *Christie* v. *Lewis*, 5 Moore, 253; 2 B. & B. 410; *Saville* v. *Campion*, 2 B. & Ald. 510; *Dean* v. *Hogg*, 4 M. & Sc. 195; 3 L.J. C.P. 113.

(*f*) *Trinity House* v. *Clark*, 4 M. & S. 295, 299; *Hutton* v. *Bragg*, 7 Taunt. 14.

(*g*) *Horsley* v. *Rush*, cited 7 T.R. 209.

bailment of the ship to the charterer, and the vessel is employed by the latter as a general ship for the conveyance of merchandise, the charterer becomes the carrier of the goods shipped on board, and the master is his servant and agent whilst procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the registered owners of the vessel, and the latter, consequently, cannot be made responsible for the loss of, or injury to, the goods shipped on board under such contracts (*h*). But, when the charter-party operates merely as a contract between the charterer and the shipowner for the conveyance by the latter of goods and merchandise to be shipped on board by the charterer, the registered owners are then the carriers of the goods, and will be responsible to the charterer for the non-conveyance of them, according to their contract. And, if the ship is put up as a general ship, without any intimation that she is under charter, and third parties ship goods and take bills of lading from the master, the owners will be responsible for the proper stowage and safe carriage of the goods so shipped. If in such a case the master refuses to sign bills of lading, except "as per charter-party," the shipper cannot be compelled to accept such bills, but may insist on having his goods returned (*i*). Although the shipowners are not parties to a charter-party under seal, entered into by the master in his own name on their behalf, yet they are responsible for a breach of those duties and obligations which attach to them in their character of carriers, independently of the charter-party. Thus, where the plaintiff had shipped a cargo of oranges on board a vessel, of which the defendants were the owners, to be carried for hire from St. Michael's to London, but the defendants employed an unskilful master, through whose negligence the oranges were lost, it was held that the shipowners were responsible for the loss, although the goods had been shipped on board by virtue of a charter-party of affreightment under seal executed by the master, by which the latter had covenanted to convey the cargo to its destination (*k*). When the contract of affreightment is not under seal, the action for the breach of such contract, and of the implied promises and engagements resulting from the acceptance of goods to be carried for hire, may be brought, either against the owners who appoint the master to the command of the vessel, and constitute him their agent for the employment of the ship, or against

(*h*) *James* v. *Jones*, 3 Esp. 27; *Major* v. *White*, 7 C. & P. 41; *ante*, p. 317; *Colvin* v. *Newberry*, 1 Cl. & F. 283.

(*i*) *Peek* v. *Larsen*, L.R. 12 Eq. 378; 40 L.J. Ch. 763; see *Jones* v. *Hough*, 5 Ex.D. 115; 49 L.J. Ex. 211; *Rayner* v. *Rederiaktiebolaget Condor*, (1895) 2 Q.B. 289; 64 L.J. Q.B. 540.

(*k*) *Leslie* v. *Wilson*, 6 Moore, 429; 3 B. & B. 171; *Fletcher* v. *Braddick*, 2 Bos. & P. N.R. 186; *Fenton* v. *Dublin St. P. Co.*, 8 Ad. & E. 843; 8 L.J. Q.B. 28.

the master who has accepted the goods to be carried, whether the contract is expressed to be made, or whether the goods have been accepted by him, in his own name only, or for and on behalf of his principals and employers; but, when the plaintiff has elected to proceed against and has sued one, the other is discharged (*l*). An agent is not ordinarily liable (see *ante*, p. 326) upon simple contracts entered into by him in a representative character on behalf of his principal; but the master of a ship is considered to be something more than a mere agent, and is made responsible accordingly (*m*).

Performance of terms and conditions of contract.—If, by a charter-party of affreightment, a shipowner agrees that his ship shall sail to a "safe port" to take in a cargo, the naming of a "safe port" is a condition precedent to the shipowner's liability to send out the vessel (*n*). The voyage begins from the time the vessel breaks ground to proceed to her place of loading; so that, if the charter-party contains the usual exception of dangers and accidents of seas, rivers, and navigation during the voyage, and the vessel is delayed or hindered by foul weather in getting there, the delay is within the exception (*o*). By the particular terms of a charter-party the cargo was to be loaded from the shore "at ship's risk." There were the usual exceptions, and, through one of the perils excepted, a part of the cargo was lost between the shore and the ship. It was held that the words "ship's risk" did not mean absolute risk, but that the risk was subject to the same exceptions as if the goods were loaded on board (*p*). If the shipowner agrees that the vessel shall leave England on or before a particular day to bring back a cargo from a foreign port, or that she shall arrive at a foreign port by a particular day and shall be ready to receive cargo, the departure or arrival of the vessel at the time specified may constitute a condition precedent to the freighter's liability to provide the cargo, and use the ship, and pay freight (*q*). Whether it will do so or not depends on the intention of the parties, to be gathered from the language they have used, and that intention may be inferred from the consequences of the breach; so that, if the delay entirely defeats the object of the freighter in taking up

(*l*) *Priestley* v. *Fernie*, 3 H. & C. 977; 34 L.J. Ex. 172.

(*m*) *Ellis* v. *Turner*, 8 T.R. 533; *Boson* v. *Sandford*, 1 Show. 104; *Morse* v. *Slue*, 1 Ventr. 190, 238; *Liver Alkali Co.* v. *Johnson*, L.R. 9 Ex. 338; 43 L.J. Ex. 216.

(*n*) *Rae* v. *Hackett*, 12 M. & W. 724; 13 L.J. Ex. 216.

(*o*) *Barker* v. *M'Andrew*, 18 C.B. N.S. 759; 34 L.J. C.P. 191; *The Carron Park*, 15 P.D. 203; 59 L.J. P. 74.

(*p*) *Nottebohn* v. *Richter*, 18 Q.B.D. 63; 56 L.J. Q.B. 35.

(*q*) *Glaholm* v. *Hays*, 2 Sc. N.R. 471; 10 L.J. C.P. 98; *Shadforth* v. *Higgin*, 3 Campb. 385; *Lovatt* v. *Hamilton*, 5 M. & W. 644; *Oliver* v. *Fielden*, 4 Exch. 135; 18 L.J. Ex. 353; *Croockewit* v. *Fletcher*, 1 H. & N. 912; 26 L.J. Ex. 153; *Behn* v. *Burness*, 3 B. & S. 759; 32 L.J. Q.B. 204.

the vessel, the agreement for departure or arrival by a certain day will be a condition precedent (*r*). Where, by charter-party, the freighter covenanted to pay freight for a vessel at so much a ton per month until her final discharge, so much of such freight as might be earned at the time of the arrival of the ship at her first destined port abroad to be paid within ten days next after arrival there, and the remainder of the freight at specific periods, it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight (*s*). A shipowner by entering into a charter-party impliedly undertakes that the ship shall be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charter-party; and if the ship is not so fit, and cannot be made so in such a time as not to frustrate the object of the voyage, the charterer may decline to put a cargo on board, and may maintain an action against the shipowner (*t*). By a charter-party certain dangers during the voyage were excepted, and by a separate clause the charterers were to have the option of cancelling the charter-party if the ship did not arrive ready to load on a certain date. The ship arrived at the date, but in consequence of the excepted dangers was not ready to load. It was held that the exception clause applied only to the voyage, and not to the readiness to load, and therefore the charterers might cancel the charter-party (*u*).

Representations in charter-parties.—If a vessel is described in a charter-party as A 1, it is a warranty that she is A 1 at the time the description is given, but not that she shall continue so, or retain the same letter on her arrival at the port of loading (*x*). A representation in a charter-party that the ship chartered is "now at sea, having sailed three weeks ago," is a warranty (*y*); and describing her as "the steamship H." is a warranty that the principal motive power is steam (*z*); but a representation that she is 180 tons when she is 200 is mere description and not a warranty (*a*). A statement in a charter-party that the ship is expected to be at Alexandria about the 15th December is a warranty that she is then in such a place and under such engagement as that she may reasonably be expected to be at Alexandria

(*r*) *McAndrew* v. *Chapple*, L.R. 1 C.P. 643; 35 L.J. C.P. 281.

(*s*) *Graves* v. *Legg*, 9 Exch. 717; 23 L.J. Ex. 231.

(*t*) *Stanton* v. *Richardson*, L.R. 9 C.P. 390; 43 L.J. C.P. 230.

(*u*) *Smith* v. *Dart and Son*, 14 Q.B.D. 105; 54 L.J. Q.B. 121. As to the duration of a voyage, see *The Accomac*, 15 P.D. 208; 59 L.J. P. 91.

(*x*) *Hurst* v. *Usborne*, 18 C.B. 144; 25 L.J. C.P. 209; *Routh* v. *Macmillan*, 33 L.J. Ex. 38; 2 H. & C. 750; *French* v. *Newgass*, 3 C.P.D. 163; 47 L.J. C.P. 361.

(*y*) *Ollive* v. *Booker*, 1 Exch. 416; 17 L.J. Ex. 21.

(*z*) *Fraser* v. *Telegraph Construction Co.*, L.R. 7 Q.B. 566; 41 L.J. Q.B. 249.

(*a*) *Barker* v. *Windle*, 6 E. & B. 675; 25 L.J. Q.B. 349.

about the day named (*b*). Whenever a descriptive statement in a charter-party was intended to be a substantive part of the contract, it will be construed as a warranty. Such a statement is more or less important, in proportion as the object of the contract more or less depends upon it. In some cases, if not performed by the party making it, it will enable the other to repudiate the contract *in toto*. In other cases it gives only a claim to compensation in damages for a breach of contract (*c*).

On the margin of a charter-party was written an unsigned note; in the charter-party was a guarantee, "owners guarantee that the vessel shall not carry less than 2,000 tons dead weight;" a lump sum was stipulated for freight, but a *pro ratâ* reduction provided in case the vessel should not carry the guaranteed dead weight; the marginal note was "including machinery the largest pieces measuring, say (so much);" it was held that the marginal note amounted to a representation, and that since the pieces of machinery tendered by the charterers were larger than was contemplated, and so the weight stowed was less than 2,000 tons, the charterers were not entitled to a reduction of the freight (*d*).

Where the charter-party stipulated that the ship should load "a full and complete cargo of iron ore, say about 1,100 tons," and the shipowner provided a ship which could carry 1,210 tons, it was held that charterer fulfilled his contract by loading only the 1,100 tons (*e*). But where it was provided that the ship should load "a cargo of sleepers and timbers," the charterer to "have the option of shipping 100 to 200 tons of general cargo," and the owners guaranteed "the ship to carry at least about 90,000 cubic feet, or 1,500 tons dead weight of cargo," it was held that the latter clause did not amount to a warranty to carry 90,000 cubic feet of sleepers and timbers, but only to a warranty of the carrying capacity of the ship (*f*).

Substantial performance of conditions precedent.—Where the plaintiff covenanted to let his ship to freight to the defendants, and take a cargo on board, and proceed therewith to Naples and make delivery thereof to the agents of the defendants, and, having so done, receive on board a return cargo, and the defendants, in consideration of the premises, covenanted that they would provide a complete homeward cargo and pay freight, and the plaintiff received the cargo and proceeded with it to Naples, where it was

(*b*) *Corkling* v. *Massey*, L.R. 8 C.P. 395; 42 L.J. C.P. 153.

(*c*) *Behn* v. *Burness*, 3 B. & S. 753; 32 L.J. Q.B. 204; *Neill* v. *Whitworth*, 34 L.J. C.P. 155; 18 C.B.N.S. 435; *Bentsen* v. *Taylor*, (1893) 2 Q.B. 274; 63 L.J. Q.B. 15.

(*d*) *Mackill* v. *Wright Brothers*, 14 App. Cas. 106.

(*e*) *Morris* v. *Levison*, 1 C.P.D. 155; 45 L.J. C.P. 409. See *Miller* v. *Borner*, (1900) 1 Q.B. 691; 69 L.J. Q.B. 429.

(*f*) *Carnegie* v. *Connor*, 24 Q.B.D. 45; 59 L.J. Q.B. 122.

seized by the Neapolitan Government, it was held that the material part of the covenant was the letting of the ship and the making of the voyage, and, as that had been performed, the defendants were bound to provide the return cargo and pay the freight (*g*). And, where the plaintiffs let a ship to the defendants, and covenanted to take on board at Havre six pipes of brandy, with such other goods as the captain might procure on freight, and proceed therewith to Terceira, and there take a cargo on board and proceed therewith to London, and the defendants, in consideration of the completion of the voyage, covenanted to pay freight, and guaranteed the ship a complete cargo home, and it appeared that the voyage to Terceira had been performed, and that the ship was ready to receive the return cargo at that place, it was held that the covenant relating to the taking on board the brandy at Havre and carrying it to Terceira was not a condition precedent to the liability of the defendants upon their covenant to provide the homeward cargo, but a distinct and independent covenant, for the breach of which the plaintiffs would be liable in damages (*h*).

Time of performance—Waiver.—If the vessel is to proceed to a particular port and there load a full cargo, the loading must be completed within a reasonable time; and, if extraordinary circumstances arise preventing the merchant from doing what he has undertaken to do, he must make compensation in damages, as he ought to have provided against the unforeseen contingency by his contract (*i*). Where, however, neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other (*k*). An engagement to load with "the usual dispatch of the port" is absolute, and admits of no qualification to dispense with performance even where the performance is hindered by a casualty which the charterer could not prevent (*l*). Such an engagement covers the whole period from the time when the vessel is placed at the disposal of the charterer at the port in a condition to receive her cargo (*m*). If parties by advertisement hold out that they are ready to give a guarantee that a vessel shall sail on a particular day, and an intending passenger takes a berth on the strength of the assurance, the time named will be of the essence of the con-

(*g*) *Storer* v. *Gordon*, 3 M. & S. 308.

(*h*) *Fothergill* v. *Walton*, 8 Taunt. 576; 2 Moore, 630; *Stavers* v. *Curling*, 3 Sc. 740; 6 L.J. C.P. 41; *Pust* v. *Dowie*, 34 L.J. Q.B. 127; 5 B. & S. 33; *Behn* v. *Burness*, 3 B. & S. 753; 32 L.J. Q.B. 204; *ante*, p. 903.

(*i*) *Adams* v. *Royal Mail St. P. Co.*, 5 C.B. N.S. 497; 28 L.J. C.P. 33; *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; 39 L.J. Q.B. 188; *Dahl* v. *Nelson*, 6 App.Cas. 38; 50 L.J. Ch. 511. See *post*, p. 926.

(*k*) *Cunningham* v. *Dunn*, 3 C.P.D. 443; 48 L.J. C.P. 62; *Ford* v. *Cotesworth*, *supra*.

(*l*) *Kearon* v. *Pearson*, 7 H. & N. 386; 31 L.J. Ex. 1.

(*m*) *Ashcroft* v. *Crow Orchard Colliery Co.*, L.R. 9 Q.B. 540; 43 L.J. Q.B. 194. See, however, the cases *post*, p. 928.

tract (*n*). But this is not the case, if merchandise is shipped on board, and the vessel carries it to the place of destination. Where, by charter-party, the plaintiff let his vessel to freight to the defendant, and covenanted that the vessel should sail with the *next* wind on a voyage to Cadiz, and the defendant covenanted that if the ship went the intended voyage, and returned to the Downs, the plaintiff should have so much by way of freight for the voyage, the substance of the covenant was considered to be that the ship should perform the intended voyage, that being the primary intention of the parties, and not merely that she should sail with the next wind, which might change every hour, and that this was shown by the covenant of the defendant, who was to pay so much for the performance of the voyage, and not merely for sailing with the next wind (*o*). But where the plaintiff agreed to charter a ship at the completion of her then voyage, and she was detained as unseaworthy, and the repairs not finished for two months; it was held that the plaintiff had not got a ship reasonably fit for the purpose for which it was hired, and that he might abandon the charter-party (*p*).

Reasonable time of performance.—If a shipowner covenants generally that a ship shall sail to a particular port, and there take on board a cargo to be provided by the charterer, the sailing of the vessel direct and without any deviation or delay to the appointed port is not a condition precedent to the charterer's liability to provide and ship the cargo; but, if the delay has been unreasonable, and the charterer has thereby lost all the benefit of the voyage, and been prevented from procuring the cargo, he will then be released from his liability upon the contract (*q*).

Mode of performance—Complete cargo.—The performance of a contract that a vessel shall sail to a foreign port, and there load a particular cargo, is to be regulated, as regards the loading of the cargo, by the custom and usage of the port where the cargo is to be taken on board (*r*). If the charterer has agreed to load the ship with a full and complete cargo (*s*), he is bound, in certain cases, to fill up the interstices with broken stowage (*t*). In some cases he

(*n*) *Cranston* v. *Marshall*, 5 Exch. 395; 19 L.J. Ex. 340.

(*o*) *Constable* v. *Cloberie*, Palm. 397; *Bornmann* v. *Tooke*, 1 Campb. 377; *Davidson* v. *Gwynne*, 12 East, 380; *Hall* v. *Cazenove*, 4 East, 477; *Havelock* v. *Geddes*, 10 East, 564.

(*p*) *Tully* v. *Howling*, 2 Q.B.D. 182; 46 L.J. Q.B. 388.

(*q*) *Clipsham* v. *Vertue*, 5 Q.B. 265; 13 L.J. Q.B. 2; *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 26 L.J. Ex. 26; *Hurst* v. *Usborne*, 18 C.B. 144; 25 L.J. C.P. 209; *Jackson* v. *Union Mar. Ins.*, L.R. 10 C.P. 125; 44 L.J. C.P. 27. See *per* Lord Blackburn, *Dahl* v. *Nelson*, 6 App.Cas. p. 53; 50 L.J. Ch. 511.

(*r*) *Cuthbert* v. *Cumming*, 11 Exch. 408; 24 L.J. Ex. 310; *Hudson* v. *Clementson*, 18 C.B. 213; 25 L.J. C.P. 234.

(*s*) As to what is a full and complete cargo, see *Isis S.S. Co.* v. *Bahr*, (1900) A.C. 340; 69 L.J. Q.B. 660.

(*t*) *Cole* v. *Meek*, 15 C.B.N.S. 795; 33 L.J. C.P. 183. The stowage of coals with machinery is not proper stowage:

may load a full cargo of the lightest commodities; and, if any ballast is then wanting, it must be put in by the master (*u*). It is the duty of the owner of a vessel to stow the cargo with as much skill as a competent stevedore can do; but he is not responsible to the charterer, when the stevedore is appointed by the latter, although it is provided that he is to act under the master's orders; for such a provision only means that the master is to have a general control over the stevedore, so as to secure the proper trim and safety of the ship (*x*).

Impossibility of performance—Contracts to procure and carry cargoes and merchandise.—We have already seen that it is a rule of law that, whenever a party enters into an absolute and unqualified contract to do some particular act, the impossibility of performance occasioned by inevitable accident, or by some unforeseen occurrence over which he has no control, will not release him from the obligation of his contract (*y*). Therefore, if a shipowner has covenanted to procure and ship on board a cargo of guano, corn, or timber at a specified port, the circumstance that no guano, corn, or timber was to be procured at that port (*z*), or that its exportation had been prohibited (*a*), or that the loading of it on board was prevented by an embargo (*b*), or by want of water (*c*), or by the plague (*d*), will not constitute an answer to an action for the non-performance of the contract. The doctrine, however, of constructive loss does not apply to contracts between shipowner and charterer but only as between the underwriter and the assured; therefore, where a shipowner who had agreed that his ship "shall proceed" to a certain port put into another port for repairs, and then abandoned the voyage without the consent of the charterer, he was held liable for damages unless it could be shown either to be physically impossible to complete the voyage or so unreasonable as to be impossible from a business point of view (*e*).

Implied authority of agents of ship-charterers.—The agent of the charterer of a ship, to whom the ship is addressed for loading under a charter-party, has no implied authority to substitute a different voyage from that which is stipulated for by the charter-party, and cannot by agreement with the shipmaster substitute a

Mackill v. *Wright Brothers*, 14 App.Cas. 106.

(*u*) *Irving* v. *Clegg*, 1 Bing. N.C. 53; 3 L.J. C.P. 265; *Moorsom* v. *Page*, 4 Campb. 103.

(*x*) *Blaikie* v. *Stembridge*, 6 C.B. N.S. 909; 28 L.J. C.P. 329.

(*y*) *Ante*, p. 135.

(*z*) *Hills* v. *Sughrue*, 15 M. & W. 261; *Kirk* v. *Gibbs*, 1 H. & N. 815; 26 L.J. Ex. 209.

(*a*) *Blight* v. *Page*, 3 Bos. & P. 295, n.

(*b*) *Sjoerds* v. *Luscombe*, 16 East, 201.

(*c*) *Schilizzi* v. *Derry*, 4 E. & B. 886; 24 L.J. Q.B. 193.

(*d*) *Barker* v. *Hodgson*, 3 M. & S. 267; *Bute* (*Marquis*) v. *Thompson*, 13 M. & W. 487; 14 L.J. Ex. 95.

(*e*) *Assicurazioni Generali* v. *Bessie Morris S.S. Co.*, (1892) 2 Q.B. 652; 61 L.J. Q.B. 754.

different port of loading, or a different quality or description of cargo, from that prescribed by the charter-party (*f*).

Shipment and carriage of merchandise under bills of lading.—When the use of an entire vessel, or a certain amount of stowage therein, is not contracted for, but the merchant or owner of the goods merely sends certain parcels or packages of goods on board, to be conveyed to the port of destination, the master or commander of the vessel, or some person acting for him, usually gives a receipt for them, and the master afterwards signs and delivers to the merchant sometimes two and sometimes three parts of a bill of lading (*ante*, p. 548), of which the merchant commonly sends one or two to his agent, factor, or other person to whom the goods are to be delivered at the place of destination: that is, one on board the ship with the goods, another by the post or other conveyance, and one he retains for his own security (*g*). The bill of lading is a written or printed memorandum, signed by the master, acknowledging the shipment of the goods on board, and promising to deliver them at the port of destination to a person named as the consignee, or his assigns, on payment of freight, primage, and average, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted." The master, who thus acknowledges the receipt of the goods, and promises to carry and deliver them, is personally responsible for the fulfilment of his engagement; and the shipowner or charterer, who receives the fruit and earnings of the ship, is also liable upon the bill of lading, although he is not named therein (*h*). It is the master's duty before signing the bills to see that the dates of shipment are correctly stated in them, and the employment by the ship's owners of brokers to arrange the terms upon which the cargo is to be carried does not relieve him from this duty (*i*). Delivery to the shipowner's servants alongside the vessel is equivalent to a delivery on board (*j*). The duty to deliver the goods under a bill of lading arises on presentment of the bill; and, if it is not presented to the master on the arrival of the ship at her place of destination, the master is not bound to keep the goods for an indefinite time on board his ship, but may deliver them to any trustworthy person to be kept until the bill of lading is presented (*k*). A bill of lading signed by the master in his own name is not

(*f*) *Sickens* v. *Irving*, 7 C.B. N.S. 165; 29 L.J. C.P. 25.

(*g*) Abbott on Shipping, 358 (ed. 13).

(*h*) *Cannan* v. *Meaburn*, 8 Moore, 127; 2 L.J. (O.S.) C.P. 60.

(*i*) *Stumore, Weston & Co.* v. *Breen*, 12 App.Cas. 698; 56 L.J. Q.B. 401.

(*j*) *British Columbia and Vancouver Island Spar, Lumber and Saw Mill Co., Lim.* v. *Nettleship*, L.R. 3 C.P. 499; 37 L.J. C.P. 237.

(*k*) *Howard* v. *Shepherd*, 19 L.J. C.P. 255; 9 C.B. 321; and see the 57 & 58 Vict. c. 60, s. 493, *post*, p. 918.

conclusive upon the shipowner as to the shipment of the goods mentioned therein (*l*). But the shipowner is bound to deliver the full amount of goods signed for by the master in a bill of lading unless he can prove affirmatively that the whole or some part of it was not in fact shipped (*m*). But it is so in the hands of a consignee or indorsee for valuable consideration, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact laden on board. But the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims (*n*). The charter-party may, however, provide that the bill of lading shall be conclusive evidence of the quantity shipped (*o*). The person actually putting the goods on board is the shipper, and the expression "wholly," &c., only means that the master or other persons signing must not in any way be mixed up with the fraud (*p*). The consignee has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board (*q*).

Countermand of the shipment—Re-delivery of the goods to the consignor.—When goods have been shipped by a charterer or consignor on board a vessel to be carried and delivered to the consignee, pursuant to a contract of sale, or under bills of lading, or under any contract by which the ownership and right of property in the goods have been transferred to the consignee or some third party, the consignor's power over the goods is gone, and he cannot lawfully countermand the consignment and require the goods to be delivered back to him. He cannot, after he has ceased to be the owner of them, stop them *in transitu*, and prevent their delivery to the consignee, unless the latter has become bankrupt (*ante*, p. 567). But, if the goods are merely addressed to the consignor's agent for sale, or under circumstances which do not divest the consignor of his ownership and right of property in the goods, he may countermand the consignment and require the goods to be returned to

(*l*) *Grant* v. *Norway*, 10 C.B. 687; 20 L.J. C.P. 93; *Hubbersty* v. *Ward*, 8 Exch. 334; 22 L.J. Ex. 113; *Jessel* v. *Bath*, L.R. 2 Ex. 267; 36 L.J. Ex. 149; *Brown* v. *Powell Duffryn Coal Co.*, L.R. 10 C.P. 562; 44 L.J. C.P. 289; *Cox* v. *Bruce*, 18 Q.B.D. 147; 56 L.J. Q.B. 121.

(*m*) *Smith & Co.* v. *Bedouin St. Nav. Co.*, (1896) A.C. 70; 65 L.J. P.C. 8.

(*n*) 18 & 19 Vict. c. 111, s. 3. See *Parsons* v. *New Zealand Shipping Co.*, (1901) 1 K.B. 548; 70 L.J. K.B. 404.

(*o*) *Lishman* v. *Christie*, 19 Q.B.D. 333; 56 L.J. Q.B. 538.

(*p*) *Valieri* v. *Boyland*, L.R. 1 C.P. 382; 35 L.J. C.P. 215.

(*q*) *Meyer* v. *Dresser*, 16 C.B. N.S. 646; 33 L.J. C.P. 289; *ante*, pp. 58, 550.

him, subject to the following qualifications and restrictions. If the ship is a general ship, carrying other goods besides those of the consignor, the goods must be demanded back a convenient time before the period appointed for the ship's sailing, and the demand must be accompanied by a tender of the freight, and of the reasonable costs and charges of the re-shipment and re-delivery of the goods, and the demand must appear to have been made at a time when it was reasonably in the power of the master to comply with it, without injury to the cargo or the property of other parties on board, and without creating delay in sailing. If the entire vessel has been chartered, the charterer may demand back the goods, on tendering all the reasonable charges and lawful claims of the ship-owner and master upon them, together with the expenses of re-shipment (*r*). An owner of goods shipped to proceed to a foreign port has a right to have them re-delivered to him when the vessel, having commenced her voyage, meets with a disaster, whereby the goods are damaged so much that they cannot be profitably carried to their destination (*s*).

Loss of or damage to goods by the way.—Whenever a party has absolutely contracted to carry cargoes or merchandise from one place to another, subject to certain express exceptions, he has impliedly contracted to carry them safely (*t*); and the circumstance that he has been prevented from fulfilling his contract by some casualty or inevitable accident will constitute no answer to an action brought against him for the recovery of damages for the breach of contract, if the casualty has not been expressly provided against by the contract. Therefore, where the defendant agreed to carry the plaintiff's goods by ship from Gibraltar to London, calling at Cadiz, and the goods were seized by the revenue authorities at Cadiz, and condemned and sold, it was held that such seizure and sale formed no answer to an action for the non-delivery of the goods (*u*). If the vessel becomes disabled, and gets to port in a sinking state, the master is bound to tranship and forward the cargo, if he has the means of transhipment at hand (*x*), and is allowed a reasonable time to do so (*y*); but, if the vessel is wrecked, and the master has no means of transhipment (*z*), and no prospect of obtaining any, or if the cargo is

(*r*) *Thompson* v. *Small*, 1 C.B. 328; 14 L.J. C.P. 157.

(*s*) *Blasco* v. *Fletcher*, 14 C.B. N.S. 147; 32 L.J. C.P. 284.

(*t*) *Rogers* v. *Head*, Cro. Jac. 262; *Matthews* v. *Hopping*, 1 Keb. 852.

(*u*) *Spence* v. *Chodwick*, 10 Q.B. 517; 16 L.J. Q.B. 313; *Evans* v. *Hutton*, 5 Sc. N.R. 670; 12 L.J. C.P. 17; *Gosling* v. *Higgins*, 1 Campb. 451.

(*x*) *Cannan* v. *Meaburn*, 8 Moore, 127; 2 L.J. (O.S.) C.P. 60.

(*y*) *The Soblomsten*, L.R. 1 A. & E. 293; 36 L.J. Adm. 5.

(*z*) As to the duty of the master to tranship and forward the goods, see *Shipton* v. *Thornton*, 9 Ad. & E. 337; 8 L.J. Q.B. 73; *Gibbs* v. *Grey*, 2 H. &

of a perishable nature, and cannot be transhipped and forwarded to the place of destination without risk of serious injury or total destruction, he is then clothed with an implied authority from the owners of such cargo to do the best he can with it for their benefit; and if, being unable to communicate with the owner, he acts *bonâ fide* with ordinary diligence, forethought, and prudence, he exempts his employers, the shipowners, from all liability for the loss (*a*). But where there is no urgent necessity for selling the goods, and the master can communicate with the owners, he must not sell without leave of the owners (*b*), and if he does such sale is void (*c*). There is a duty on the master of a ship as representing the shipowner to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures when reasonably practicable under all the circumstances to check the loss resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading; and for neglect of this duty by the master, the shipowner is responsible to the shipper (*d*). But he is not entitled to carry on goods in an unfit state against the express wish of the shippers in order to earn the freight (*e*); he must exercise his discretion whether he can carry on the cargo without risk to the ship (*f*). If a ship is greatly infested by rats and serious damage is done to the cargo, the undertaker of the work of carrying is responsible for the injury, although he may have kept cats on board for the express purpose of destroying the rats (*g*). Where after a disaster at sea the shipowner in the interests of the whole adventure, and before he has elected to abandon the ship, incurs reasonable and necessary expenses in landing a perishable cargo and carrying it to a place of safety, the expenses are either a general average charge or a charge against cargo or against cargo and freight as the case may be. There is nothing to prevent a shipowner in such a case from employing experienced persons to act in his place for the benefit of all concerned, but he cannot make this expenditure a general average charge unless he acted reasonably in so doing (*h*).

N. 30; 26 L.J. Ex. 286; *Mathews* v. *Gibbs*, 2 E. & E. 282; 30 L.J. Q.B. 55; but see *The Hamburg*, 32 L.J. Adm. 161.

(*a*) *The Gratitudine*, 3 Rob. 261; *Ireland* v. *Thompson*, 4 C.B. 168; 17 L.J. C.P. 241; *Australasian Steam Co.* v. *Morse*, L.R. 4 P.C. 222.

(*b*) *Acatos* v. *Burns*, 3 Ex.D. 282; 47 L.J. Q.B. 566.

(*c*) *Atlantic Mutual Ins. Co.* v. *Huth*, 16 Ch.D. 474.

(*d*) *Notara* v. *Henderson*, L.R. 7 Q.B. 225; 41 L.J. Q.B. 158.

(*e*) *Notara* v. *Henderson*, *supra*.

(*f*) *The Savona*, (1900) P. 252; 69 L.J. P. 95.

(*g*) *Laveroni* v. *Drury*, 8 Exch. 170; 22 L.J. Ex. 2; *Kay* v. *Wheeler*, L.R. 2 C.P. 302; 36 L.J. C.P. 180.

(*h*) *Rose* v. *Bank of Australasia*, (1894) A.C. 687; 63 L.J. Q.B. 504.

Implied promise to carry safely.—Whenever goods have been bailed by one man to another upon the faith of an express or implied undertaking by the latter to carry them to a distant part, it is no answer to an action brought against him to recover damages for the breach of his engagement, to say that the goods were lost by the way, the very fact of the loss affording *primâ facie* evidence of neglect and want of care (*i*). If the goods have been stolen, or consumed by fire, or destroyed by accident, without fault or want of care on the part of the undertaker of the work, the latter stands excused, and may avail himself of the robbery or the unavoidable accident as an answer to an action brought against him for the non-delivery of the goods to the consignee. "He is only," observes Holt, C.J., "to do the best he can; and if he be robbed, &c., it is a good account; for it would be unreasonable to charge him with a trust further than the nature of the thing puts it into his power to perform it" (*k*). A loss by theft or secret purloining of goods is *primâ facie* evidence of negligent keeping; and the carrier must rebut this presumption by showing that he had taken all such precautions as appeared to be necessary to guard against it. In an action against the commander of a ship of war for the loss of two casks of dollars which had been delivered to him to be carried from the River Plate to London upon freight for hire, it appeared that on the arrival of the ship in the Thames the two casks had been opened and plundered by the crew; and it was held that the very occurrence of the loss was *primâ facie* evidence of negligent keeping on the part of the defendant, and that he was responsible for the loss (*l*). In the contract of a shipowner to carry goods shipped on board his vessel there is an implied condition that the vessel shall be seaworthy (*m*), except as to latent defects.

Limitation of liability by special contract.—There are certain cases, as we shall presently see, where a carrier contracts for the conveyance of very perishable or fragile articles, in which he may accept the goods and contract to carry them on the express terms that he shall not be responsible for damage done to them in the transit (*post*, p. 956). Generally speaking, however, it is not competent to a party to enter into a contract for the performance of a particular duty, and by the same contract to stipulate that he shall be exempt from *all* legal responsibility if he neglects to do

(*i*) *Parry* v. *Roberts*, 3 Ad. & E. 120; 4 L.J. K.B. 189.

(*k*) Holt, C.J., *Coggs* v. *Bernard*, 1 Smith's L.C. 179 (ed. 10).

(*l*) *Hodgson* v. *Fullarton*, 4 Taunt. 787; *Hatchwell* v. *Cooke*, 6 Taunt. 577.

(*m*) *Kopitoff* v. *Wilson*, 1 Q.B.D. 377; 45 L.J. Q.B. 436; but see *Schloss* v. *Heriot*, 14 C.B. N.S. 59; 32 L.J. C.P. 211, where the contrary was held (although it was admitted that an action would lie for negligence), and which does not appear to have been cited in *Kopitoff* v. *Wilson*.

what he has undertaken to perform (*n*). We cannot, observes Lord Ellenborough, construe a contract for the carriage of goods between the owners of vessels carrying goods for hire and the persons putting the goods on board, so as to make the owners say "We will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious; for this would in effect be saying, 'We will be at liberty to receive your goods on board a vessel, however leaky; we will not be bound even to provide a crew equal to the navigation of her; and, if through these defaults on our part the goods are lost, we will pay nothing'" (*o*).

A stipulation in a bill of lading that the shipowner is not to be accountable for leakage or breakage absolves him from responsibility for leakage and breakage the result of mere accident, where no blame is imputable, or for leakage the result of bad stowage, where the shippers have themselves superintended the stowage (*p*), but does not exempt him from the obligation which the law imposes upon him of taking reasonable care of goods entrusted to him to be carried (*q*). And an exception in a bill of lading of "accidents or damage of the seas, rivers, and steam navigation of whatever nature or kind soever," does not protect the shipowner from liability for damage arising from a collision caused by gross negligence of his ship's master and crew (*r*). Where a bill of lading contained the following exemption from the shipowner's liability: negligence of pilot or other person in service of the ship, &c., "whether in navigating the ship or otherwise; loss or damage arising from rain, storage, or contact with other goods being excepted," and the goods were exposed to rain and contact with other wet goods, and were thereby injured, it was held that the words "or otherwise" referred to negligence in bringing about the excepted loss other than loss caused in navigating the ship, and, therefore, that the shipowner was not liable (*s*). An exception of loss by thieves means *primâ facie* persons outside the ship, and not belonging to it (*t*). Where a charter-party contained an exemption from liability for negligence of master or crew in the navigation of the ship, and in the ordinary course of the voyage, it was held that this did not protect the shipowner

(*n*) *Sutton* v. *Ciceri*, 15 App.Cas. 144.

(*o*) *Lyon* v. *Mells*, 5 East, 438; *Ellis* v. *Turner*, 8 T.R. 531; see, however, *The Duero*, L.R. 2 A. & E. 293; 38 L.J. Adm. 69.

(*p*) *Ohrloff* v. *Briscall*, L.R. 1 P.C. 231; 35 L.J. P.C. 63.

(*q*) *Phillips* v. *Clark*, 2 C.B. N.S. 164; 26 L.J. C.P. 168; *Czech* v. *General Steam Navigation Co.*, L.R. 3 C.P. 14; 37 L.J. C.P. 3.

(*r*) *Lloyd* v. *Gen. Iron Screw Col. Co.*, 3 H. & C. 284; 33 L.J. Ex. 269.

(*s*) *Norman* v. *Binnington*, 25 Q.B.D. 475; 59 L.J. Q.B. 490; *Baerselman* v. *Bailey*, (1895) 2 Q.B. 301; 64 L.J. Q.B. 707.

(*t*) *Taylor* v. *Liverpool & G. W. Steam Co.*, L.R. 9 Q.B. 546; 43 L.J. Q.B. 205; *Steinman* v. *Angier Line*, (1891) 1 Q.B. 619; 60 L.J. Q.B. 425.

from liability for injury to the cargo caused by the negligence of one of the officers of the ship after she had arrived at the wharf but before her cargo was discharged (*u*).

Loss by the act of God, dangers and accidents of the seas, rivers, and navigation.—From losses occasioned by the act of God, by the King's enemies, and the dangers and perils of the sea and of navigation, the carrier by water is, and always has been, exempt by the common law; but he is not exempt, nor does the exception in the bill of lading or other contract of affreightment exempt him, from accidents occasioned by his own negligence and misconduct or want of skill, or the negligence, misconduct, or want of skill of the persons whom he has entrusted with the navigation of the vessel (*x*). The expression "act of God" denotes natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the negligence of man; if the loss could not be prevented by any reasonable precaution the carrier will be exempt (*y*). And the term "dangers and accidents of the sea and of navigation" denotes the dangers and accidents peculiar to the ocean and to navigation from port to port which no human care or skill can guard against or surmount, such as accidents resulting from the irresistible violence of the winds and waves, and from tides and currents (*z*); the destruction of a perishable cargo or of living animals from the rolling of a ship in a storm (*a*); jettison of goods from irresistible necessity to lighten the ship and save her from foundering (*b*); the grounding of a vessel on the hard and uneven bottom of a dry harbour, in which she had been obliged to take refuge (*c*); or on a sunken rock or sandbank not generally known, and not marked on the ordinary charts or maps; irresistible attacks by pirates (*d*); the accidental breaking of tackle by which the vessel is moored in port (*e*); or accidental collisions in fogs or storms, where no blame is imputable to either of the vessels striking together (*f*); or where the collision is caused by the negligence of the other vessel (*g*). Where a cargo was injured by a taint communicated to it in consequence of the vessel not having been properly cleaned, it was held that this was not damage caused by improper navigation (*h*).

(*u*) *The Accomac*, 15 P.D. 208; 59 L.J. P. 91. As to negligence of a stevedore, see *The Ferro*, (1893) P. 38; 62 L.J. P. 48.

(*x*) Mansfield, C.J., 1 Doug. 278; *Siordet* v. *Hall*, 1 Moo. & P. 561; 6 L.J. (O.S.) C.P. 137.

(*y*) *Nugent* v. *Smith*, 1 C.P.D. 423, 434; 45 L.J. C.P. 697. See *post*, p. 949.

(*z*) *Hodgson* v. *Malcolm*, 2 B. & P.N.R. 336.

(*a*) *Lawrence* v. *Aberdein*, 5 B. & Ald. 110.

(*b*) *Bird* v. *Astock*, 2 Bulst. 280.

(*c*) *Fletcher* v. *Inglis*, 2 B. & Ald. 315.

(*d*) *Pickering* v. *Barclay*, Styles, 132.

(*e*) *Laurie* v. *Douglas*, 15 M. & W. 746.

(*f*) *Buller* v. *Fisher*, 3 Esp. 67.

(*g*) *Sailing Ship Garston Co.* v. *Hickie, Borman & Co.*, 18 Q.B.D. 17; 56 L.J. Q.B. 38.

(*h*) *Canada Shipping Co.* v. *British Shipowners' Assoc.*, 23 Q.B.D. 342; 58 L.J. Q.B. 462.

Loss occasioned by negligence or misconduct not loss from sea peril, though sea does mischief.—The general rule in cases of insurance is, that the immediate and not the remote cause of loss is to be considered: but this rule does not apply as between the owner and carrier of goods. Thus, if a vessel deviates from its proper course, and sails unnecessarily through dangerous straits and channels, or into seas infested with pirates, and is wrecked or plundered in consequence of such deviation, the loss, though proximately caused by what is usually termed "a peril of the sea," is deemed to have been occasioned by the misconduct of the master or commander, who had improperly gone out of his way to meet the danger. A collision arising from the negligence of the crew of the ship is not a peril of the sea within the meaning of an exception of loss arising from perils of the sea in a bill of lading (*i*). If the cargo is seriously damaged or destroyed by rats, the loss is not the result of a danger or an accident of the seas, but of neglect and want of care on the part of the master and crew (*k*). But if rats gnaw a hole in any part of the ship whereby sea water is let in and damages the cargo, that is a peril of the sea within the exception (*l*). So, also, if the sea water enters through an insufficiently secured opening, this is a damage arising from "improper navigation" of the ship (*m*). If a vessel becomes unseaworthy, and the owner neglects to avail himself of an opportunity to repair her, and thereby causes the loss of the cargo, the loss is the result of negligence (*n*). If the vessel at the time of the commencement of the voyage is unseaworthy—if the hull is worm-eaten or gnawed by rats, or the timbers are rotten, and the vessel is shaken to pieces and founders in a gale which a stout and seaworthy ship would have withstood in safety, the loss though proximately caused by the violence of the winds and waves, has not, in contemplation of law, been occasioned by perils of the seas, but by the negligence and misconduct of the owner of the ship, who is responsible to the owner of the cargo for the loss of the goods shipped on board (*o*). When, on the other hand, from the rolling and labouring of a ship in a storm a number of horses, though properly stowed and secured on board at the commencement of the tempest, broke loose and kicked each other to death in the hold of the vessel, the loss, though proximately caused by

(*i*) *Grill* v. *General Iron Screw Col. Co.*, L.R. 3 C.P. 476; 37 L.J. C.P. 205. See *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q.B.D. 521; 52 L.J. Q.B. 220.

(*k*) *Laveroni* v. *Drury*, 8 Exch. 170; 22 L.J. Ex. 2.

(*l*) *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, 12 App.Cas. 518; 57 L.J. Q.B. 24.

(*m*) *Carmichael* v. *Liverpool Association*, 19 Q.B.D. 243; 56 L.J. Q.B. 428; *The Cressington*, (1891) P. 152; 60 L.J. P. 25; *Blackburn* v. *Liverpool and River Plate S. N. Co.*, (1902) 1 K.B. 290; 71 L.J. K.B. 177.

(*n*) *Worms* v. *Storey*, 11 Exch. 430; 25 L.J. Ex. 1.

(*o*) *Hunter* v. *Potts*, 4 Campb. 202.

their own hoofs, was deemed to have been occasioned by peril of the sea (*p*).

"If a ship perish in consequence of striking against a rock or shallow, the circumstances under which that event has taken place must be ascertained in order to decide whether it happened by a peril of the sea, or by the fault of the owner, carrier, or master. If the situation of a rock or shallow is generally known, and the ship is not forced upon it by adverse winds, or storms and tempests, the loss is to be imputed to the fault of the master. And it matters not, in such a case, whether the loss arises from his rashness in not taking a pilot, or from his own ignorance or unskilfulness. On the other hand, if the ship is forced upon such a rock or shallow by adverse winds or tempests, or if the shallow is occasioned by a recent and sudden collection of sand in a place where ships could before sail with safety, or if the rock or shallow is not generally known; in all these cases the loss is to be attributed to the act of God, and it is deemed a peril of the sea" (*q*). If the carrier by water overloads his vessel, and so causes it to founder in a gale of wind, the loss is occasioned by the negligence of man; but it is otherwise, if the boat has not been surcharged, but sinks solely through the violence of the winds and waves (*r*). If a hoyman shoots a bridge in tempestuous weather, or at a dangerous period of the tide, and the hoy is sunk, the loss is occasioned by the negligence of the hoyman; but, if he has shot the bridge at a proper time and in proper weather, but the hoy has been taken aback by a sudden gust of wind, and has been driven against the abutments of the bridge and sunk, and the goods on board lost, the loss is deemed to have been occasioned by the act of God, and the carrier, consequently, is exempt from responsibility in respect thereof (*s*).

Proof that loss was occasioned by negligence and not by sea peril.—In order to determine whether the loss has or has not been occasioned by the negligence or want of skill of the servants of the shipowner, the established rules of nautical practice, the usages and regulations of particular ports and rivers, the state of the wind, the tide, and the light, the degree of vigilance of the master and crew, and all other circumstances bearing upon the conduct and management of the vessel must be considered (*t*).

Loss by fire—Limitation of responsibility of owners and part owners of ships by statute.—By the Merchant Shipping Act,

(*p*) *Gabay* v. *Lloyd*, 3 B. & C. 793.
(*q*) Abbott, 464, 465 (ed. 13).
(*r*) 22 Assiz. 41; *Williams* v. *Lloyd*, Jones's Rep. 180.
(*s*) *Amies* v. *Stevens*, 1 Str. 128.
(*t*) Abbott, 458 *et seq.* (ed. 13); *Tuff* v. *Warman*, 5 C.B. N.S. 573; 27 L.J. C.P. 322.

1894 (*u*), no owner of any sea-going ship or share therein shall be liable to make good any loss or damage which may happen, without his fault or privity, to any goods or merchandise taken on board such ship by reason of any fire happening on board, or to any gold, silver, diamonds, watches, jewels or precious stones taken on board, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof has at the time of shipping the same inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles (*v*). And by s. 503, the owners of a ship, whether British or foreign (*x*), shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say:—(1) where any loss of life or personal injury is caused to any person being carried in the ship; (2) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; (3) where any loss of life or personal injury is caused to any person carried in any vessel by reason of the improper navigation of the ship; (4) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship, be liable to damages beyond the following amounts, viz., in respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding 15*l.* for each ton of their ship's tonnage; and in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding 8*l.* for each ton of the ship's tonnage (*y*). By s. 508, nothing contained in the Act is to take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman.

The limitation of liability under the Act does not, it seems, extend to the owner of any lighter, barge, boat, or vessel, used solely in rivers or inland navigation, or to any ship or vessel not duly registered (*z*). The Act embraces two descriptions of losses, the one a loss or damage to the cargo laden on board the ship occasioned by the negligence of the master or mariners, and rendering the shipowner liable, *ex contractu*, at common law to the

(*u*) 57 & 58 Vict. c. 60, s. 502.

(*v*) The nature of the articles must be described, and their money value stated: *Williams* v. *Afric. St. Ship Co.*, 1 H. & N. 300; 26 L.J. Ex. 69.

(*x*) *The Amalia*, 32 L.J. Adm. 191; *The Andalusian*, 3 P.D. 182; 46 L.J. P. 77.

(*y*) As to the meaning of "tonnage" in this section, see *The Petrel*, (1893) P. 320; 62 L.J. P. 92; *The Zanzibar*, (1892) P. 233; 61 L.J. P. 81; and sect. 503 (2).

(*z*) *Morewood* v. *Pollok*, 22 L.J. Q.B. 250; 1 E. & B. 743.

extent of the value of such cargo; and the other a loss or damage to the ship or cargo of some third party, occasioned by the negligence or misconduct of the master, in respect of which the owner is liable *ex delicto*, but not upon any contract. To an action *ex delicto* in respect of an injury to the property of a third party, both the shipowner and the master are liable—the owner, as the employer, responsible for the wrongful act done by the servant in the course of his employment, and the other as the party actually committing the injury; and it is this liability *ex delicto* to which the Act refers, when it provides that nothing therein contained shall lessen or take away any responsibility to which any master or mariner might then by law be liable, notwithstanding such master or mariner might be an owner or part owner of his ship or vessel. If the master be a part owner, his responsibility, if he is sued (*ex delicto*) in his character of master, and not as one of several part owners, will not be limited by the Act; but, if he is sued as one of the part owners with the other part owners, the circumstance of the loss being occasioned by his fault, and with his privity, will not take away from the other part owners the protection which the statute intended to give them (*a*). If the ship is sunk by a collision with another vessel, the shipowner is not released from liability by the loss of his vessel (*b*).

Losses occasioned by negligence of licensed pilots.—The Merchant Shipping Act, 1894 (*c*), further exempts the owner and master of a ship from liability in respect of losses or damage occasioned by the neglect or incapacity of a licensed pilot in charge of the vessel. "The shipowners are not responsible when they take a pilot by compulsion; but in all other cases they are responsible for the acts of the pilot" (*d*). "It is the duty of the master to look after the pilot in the case of his palpable incompetency, or intoxication, or of the loss of his faculties. The taking of a pilot under the Act does not relieve the shipowner from the ordinary legal consequences resulting from the negligence of the master and crew" (*e*).

Delivery of goods by shipowners.—There is an implied engagement on the part of every undertaker of the work of carrying, to proceed by the ordinary course to the place of delivery without delay, and without unnecessary deviation (*f*). If it is customary

(*a*) Bayley, J., *Wilson* v. *Dickson*, 2 B. & Ald. 13.

(*b*) *Brown* v. *Wilkinson*, 15 M. & W. 391; 16 L.J. Ex. 34; *The Mellona*, 12 Jur. 271; 3 Rob. 7.

(*c*) 57 & 58 Vict. c. 60, s. 633.

(*d*) *The Energy*, L.R. 3 A. & E. 48; 39 L.J. Adm. 25; *The Ocean Wave*, L.R. 3 P.C. 205; *The Calabar*, L.R. 2 P.C. 238; *The Lion*, L.R. 2 P.C. 525; 38 L.J. Adm. 51.

(*e*) Dr. Lushington, *The Eden*, 10 Jur. 298; 2 Rob. 442; *The Duke of Manchester*, 10 Jur. 865; *The Iron Duke*, 9 Jur. 476; 2 Rob. 377; *The Iona*, L.R. 1 P.C. 426; *The Velasquez*, L.R. 1 P.C. 494; 36 L.J. Adm. 19; *The Queen*, L.R. 2 A. & E. 354; 38 L.J. Adm. 39.

(*f*) *Davis* v. *Garrett*, 4 Moo. & P. 540; 8 L.J. (O.S.) C.P. 253.

for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to fetch the goods from the vessel itself, or from the wharf, as soon as the arrival of the ship has been reported, the carrier must give such owner or consignee notice of the arrival of the goods on board, or at the customary place of destination, in order to discharge himself from further liability as a carrier. He cannot at once discharge himself from all responsibility by immediately landing the goods without any notice to the consignee, but is bound to keep the goods on board or on the wharf, at his own risk, for a reasonable time, to enable the consignee or his assigns to come and fetch them (*g*). The Merchant Shipping Act, 1894 (*h*), empowers the shipowner to enter and land goods in default of entry and landing by the owner; and, notwithstanding the landing, the shipowner may, by giving notice for that purpose, preserve his lien for freight. But the Act creates no personal liability for freight in a consignee who takes delivery of goods so deposited with a warehouseman by the shipowner merely as agent for the owner of the goods (*i*). After part of the goods have been landed by the shipowner, the consignee may interfere and claim the remainder, if the shipowner can deliver the remainder to him without any further loss or injury than would have been the case if the consignee had been ready before any of the goods were discharged (*k*). The Act also provides for the sale of the goods, if they are not claimed by the owner (*l*).

Losses on board lighters conveying goods from ship to shore.—When the vessel is not able to discharge at a wharf, but the goods are placed in lighters to be conveyed from the ship to the shore, and are lost on their passage through the neglect or want of skill of the lighterman, the loss will fall on the owner of the goods, if the lighterman is paid and employed by him (*m*); but, if he is employed and paid by the shipowner or carrier, he is then the servant of the latter, expediting the goods in the further prosecution of the voyage to their place of destination, and the carrier, consequently, must make good the loss. Generally speaking, the task of discharging the cargo in the port of London is accomplished through the medium of public lightermen, whose lighters are entered at Waterman's Hall, and who are public officers employed and paid by the merchants and owners of the

(*g*) *Bourne* v. *Gatliff*, 3 Sc. N.R. 44; 8 *ib.* 604; 11 Cl. & Fin. 45.

(*h*) 57 & 58 Vict. c. 60, s. 493.

(*i*) *White & Co.* v. *Furness, Withy & Co.*, (1895) A.C. 40; 64 L.J. Q.B. 161.

(*k*) *Wilson* v. *London, Italian and Adriatic Steam Nav. Co.*, L.R. 1 C.P. 61; 35 L.J. C.P. 9.

(*l*) Sect. 497; *Beresford* v. *Montgomerie*, 17 C.B. N.S. 379; 34 L.J. C.P. 41; *Wilson* v. *London, Italian and Adriatic Steam Nav. Co.*, *supra*.

(*m*) *Sparrow* v. *Carruthers*, 2 Str. 1236; *Strong* v. *Natally*, 1 Bos. & P. N.R. 16.

goods. The lightermen are responsible, in their character of common carriers, to the merchant who employs them; and the shipowner is discharged as soon as the goods have been safely loaded on board such lighters. But he is not, by the custom of the river Thames, exonerated from liability until the loading is complete; and he is not discharged from his obligation to guard the portion of the cargo that has been placed in the lighter, by telling the lighterman that he has not sufficient hands on board to take care of it. He is, on the other hand, bound to take care of the lighter and its contents until it is fully laden, and is ready to leave the side of the ship (*n*). The protection afforded by s. 502 of the Merchant Shipping Act, 1894 (*ante*, p. 916), to owners of sea-going vessels in respect of loss or damage by fire to goods or merchandise shipped on board, does not extend to the case of a fire happening on board lighters employed by the shipowner in carrying goods from the shore to be laden on board the vessel (*o*). Therefore, if goods are set on fire by reason of the negligence of such lightermen, the shipowners are responsible for the damage.

Payment of freight or hire.—If a charter-party amounts to a demise of the ship to the charterer for a certain term at a certain hire, and the vessel is bailed to him pursuant to the contract, he is responsible for the payment of the hire at the expiration of the term of hiring, although the vessel may have been lost; but, if the shipowner merely grants the use of the vessel, retaining the possession of it through the medium of his own seamen and servants, the shipowner loses his right to the hire, at the same time that the charterer is deprived of the use and enjoyment of the vessel. When the charter-party amounts merely to a contract by the shipowner or shipmaster for the conveyance of merchandise to a specified destination, the fulfilment of the covenant or undertaking to carry the goods, or the shipowner's readiness and willingness to fulfil it, is a condition precedent to the payment of the hire, so that the plaintiff must of necessity show the work done, or that he was ready and willing to do it, and was hindered from doing it by the defendant, before he can demand the money (*p*). Ordinarily, the right to the freight does not arise until the goods are not only conveyed to their destination, but also delivered (*q*); or, in the case of a charter-party, until the charterers have had the full use of the ship for the purposes for which they chartered it (*r*). The

(*n*) *Catley* v. *Wintringham*, 1 Peake, 202; *Robinson* v. *Turpin*, *ib.* 203, n. (*a*).

(*o*) *Morewood* v. *Pollok*, 22 L.J. Q.B. 250; 1 E. & B. 743.

(*p*) *Tate* v. *Meek*, 2 Moore, 291; *Campion* v. *Colvin*, 3 Bing. N.C. 17; 5 L.J. C.P. 317; *Cleary* v. *M'Andrew*, 2 Moo. P.C. N.S. 216; *The Soblomsten*, L.R. 1 Adm. 293; 36 L.J. Adm. 5.

(*q*) *Cato* v. *Irving*, 5 De G. & S. 210, 224; 21 L.J. Ch. 675.

(*r*) *Brown* v. *Tanner*, L.R. 3 Ch. 597; 37 L.J. Ch. 923.

freight may, however, by the special contract of the parties, be made payable on the delivery of the goods on board (*s*), on the sailing (*t*), or on the final sailing of the vessel from the port of loading (*u*) prior to the performance of the voyage, or at any other period of time which they may choose to appoint; but, in all cases of doubtful construction, the courts will adhere to the maxim that the freight is not due until it has been earned by the performance of the work for which it is to be paid (*x*). Where part of the cargo was justifiably sold for repairs before arrival at the port of destination, and sold for more than it would fetch at the port of destination, and the proceeds paid to the charterer, it was yet held that freight could not be claimed in respect of such part of the cargo (*y*). Where the freight was to be paid "within three days after the arrival of the ship and before delivery of any portion of the goods," and the ship arrived in port, but was sunk and the goods destroyed within the three days, it was held that the freight was not payable (*z*). If freight is paid in advance and the cargo is lost, the freight so paid cannot be recovered back (*a*), unless the loss has been occasioned by negligence, or misconduct, or want of skill in the navigation of the vessel (*b*). If by the occurrence of an accident on the voyage delay is occasioned, the master may claim a reasonable time to carry on the cargo, either in the same ship when repaired, or by transhipping it into another vessel (*c*).

When the use of the entire vessel is bargained for (*d*), and the charterer covenants or agrees to provide and ship a full cargo, and pay freight therefor at so much a ton, and the shipowner sends out the vessel, the circumstance that the lading has been prevented

(*s*) *Andrew* v. *Moorhouse*, 5 Taunt. 438; 1 Marsh. 122; *De Silvale* v. *Kendall*, 4 M. & S. 42; *Allison* v. *Bristol Marine Ins. Co.*, 1 App.Cas. 209.

(*t*) *Thompson* v. *Gillespy*, 5 E. & B. 209; 24 L.J. Q.B. 340; *Hudson* v. *Bilton*, 6 E. & B. 565; 26 L.J. Q.B. 27.

(*u*) *Roelandts* v. *Harrison*, 9 Exch. 444; 23 L.J. Ex. 169. As to the meaning of "port," see *Sailing Ship Garston Co.* v. *Hickie, Borman & Co.*, 15 Q.B.D. 580; 56 L.J. Q.B. 38; *Hunter* v. *Northern Marine Ins. Co.*, 13 App.Cas. 717; *Price* v. *Livingstone*, 9 Q.B.D. 679; 53 L.J. Q.B. 118.

(*x*) *Mashiter* v. *Buller*, 1 Campb. 84; Abbott, C.J., *Manfield* v. *Maitland*, 4 B. & Ald. 585; *Vlierboom* v. *Chapman*, 13 M. & W. 230; 13 L.J. Ex. 384.

(*y*) *Hopper* v. *Burness*, 1 C.P.D. 137; 45 L.J. C.P. 377; as to payment of freight where part of cargo has been burnt, see *Aitken, Lilburn & Co.* v. *Ernsthausen*, (1894) 1 Q.B. 773; 63 L.J. Q.B. 559; as to advance freight in such circumstances, see *Weir* v. *Girvin*, (1900) 1 Q.B. 45; 69 L.J. Q.B. 168.

(*z*) *Duthie* v. *Hilton*, L.R. 4 C.P. 138; 38 L.J. C.P. 93; *Asfar* v. *Blundell*, (1896) 1 Q.B. 123; 65 L.J. Q.B. 138.

(*a*) *Saunders* v. *Drew*, 3 B. & Ad. 450; *Byrne* v. *Schiller*, L.R. 6 Ex. 319; 40 L.J. Ex. 177; *Allison* v. *Bristol Marine Ins. Co.*, *supra*. See *Smith* v. *Pyman*, (1891) 1 Q.B. 742; 60 L.J. Q.B. 621; *Oriental SS. Co.* v. *Tylor*, (1893) 2 Q.B. 518; 63 L.J. Q.B. 128.

(*b*) See *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67; 56 L.J. Q.B. 202; *Dufourcet* v. *Bishop*, 18 Q.B.D. 373; 56 L.J. Q.B. 497.

(*c*) *Cleary* v. *M'Andrew*, 2 Moo. P.C. N.S. 216.

(*d*) As to putting cargo in the cabin, see *Mitcheson* v. *Nicol*, 7 Exch. 929; 21 L.J. Ex. 323; and on deck, see *Neill* v. *Ridley*, 9 Exch. 680.

by some unforeseen cause or inevitable accident does not release the charterer from his contract. And, when the goods have been shipped on board, the charterer cannot abandon them and refuse to pay the freight on the ground that they have been damaged or destroyed by perils of the sea (*e*), or by the fault of the master and crew (*f*); nor can he deduct from the freight the value of missing articles (*g*). When the charterer merely covenants to pay freight at the rate of so much a ton, &c., for the goods actually shipped on board, and does not covenant to furnish any particular quantity of goods, he is only liable for the quantity of goods actually shipped; but, if he contracts for the use of the entire ship, or part of a ship, or for a certain specified tonnage, the payment of freight must be proportioned to the amount of tonnage space, or accommodation he has contracted for. If he covenants to ship on board a full and complete cargo, and to pay so much a ton for every ton loaded on board, he is bound to put on board and to pay freight for as much as the ship will hold and safely carry, whatever may be the amount of the burthen and tonnage of the vessel mentioned in the charter-party. A misdescription of the ship's burthen does not in such a case exonerate the charterer from the liability to ship on board, and to pay freight for, a full and complete cargo, provided the charterer has had an opportunity of examining the ship, and forming his own judgment of her capacity, and there has been no fraudulent misrepresentation or concealment of the truth (*h*). Although the charterer has taken the whole ship, and covenanted to provide and put on board, and pay freight for, a "full and complete cargo," yet the shipowner may take on board merchandise as ballast, provided it occupies no larger space than the ballast would have done, and does not interfere with the proper shipment and carriage of the cargo (*i*).

Calculation of freight.—When freight is covenanted to be paid at the rate of so much per ton the freight is to be calculated and paid on that quantity alone which is put on board, carried throughout the whole voyage, and delivered, at the end of it, to the merchant. If, therefore, a cargo of corn increases in bulk and weight during the voyage, or after the cargo is taken out of the vessel, the freight is payable only on the quantity actually shipped on board, and not on the increased quantity delivered; for such a cargo may be increased in bulk and deteriorated in quality by the negligence of the master and crew during the voyage (*k*).

(*e*) Abbott on Shipping, 460, 461 (ed. 13).

(*f*) *Dakin* v. *Oxley*, 15 C.B. N.S. 646; 33 L.J. C.P. 115.

(*g*) *Meyer* v. *Dresser*, 16 C.B. N.S. 646; 33 L.J. C.P. 289.

(*h*) *Hunter* v. *Fry*, 2 B. & Ald. 424; *Thomas* v. *Clarke*, 2 Stark. 450; *Barker* v. *Windle*, 6 E. & B. 675; 25 L.J. Q.B. 349.

(*i*) *Towse* v. *Henderson*, 4 Exch. 890; 19 L.J. Ex. 163.

(*k*) *Gibson* v. *Sturge*, 10 Exch. 622; 24

Payment pro ratâ.—If the covenant or agreement of the shipowner or master be entire for the conveyance of a full cargo of merchandise for a specific sum, the charterer is not bound to accept and pay for half a cargo; but, if the charterer loads less than a full cargo, or if part of the cargo is lost without any default on the part of the shipowner, the whole of the sum is payable (*l*). And, if he agrees to pay by the bale or cask, or at the rate of so much a ton, he is bound to accept and pay for what has been actually brought and tendered to him (*m*). He must pay, also, in all cases, for such goods as he actually accepts; and, if he voluntarily accepts goods short of the port of destination, so as to raise an inference that further carriage of the goods was dispensed with (*n*), he is liable upon an implied contract to pay *pro ratâ itineris peracti*. This apportionment usually happens when the ship, by reason of some disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage (*o*). The shipowner is not entitled to freight *pro ratâ* where goods have been sold on the voyage at an intermediate port without leave from the owners, where such leave was obtainable (*p*).

Time freight.—Where the charterer engages to pay so much per month, week, or day of the voyage, or of the ship's employment, and no time is fixed for the commencement of the computation, his liability to the freight will begin on the day that the ship breaks ground and commences the voyage, and will continue during all unavoidable delays for provisions, repairs, &c., not occasioned by the negligence or misconduct of the master or owners (*q*). The month is always understood to be a calendar, and not a lunar, month (*r*); and the freight becomes due in general at the expiration of each month, or other interval of time limited by the parties for its payment, whether the ship does or does not ultimately arrive at her place of destination. But, where the freighter covenanted to pay freight for a vessel at so much a ton per month until her final discharge, so much of such freight as might be earned at the time of the arrival of the ship at her first destined port abroad to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods,

L.J. Ex. 121; *Buckle* v. *Knoop*, L.R. 2 Ex. 125, 333; 36 L.J. Ex. 49, 223.

(*l*) *Robinson* v. *Knights*, L.R. 8 C.P. 465; 42 L.J. C.P. 211; *The Norway*, 3 Moo. P.C. N.S. 245; Br. & L. 404; *Merchant Shipping Co.* v. *Armitage*, L.R. 9 Q.B. 99; 43 L.J. Q.B. 24; *Blanchet* v. *Powell's Llantivit Coll. Co.*, L.R. 9 Ex. 74; 43 L.J. Ex. 50.

(*m*) *Christy* v. *Row*, 1 Taunt. 314; *Ritchie* v. *Atkinson*, 10 East, 295, 310.

(*n*) *The Soblemsten*, L.R. 1 Adm. 293; 36 L.J. Adm. 5; but as to when this inference arises, see *Metcalfe* v. *Britannia Iron Works Co.*, 2 Q.B.D. 423; 46 L.J. Q.B. 443.

(*o*) *Vlierboom* v. *Chapman*, 13 M. & W. 230; 13 L.J. Ex. 384.

(*p*) *Acatos* v. *Burns*, 3 Ex.D. 282; 47 L.J. Ex. 566.

(*q*) *Havelock* v. *Geddes*, 10 East, 566; *Ripley* v. *Scaife*, 5 B. & C. 169.

(*r*) *Jolly* v. *Young*, 1 Esp. 186.

it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover *any* freight (*s*).

Shipowner's lien for freight—Payment of freight by consignee (*t*). If the shipowners have by the charter-party divested themselves of the possession of the vessel in favour of the charterer, they have, of course, no lien upon the goods shipped on board, and cannot take possession of them and detain them as a security for the rent or hire agreed to be paid for the use of the vessel (*u*). But, if the charter-party does not amount to a bailment of the ship, but the shipowners keep possession of the vessel, and contract merely to carry merchandise for the charterer for certain freight, the delivery of the goods and the payment of the freight constitute mutual conditions to be performed at the same time, so that the shipowner may retain the cargo until he is tendered payment of the freight (*x*). When, however, by the terms of the contract, credit is given for the payment of the freight, as, for instance, if it is to be paid a month or three months after the arrival of the ship, the carrier must forthwith deliver the goods, and rely on the subsequent performance by the charterer of his contract to pay (*y*); and, if the latter becomes bankrupt prior to the arrival of the vessel at the port of destination, the indorsee of the bill of lading is entitled to demand the goods, and the shipowners cannot claim any lien upon them for freight (*z*). If the master does not think fit to insist on his right of detention, but delivers the goods to the consignee, and the latter afterwards refuses to pay the freight, or pays the master by a bill of exchange which turns out to be worthless, the master may resort to the consignor or shipper for payment (*a*), unless he has for his own convenience and accommodation preferred a bill when he might have had cash (*b*). Payment to the shipowners on their demand is a discharge against any claim by the master; and, on the other hand, payment to the master, in the absence of any notice from the owners to withhold it, is a valid payment as against them (*c*). The consignee is *primâ facie* the owner of the goods, and as such is liable for the freight; but, if he be not the owner, he is not liable for freight simply as consignee, except on a new contract to pay the freight. If the goods have

(*s*) *Gibbon* v. *Mendez*, 2 B. & Ald. 17; *Smith* v. *Wilson*, 8 East, 437.

(*t*) 57 & 58 Vict. c. 60, s. 494.

(*u*) *Hutton* v. *Bragg*, 7 Taunt. 14.

(*x*) *Saville* v. *Campion*, 2 B. & Ald. 503; *Campion* v. *Colvin*, 3 Bing. N.C. 17; 5 L.J. C.P. 317; *Tate* v. *Meek*, 2 Moore, 291; *Paynter* v. *James*, L.R. 2 C.P. 348.

(*y*) *Alsager* v. *St. Kath. Dock Co.*, 14 M. & W. 794; 15 L.J. Ex. 34.

(*z*) *Tumvaco* v. *Simpson*, L.R. 1 C.P. 363; 35 L.J. C.P. 196.

(*a*) *Tapley* v. *Martens*, 8 T.R. 453; *Shepard* v. *De Bernales*, 13 East, 572; *Domett* v. *Beckford*, 5 B. & Ad. 521; 3 L.J. K.B. 10.

(*b*) *Strong* v. *Hart*, 6 B. & C. 160.

(*c*) *Smith* v. *Plummer*, 1 B. & Ald. 575; *Atkinson* v. *Cottesworth*, 3 B. & C. 648.

always been delivered on payment of freight by the defendant, that is reasonable evidence that in the particular case he agreed to pay the freight (*d*).

Liability for freight resulting from acceptance of goods under bills of lading.—It has been held that, if a person receives goods under a bill of lading in which it is expressed that the goods are to be delivered to him, he paying freight, he, by implication, agrees to pay freight (*e*). The law does not, however, imply any contract for the payment of the freight from the delivery and acceptance of less than the whole cargo (*f*), or from the mere fact of the acceptance of the goods; but it is for a jury to say whether the acceptance, coupled with the particular terms of the bill of lading under which the goods were received, establishes the existence of a contract on the part of the consignee to pay the freight (*g*). The words "he paying freight" are not essential, "freight for the said goods" are sufficient (*h*). Though freight may not be payable in respect of a man's own goods conveyed in his own ship, yet it becomes so if he makes third persons consignees of the goods under the bill of lading (*i*). If the consignee receives the goods without any disclaimer of his liability, and there is no reference on the face of the bill of lading to any charter-party whereby the consignor has contracted to pay the freight, the presumption is that the consignee has agreed to pay it; but, when the bill of lading provides for the payment of the freight as per charter-party, and the consignor has contracted by such charter-party for the payment of the freight, it does not necessarily follow that the consignee, by accepting the goods under the bill of lading, has himself contracted to pay it, although he is generally considered so to do. The contract for the payment of the freight inserted in the charter-party does not run with the property in the goods, and is not transferred with it so as to throw the burthen of performance upon the parties into whose hands the goods come by indorsement of the bill of lading. But it has been so much the practice for the indorsee of the bill of lading to pay the freight which the consignor or charterer has, by the charter-party, contracted with the shipowner to pay, that the acceptance of the goods by such indorsee without any disclaimer of his liability is evidence of a new contract and a new agreement for the payment of the freight mentioned therein, the consideration for

(*d*) *Coleman* v. *Lambert*, 5 M. & W. 502; 9 L.J. Ex. 43.

(*e*) *Cock* v. *Taylor*, 13 East, 403; *Wilson* v. *Kymer*, 1 M. & S. 157; *Bell* v. *Kymer* 5 Taunt. 477; *Gumm* v. *Tyrie*, 34 L.J. Q.B. 124; 6 B. & S. 298.

(*f*) *Young* v. *Moeller*, 5 E. & B. 762; S. C. nom. *Möller* v. *Young*, 25 L.J. Q.B. 94.

(*g*) *Zwilchenbart* v. *Henderson*, 9 Exch. 722; 23 L.J. Ex. 234.

(*h*) *Wegulin* v. *Cellier*, L.R. 6 H.L. 286; 42 L.J. Ch. 758.

(*i*) *Wegulin* v. *Cellier*, *supra*.

which is the delivery of the goods to him at his request (*k*); and, if such new contract is established, the remedy for the freight on the bill of lading against the consignee or his assignee co-exists with the remedy against the original consignor or charterer upon the charter-party (*l*). Where a charter-party, stipulating for freight in a lump sum of 2,800*l.* in full of all charges, contained the following clause, "The captain to sign bills of lading at any rate of freight without prejudice to this charter," it was held that, so long as the goods shipped remained the property of the charterers or of their agents, they were liable to the lump freight, and the shipowners had a lien for it, but that the shipowners might be bound to deliver the goods to a *bonâ fide* holder for value of the bill of lading upon payment of the freight mentioned in the bill of lading (*m*). The master has no authority to draw bills of lading making the freight payable otherwise than to the owner (*n*). If the amount of the freight is specified on the face of the bill of lading, it is in general conclusive between the parties (*o*). Where therefore a mere nominal rate of freight was provided to be paid by the bill of lading, the shipowner being also owner of the cargo, it was held that a subsequent mortgagee of the ship and freight could not charge the assignee of the bill of lading the current rate of freight, but was confined to the nominal freight specified on the face of the bill of lading (*p*). If the receiver of the goods appears on the face of the bill of lading to be an agent acting on behalf of a known principal who is the consignee, the principal, and not the agent, is then liable for the freight (*q*). But, if the agency is undisclosed, and the principal has given the agent no authority to pledge his credit for the payment of the freight, and the goods never reach the hands of the principal, the latter cannot be made responsible for the amount of the freight (*r*); and the agent who actually received the goods under the bill of lading is then the party to be proceeded against (*s*). If the consignee of goods indorsed the bill of lading to A., with the words "looking to him for all freight, dead freight, and demurrage; without recourse to us," and the shipowner accepted the indorsement, and in pursuance of it delivered the goods to A., the consignee is exonerated from liability for freight (*t*); but the consignee, at all events where A.

(*k*) *Sanders* v. *Vanzeller*, 4 Q.B. 295; 12 L.J. Q.B. 497; *Kemp* v. *Clark*, 12 Q.B. 647; 17 L.J. Q.B. 305.

(*l*) *Christy* v. *Row*, 1 Taunt. 300; *Shepard* v. *De Bernales*, 13 East, 565.

(*m*) *Gledstanes* v. *Allen*, 12 C.B. 202.

(*n*) *Reynolds* v. *Jex*, 34 L.J. Q.B. 251; 7 B. & S. 83.

(*o*) *Foster* v. *Colby*, 3 H. & N. 715; 28 L.J. Ex. 81; *Shand* v. *Sanderson*, 4 H. & N. 389; 28 L.J. Ex. 278.

(*p*) *Brown* v. *North*, 8 Exch. 1; 22 L.J. Ex. 49.

(*q*) *Amos* v. *Temperley*, 8 M. & W. 805; 11 L.J. Ex. 183.

(*r*) *Tobin* v. *Crawford*, 9 M. & W. 718; 12 L.J. Ex. 490.

(*s*) *Dougal* v. *Kemble*, 3 Bing. 383; 4 L.J. (O.S.) C.P. 103.

(*t*) *Lewis* v. *McKee*, L.R. 2 Ex. 37; 36 L.J. Ex. 6.

is his agent, is bound to prove an assent on the part of the shipowner discharging him from liability; and he does not prove such an assent by showing that the indorsement was on the bill when presented to the captain without also showing that the captain in fact assented to it (*u*). Where a bill of lading represented the freight of goods to have been paid, when in fact it had not been paid, it was held by the Court that, though such representation was not conclusive as between the shipper of the goods and the shipowner, yet, as against an indorsee for value of the bill of lading without notice, the freight must be held to have been paid (*x*).

Where, by the terms of the charter-party, the ship is let for a particular voyage, and the charterers are to pay the shipowners a lump freight for the whole voyage, and the master, at the request of the charterers, is to make bills of lading at any rate and payable in any manner the charterers may choose, without prejudice to the charter, this gives to the charterers the direct management as to the terms on which the bills of lading are to be signed. And, when it is once shown that the master was in fact acting for the charterers, and this is made known to the shippers, the charterers are entitled to recover the freight under the general authority which the shipowners have conferred upon them (*y*).

Stipulated payments in lieu of freight extinguishing right of lien.—When it is stipulated that a certain specified sum of money shall be paid in respect of goods shipped on board a particular vessel within a certain specified period after the sailing of the vessel, whether the goods shall then have been conveyed to their place of destination or not, or whether they shall ever be so conveyed or not, and to secure this arrangement the amount is made payable by the shipper, the sum stipulated to be paid is not freight, but a payment in lieu of freight. In this case there is no lien upon the goods to secure the payment, neither the consignee nor his goods being liable for the payment of the sum stipulated to be paid, which is held to be not freight, but a remuneration for receiving the goods with a qualified contract for conveying them, and not a reward for actual conveyance (*z*). But parties who have by special contract superseded the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the agreement into which they have entered; and they may do this, either by express condi-

(*u*) *Lewis* v. *McKee*, L.R. 4 Ex. 58; 39 L.J. Ex. 62.
(*x*) *Howard* v. *Tucker*, 1 B. & Ad. 712; *Kirchner* v. *Venus*, 12 Moore, P.C. 399.
(*y*) *Marquand* v. *Banner*, 6 E. & B. 245; 25 L.J. Q.B. 313; *Kern* v. *Deslandes*, 10 C.B. N.S. 205; 30 L.J. C.P. 297.
(*z*) *How* v. *Kirchner*, 11 Moore, P.C. 25.

tions contained in the contract itself, or by agreeing that, in case of failure of performance of that agreement, the right of lien for what is due shall subsist as if there had been an agreement for freight; and the usage of the place where the contract was made may be annexed to the contract so as to create a lien, provided both parties were cognizant of the usage at the time they made their contract (*a*).

Payment of demurrage on charter-parties and bills of lading.—Where the charter-party is silent as to the time to be occupied in the discharge, the contract implied by law is that each party will use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls upon him; and there is no implied contract by the shipowner to allow his vessel to be kept there the usual time, if, by reasonable diligence on the part of the merchant, the cargo might be sooner taken away; and no implied contract by the merchant to take the cargo out within such usual time, if he could not by reasonable diligence do so. The contract implied is that each should use reasonable dispatch in performing his part. Where, therefore, delay happens without fault on either side, the loss must remain where it falls (*b*). "Reasonable time" means reasonable under the actual circumstances of the unloading. A strike of dock labourers, for which neither the shipowner nor the charterer was responsible, may therefore be taken into consideration where no express limit of time is imposed (*c*). The charterer usually covenants or promises to load or unload the vessel within a certain time, or, if he fails to do so, to pay so much *per diem* during the delay. This payment, as well as the delay itself, is called in mercantile and legal phraseology, demurrage. The charterer cannot escape from liability upon his express covenant or promise to pay demurrage by showing that the delay was occasioned by some unforeseen event not provided for by the contract, such as the delays of other consignees in unloading (*d*), the crowded state of the docks, the delays of Custom-house officers, or the inclemency of the weather (*e*), or bad weather (*f*), or a strike of dock labourers (*g*), or even a permanent obstacle (*h*), or the neglect of the holders of the bill of lading to present it and claim the

(*a*) *Kirchner* v. *Venus*, 12 Moore, P.C. 398; *Fisher* v. *Smith*, 4 App.Cas. 1; 48 L.J. Ex. 411.

(*b*) *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; 39 L.J. Q.B. 188; *Cuningham* v. *Dunn*, 3 C.P.D. 443; 48 L.J. C.P. 62.

(*c*) *Hick* v. *Raymond*, (1893) A.C. 22; 62 L.J. Q.B. 98; *Carlton S.S. Co.* v. *Castle Mail Packets Co.*, (1898) A.C. 486; 67 L.J. Q.B. 795.

(*d*) *Straker* v. *Kidd*, 3 Q.B.D. 223; 47 L.J. Q.B. 365; *Porteus* v. *Watney*, 3 Q.B.D. 534; 47 L.J. Q.B. 643.

(*e*) *Blight* v. *Page*, 3 B. & P. 295, n.; *Barret* v. *Dutton*, 4 Campb. 333.

(*f*) *Thiis* v. *Byers*, 1 Q.B.D. 244; 45 L.J. Q.B. 11.

(*g*) *Budgett* v. *Binnington*, (1891) 1 Q.B. 35; 60 L.J. Q.B. 1.

(*h*) *Dahl* v. *Nelson*, 12 Ch.D. 568; 6 App.Cas. 38; 50 L.J. Ch. 414.

goods (*i*). But, if the delay is caused by the wrongful and unauthorised interference of the shipowner himself with the unloading of the cargo, the detention is not then the detention of the charterer, and the shipowner cannot claim demurrage in respect thereof (*k*). When a port is named in the charter-party as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place (*l*). If when she arrives there the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port (*m*), and he is not bound to wait an unreasonable time till the port is cleared (*n*). But where by a charter-party a vessel is to deliver her cargo at any safe berth as ordered, and owing to the crowded state of the dock the vessel is prevented from being berthed in the ordered berth, the shipowner cannot claim demurrage till she is berthed (*o*). Where the charter-party provided that the vessel was to unload at a certain port, or so near thereto as she might safely get at all times of tide and always afloat, and she was prevented, by the state of the tide, for some days from reaching that port, it was held that the charterers were liable for demurrage (*p*). A stipulation that the vessel shall proceed to A., and there load a cargo "in the usual and customary manner," applies to the mode of loading, whether by a lighter or at the wharf, and not to the place to which the shipowner undertakes that the ship shall proceed (*q*). Where a charter-party provided that the cargo should be "discharged with all dispatch according to the custom of the port," and the custom was to unload by lighters in turn, and delay arose while waiting for the turn, it was held the jury were rightly directed, that if the defendants had used the existing means at the port with reasonable dispatch, according to the custom, the jury were to find for the

(*i*) *Erichsen* v. *Barkworth*, 3 H. & N. 894; 28 L.J. Ex. 95.

(*k*) *Benson* v. *Blunt*, 1 Q.B. 870; 10 L.J. Q.B. 333.

(*l*) *Tapscott* v. *Balfour*, *infra*; see, however, *Davies* v. *McVeagh*, 4 Ex.D. 265; 48 L.J. Ex. 686; *Dahl* v. *Nelson*, *ante*, p. 927; *Murphy* v. *Coffin*, 12 Q.B.D. 87.

(*m*) *Tapscott* v. *Balfour*, L.R. 8 C.P. 46; 42 L.J. C.P. 16; *Ashcroft* v. *Crow Colliery Co.*, L.R. 9 Q.B. 540; 43 L.J. Q.B. 194; *Murphy* v. *Coffin*, *supra*; *Sanders* v. *Jenkins*, (1897) 1 Q.B. 93; 66 L.J. Q.B. 40; see also *Dobell* v. *Green*, (1900) 1 Q.B. 526; 69 L.J. Q.B. 454.

(*n*) *Dahl* v. *Nelson*, 6 App.Cas. 38; 50 L.J. Ch. 414. See *Pyman* v. *Dreyfus*, 24 Q.B.D. 152; 59 L.J. Q.B. 13.

(*o*) *Tharsis Sulphur Co.* v. *Morel Bros.*, (1891) 2 Q.B. 647; 61 L.J. Q.B. 11; disapproving *The Carisbrook*, 15 P.D. 98; 59 L.J. P. 37; and commenting on *Davies* v. *McVeagh*, 4 Ex.D. 265; 48 L.J. Ex. 686.

(*p*) *Horsley* v. *Price*, 11 Q.B.D. 244; 52 L.J. Q.B. 603; and see *Allen* v. *Coltart*, 11 Q.B.D. 782; 52 L.J. Q.B. 686.

(*q*) *Tapscott* v. *Balfour*, *supra*; *Coverdale* v. *Grant*, 9 App.Cas. 470; 53 L.J. Q.B. 462; *Kay* v. *Field*, 10 Q.B.D. 241; 52 L.J. Q.B. 17.

defendants (*r*); such a custom is not inconsistent with a charter-party providing that the timber shall be taken from alongside at merchant's expense (*s*). When neither the shipowner nor the charterer is to blame for delay, the number of days runs from the time when the ship is in a dischargeable state; and, if no period is mentioned, the cargo is to be discharged in a reasonable time, to commence from the time when the ship is in a state to begin delivering (*t*). Where 5*l. per diem* dumurrage was stipulated to be paid, "to reckon from the time of the vessel being ready to unload, and in turn to deliver," it was held that the words "in turn to deliver" applied to the public rules and regulations of the port of discharge, and that the charterers were not liable for the payment of demurrage until their "turn to deliver" had come, in conformity with the regulations of the port (*u*). If, after the loading has been completed, the vessel is detained by a sudden frost (*x*), or by foul weather and contrary winds, no right to demurrage arises by reason of such detention (*y*). Demurrage is, however, an elastic term, and delays which occur after the voyage may sometimes give rise to a claim in the nature of demurrage, and give a lien for demurrage within the terms of the charter-party (*z*).

The days mentioned in the clause of demurrage are understood, it is said, by the custom of the port of London, to be working days, and do not, consequently, include Sundays and Custom-house holidays (*a*). There does not, however, appear to be any general custom to this effect (*b*). The lay days allowed are, moreover, to be reckoned from the time of the ship's arrival at the usual place of discharge, and not from her arrival at the entrance of the port, although for the purposes of navigation she may have discharged a portion of her cargo at the entrance of the port (*c*). It

(*r*) *Postlethwaite* v. *Freeland*, 5 App. Cas. 599; 49 L.J. Ex. 630; *Lyle Shipping Co.* v. *Cardiff Corporation*, (1900) 2 Q.B. 638; 69 L.J. Q.B. 889; *The Alnholme*, (1893) P. 173; 62 L.J. P. 51; *Castlegate S.S. Co.* v. *Dempsey*, (1892) 1 Q.B. 854; 61 L.J. Q.B. 620; *The Jaederen*, (1892) P. 351; 61 L.J. P. 89; *Good* v. *Isaacs*, (1892) 2 Q.B. 555; 61 L.J. Q.B. 649; *Hulthen* v. *Stewart*, (1902) 2 K.B. 199; 71 L.J. K.B. 624.

(*s*) *Aktieselskab Helios* v. *Ekmann*, (1897) 2 Q.B. 83; 66 L.J. Q.B. 538; *Brenda S.S. Co.* v. *Green*, (1900) 1 Q.B. 518; 69 L.J. Q.B. 445.

(*t*) *Brown* v. *Johnson*, 10 M. & W. 331; 11 L.J. Ex. 373.

(*u*) *Robertson* v. *Jackson*, 2 C.B. 412; 15 L.J. C.P. 28; *Taylor* v. *Clay*, 9 Q.B. 713; 16 L.J. Q.B. 44; *Leidemann* v. *Schultz*, 14 C.B. 51; 23 L.J. C.P. 17; but see *Lawson* v. *Burness*, 1 H. & C. 396.

(*x*) *Pringle* v. *Mollett*, 6 M. & W. 83; 9 L.J. Ex. 148.

(*y*) *Jamieson* v. *Laurie*, 6 Bro. P.C. 474.

(*z*) *Harris* v. *Jacobs*, 15 Q.B.D. 247; 54 L.J. Q.B. 492.

(*a*) *Cochran* v. *Retberg*, 3 Esp. 121; where "dispatch-money" was to be paid on any time saved in loading, 10*s.* per hour, and nine days were saved, it was held that these days were 24 hours each, not twelve: *Laing* v. *Hollway*, 3 Q.B.D. 437; 47 L.J. Q.B. 512.

(*b*) *Brown* v. *Johnson*, 10 M. & W. 334; 11 L.J. Ex. 373. See *Neilsen* v. *Wait*, 16 Q.B.D. 67; 55 L.J. Q.B. 87.

(*c*) *Brereton* v. *Chapman*, 7 Bing. 559; *Kell* v. *Anderson*, 10 M. & W. 498; 12 L.J. Ex. 101; *Bastifell* v. *Lloyd*, 1 H. & C. 388; 31 L.J. Ex. 413.

is competent for the consignee to show that there is a custom at the port of unloading that the lay days commence at some particular period (*d*). If the parties, by mutual consent, substitute a new port for the port mentioned in the contract of affreightment, the freighter will be entitled to the lay days, and the shipowner to the demurrage, stipulated for by the original contract (*e*). In the case of demurrage, a fraction of a day counts as a day (*f*). If a consignee accepts goods under a bill of lading, at the bottom of which is a memorandum, to the effect that the ship is to be cleared within a certain time, and that demurrage, at the rate of so much *per diem*, is to be paid after that day, he will be liable for the payment of such demurrage, and may be sued therefor by the master (*g*); but he is not responsible to the master for demurrage if no such clause is contained in the bill of lading (*h*), or if the delay is caused by the master's improperly refusing to deliver the whole cargo (*i*). Where, by the bill of lading, the vessel is to be unloaded in her regular turn, the consignor is liable for her detention beyond her regular turn, although there is no express contract for demurrage in the bill of lading (*k*).

Where the phrase in the charter-party is general, viz., "the charterer's liability to cease when the cargo is shipped," this includes all liability as well past as future (*l*); but where the clause was that the liability should cease "as soon as the cargo is shipped, loading excepted," it was held that the charterer was liable for delay in loading (*m*). Where the stipulation is that the ship is to be brought to a particular place, "or as near thereto as she may safely get," this refers to any permanent obstacle as well as to anything endangering her safety (*n*).

It is not unusual for the charter-party to give the shipowner a lien on the cargo for demurrage, and to provide that the charterer's responsibility is to cease on shipment of the cargo. Such an agreement is, of course, binding, and, if that is the intention of the parties as collected from the instrument, will relieve the charterer

(*d*) *Norden Steamship Co.* v. *Dempsey*, 1 C.P.D. 654; 45 L.J. C.P. 764.

(*e*) *Jackson* v. *Galloway*, 6 Sc. 792; 8 L.J. C.P. 29.

(*f*) *Commercial Steamship Co.* v. *Boulton*, L.R. 10 Q.B. 346; 44 L.J. Q.B. 219.

(*g*) *Jessen* v. *Solly*, 4 Taunt. 54; *Stindt* v. *Roberts*, 17 L.J. Q.B. 166; 12 Jur. 518; *Wegener* v. *Smith*, 15 C.B. 285; 24 L.J. C.P. 25.

(*h*) *Brouncker* v. *Scott*, 4 Taunt. 1; *Smith* v. *Sieveking*, 5 E. & B. 589; 24 L.J. Q.B. 257; *Chappel* v. *Comfort*, 10 C.B. N.S. 802; 31 L.J. C.P. 58.

(*i*) *Young* v. *Moeller*, 5 E. & B. 762; S.C. nom. *Möller* v. *Young*, 25 L.J. Q.B. 94.

(*k*) *Cawthron* v. *Trickett*, 15 C.B. N.S. 754; 33 L.J. C.P. 182; and see *Shadforth* v. *Cory*, 32 L.J. Q.B. 379.

(*l*) *Bannister* v. *Breslauer*, L.R. 2 C.P. 497; 36 L.J. C.P. 195; *Kish* v. *Cory*, L.R. 10 Q.B. 553; 44 L.J. C.P. 205; *French* v. *Gerber*, 1 C.P.D. 737; 2 C.P.D. 247.

(*m*) *Lister* v. *Van Haansbergen*, 1 Q.B.D. 269; 45 L.J. Q.B. 495.

(*n*) *Dahl* v. *Nelson*, 12 Ch.D. 568; 6 App.Cas. 38; 50 L.J. Ch. 414. See *Capper* v. *Wallace*, 5 Q.B.D. 163; 49 L.J. Q.B. 350.

from responsibility for demurrage at the port of loading as well as at that of discharge (*o*). But such a construction will not be adopted, unless the intention of the parties is quite clear (*p*); for unless the cesser clause is expressed in terms which prohibit such a conclusion, the lien given will be considered as commensurate with the release of liability, and it will not be construed so as to release the charterer, if by so construing it the shipowner will be left without any remedy for a breach of contract which has occurred (*q*). And even where the charterer is discharged, it does not necessarily follow that the responsibility is transferred to the holder of the bill of lading (*r*). A bill of lading which incorporates the terms of a charter-party must receive a reasonable construction. It is a document regulating the rights and liabilities of the consignees, and only those clauses of the charter-party which are consistent with the bill of lading are incorporated in it (*s*). The mere fact that a bill of lading contains the words "all other conditions as per charter-party" is not sufficient to fix a person taking it in the ordinary course of business with notice of all the contents of the charter-party, since the equitable doctrine of constructive notice is not applicable to commercial transactions (*t*).

Primage and average.—The freighter whose merchandise has been conveyed to the port of destination is also liable for the payment of certain customary charges called primage and average. The first is a small customary payment to the master for his trouble, and the second consists of several petty charges, such as towage, beaconage, pilotage, &c. (*u*).

General average and contribution.—The obligation to contribute, which is deemed by the common law to be tacitly entered into by

(*o*) *Bannister* v. *Breslauer*, L.R. 2 C.P. 497; 36 L.J. C.P. 195; *Kish* v. *Cory*, L.R. 10 Q.B. 553; 44 L.J. Q.B. 205; *Sanguinetti* v. *Pacific Steam Nav. Co.*, 2 Q.B.D. 238; 46 L.J. Q.B. 105.

(*p*) *Gullischen* v. *Stewart*, 13 Q.B.D. 317; 53 L.J. Q.B. 173.

(*q*) *Clink* v. *Radford*, (1891) 1 Q.B. 625; 60 L.J. Q.B. 388; *Dunlop* v. *Balfour*, (1892) 1 Q.B. 507; 61 L.J. Q.B. 354; *Hansen* v. *Harrold*, (1894) 1 Q.B. 612; 63 L.J. Q.B. 744.

(*r*) An intention to charge the holder of the bill of lading with demurrage at the port of loading, was held not to be expressed in *Smith* v. *Sieveking*, 4 E. & B. 945; 24 L.J. Q.B. 257, by the words "paying for the said goods as per charter-party." The words "paying freight as per charter-party," were held in *Chappel* v. *Comfort*, 10 C.B. N.S. 802; 31 L.J. C.P. 58, not to make the holder of the bill of lading liable for demurrage at the port of discharge; and in *Fry* v. *Chartered Bk. of India*, L.R. 1 C.P. 689; 35 L.J. C.P. 306, not to make the holder of the bill of lading of a part of the cargo liable for the entire freight. In *Wegener* v. *Smith*, 15 C.B. 285; 24 L.J. C.P. 25, words making the goods "deliverable to order against payment of the agreed freight *and other conditions* as per charter-party," were held to make the consignee liable for demurrage at the port of delivery. But see *Steamship County of Lancaster* v. *Sharp*, 24 Q.B.D. 158; 59 L.J. Q.B. 22.

(*s*) *Gullischen* v. *Stewart*, 13 Q.B.D. 317; 53 L.J. Q.B. 173; *Gray* v. *Carr*, L.R. 6 Q.B. 522; 40 L.J. Q.B. 257; *Gardner* v. *Trechmann*, 15 Q.B.D. 154; 54 L.J. Q.B. 515; *Serraino* v. *Campbell*, (1891) 1 Q.B. 283; 60 L.J. Q.B. 303; *Diederichsen* v. *Farquharson*, (1898) 1 Q.B. 150; 67 L.J. Q.B. 103; *Repetto* v. *Millars Karri Jarrah Forests*, (1901) 2 K.B. 306; 70 L.J. K.B. 561.

(*t*) *Manchester Trust* v. *Furness*, (1895) 2 Q.B. 539; 64 L.J. Q.B. 766.

(*u*) Abbott, 531 (ed. 13).

the shipowners and owners of the cargo, is called general or gross average; and the parties subject thereto are bound to contribute rateably according to the value of their several proportions of the property saved. "This claim for average contribution is part of the law of the sea, and it certainly arises in consequence of an act done by the captain as agent, not for the shipowner only, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo" (*x*). The right of contribution, however, does not belong to wrongdoers whose acts have brought about the loss (*y*), but if the loss is caused by the negligence or wrongdoing of persons for whom the shipowner is not responsible his right to contribution remains unaffected (*z*).

Everything saved pays contribution according to its value; the shipowner contributes in proportion to the value of the ship and furniture, except the provisions of the passengers and crew (*a*), and the passengers and owners of goods shipped on board in proportion to the value of the property they save, excepting the clothes on their backs, but not excepting their wearing apparel and jewels deposited on board. The freight and earnings of the ship, after deducting the wages of the master and crew and other expenses of the voyage, likewise form the subject of contribution and general average; and, if a ship be chartered out and home for one entire and indivisible sum for the use of the ship out and home, the entire freight for the outward and homeward voyage must, when ultimately earned, contribute to the loss, whether the loss has occurred upon the outward or the homeward voyage (*b*). Goods stowed upon the deck of the vessel, and thrown overboard during a storm, are excluded from the benefit of general average and contribution. Where a deck cargo was loaded on deck with the consent of the cargo-owner on a general ship, and there was no alleged custom bearing upon the case (*c*), the other cargo-owners were held not liable as for general average in respect of jettison of the deck cargo (*d*). If the goods are so loaded without the consent of the cargo-owner, the shipowner is himself liable (*e*); and if it is agreed between the cargo-owner and the shipowner that a deck cargo shall

(*x*) *Burton* v. *English*, 12 Q.B.D. 223; 53 L.J. Q.B. 133, per Bowen, L.J., where the words "at merchant's risk" were held not sufficiently to indicate an intention to exempt from general average.

(*y*) *Strang, Steel & Co.* v. *Scott*, 14 App. Cas. 601; 59 L.J. P.C. 1.

(*z*) *The Carron Park*, 15 P.D. 203; 59 L.J. P. 74; *Milburn* v. *Jamaica Fruit Co.*, (1900) 2 Q.B. 540; 69 L.J. Q.B. 860.

(*a*) *Brown* v. *Stapyleton*, 4 Bing. 119.

(*b*) *Williams* v. *London Assurance*, 1 M. & S. 325; *Carisbrook S.S. Co.* v. *Lond. & Prov. Mar. Ins. Co.*, (1901) 2 K.B. 861; 70 L.J. K.B. 930.

(*c*) See *Miller* v. *Titherington*, 30 L.J. Ex. 217; 31 L.J. Ex. 363.

(*d*) *Wright* v. *Marwood*, 7 Q.B.D. 62; 50 L.J. Q.B. 643.

(*e*) *Ib.*; this case practically overrules *Milward* v. *Hibbert*, 3 Q.B. 120; 11 L.J. Q.B. 137.

be carried, and the shipowner and cargo-owner get the whole of the benefit from the jettison, it seems the shipowner is liable (*f*).

Shipowners allowed the stowing of goods on deck in violation of their contract with the shipper. Some of the bills of lading of some cotton contained the words "under deck" and all of them exceptions in favour of "jettison." On the voyage the cotton was properly jettisoned. The indorsees of the bills of lading brought an action against the shipowners: it was held that the cotton was carried on deck in breach of contract, and was not within the exception, which had exclusive reference to goods safely stowed under hatches; that the cause of damage was not too remote; and that the shipowners were liable (*g*). A sacrifice for the safety of the common adventure after the danger has ceased does not give rise to a claim for general average (*h*).

To establish a claim for general average, it must be shown that the goods were thrown overboard in a moment of distress and danger, with a view of preserving the ship and cargo; if they have been washed out of the ship by the violence of the waves, or have been damaged or destroyed by lightning or tempest, or have been unnecessarily cast overboard by the master, or crew, or passengers, the loss will not support a claim for general average (*i*). If the masts and cables of the vessel have been cut away for the purpose of preventing shipwreck, the owners of the cargo must contribute towards the loss of the shipowner; but, if they are blown away, or injured in consequence of the necessity of carrying a great and unusual press of canvas to escape a threatening danger, or if the ship was not seaworthy at the commencement of the voyage, and the loss was occasioned by reason of such unseaworthiness, the loss is not the subject of contribution and general average (*k*). If, in endeavouring to refloat a steamship stranded in a perilous position, the engines are worked for the common safety at too high pressure, the damage so caused to them is a general average loss. The value of the coal consumed in working the engines is also the subject of a general average contribution (*l*). If a mast is cut away with a view to saving the whole adventure, but at the time when it is cut away it is certain to be lost in any event, then there is no "sacrifice" of the mast, and therefore no claim for general average (*m*). If a ship accidentally runs foul of another ship in a

(*f*) *Wright* v. *Marwood*, 7 Q.B.D. 62; 50 L.J. Q.B. 643; *Johnson* v. *Chapman*, 19 C.B. N.S. 563; 35 L.J. C.P. 23.

(*g*) *Royal Exchange Shipping Co.* v. *Dixon*, 12 App.Cas. 11; 56 L.J. Q.B. 266.

(*h*) *Iredale* v. *China Traders Ins. Co.*, (1900) 2 Q.B. 515; 69 L.J. Q.B. 783.

(*i*) *Mouse's case*, 12 Co. 63; *Dobson* v. *Wilson*, 3 Campb. 486.

(*k*) *Birkley* v. *Presgrave*, 1 East, 220; *Covington* v. *Roberts*, 2 B. & P. N.R. 378; *Power* v. *Whitmore*, 4 M. & S. 149; *Schloss* v. *Heriot*, 14 C.B. N.S. 59; 32 L.J. C.P. 211.

(*l*) *The Bona*, (1895) P. 125; 64 L.J. P. 62.

(*m*) *Shepherd* v. *Kottgen*, 2 C.P.D. 585; 47 L.J. C.P. 67. See *Montgomery* v. *Indemnity Mut. Mar. Ins. Co.*, (1902) 1 K.B. 734; 71 L.J. K.B. 467.

fog or storm, and the master is compelled to cut away his rigging in order to preserve the ship and cargo, and is obliged to put into port to repair and renew that which has been sacrificed, the expense of re-landing and warehousing the cargo, of pilotage, and of the repairs, so far as they are absolutely necessary to enable the cargo to be forwarded, form the subject of general average (*n*). And where a ship loaded with cattle sprang a leak, and the master for the safety of all concerned put into an infected port for repairs, the result of which was, as he knew, that the cattle could not be landed in England, but had to be sold elsewhere at a lower price, it was held that the depreciation in value of the cattle was a loss giving rise to a claim in general average (*o*). But where a ship has been stranded through the negligence of her master, and it has become necessary to jettison part of the cargo, although the innocent owners of the jettisoned cargo will be entitled to general average, the shipowners will not unless their ordinary relations to the shippers have been varied by contract (*p*). In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one, exposed to a common jeopardy; but an extraordinary expenditure incurred for that purpose is as much a sacrifice, as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal or pays the worth of it to hire those extra services which get her off (*q*). If part of the cargo has been taken out and put into lighters, to enable a stranded vessel to be got afloat and sent into port for repairs, the whole expense of the operation, which is for the common benefit of ship, goods, and freight, forms the subject of general average (*r*); but not, as a general rule, expenses incurred, after the cargo has been safely discharged and warehoused, for the purpose of saving the ship alone (*s*). So long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average; but the expenditure in raising a submerged vessel with cargo is extraordinary expenditure, and is, if incurred to save the cargo, as well as the

(*n*) *Plummer* v. *Wildman*, 3 M. & S. 482, qualified by *Hallett* v. *Wigram*, 9 C.B. 601; 19 L.J. C.P. 288; *Hall* v. *Janson*, 4 E. & B. 500; 24 L.J. Q.B. 97; *Harrison* v. *Bank of Australasia*, L.R. 7 Ex. 39; 41 L.J. Ex. 36; *Atwood* v. *Sellar*, 5 Q.B.D. 286; 49 L.J. C.P. 515. See, however, as to this case and the expenses of reshipping the cargo, *Svendsen* v. *Wallace*, 10 App.Cas. 404; 54 L.J. Q.B. 497; *Rose* v. *Bank of Australasia*, (1894) A.C. 687; 63 L.J. Q.B. 504.

(*o*) *Anglo-Argentine Live Stock Agency* v. *Temperley*, (1899) 2 Q.B. 403; 68 L.J. Q.B. 900.

(*p*) *Strang, Steel & Co.* v. *Scott*, 14 App. Cas. 601; 59 L.J. P.C. 1.

(*q*) *Per* Blackburn, J., *Kemp* v. *Halliday*, 6 B. & S. 723; 34 L.J. Q.B. 233.

(*r*) *Moran* v. *Jones*, 7 E. & B. 533; 26 L.J. Q.B. 187.

(*s*) *Job* v. *Langton*, 6 E. & B. 792; 26 L.J. Q.B. 97; *Walthew* v. *Mavrojani*, L.R. 5 Ex. 116; 39 L.J. Ex. 81; *Royal Mail Co.* v. *English Bank of Rio*, 19 Q.B.D. 362; 57 L.J. Q.B. 31.

ship (which *primâ facie* is the object of such an expenditure), chargeable against all the subjects in jeopardy saved by this expenditure (*t*). So also the expense of hiring extra hands to pump (*u*), and the burning of spars and cargo as fuel for the engine to work the pump (*x*), and throwing water on the cargo in case of fire (*y*), has been held to be general average. But the fact that the shipowners have become bound to pay a sum of money for the preservation of the ship and cargo through the reasonable conduct of the master in so binding them does not make the whole sum necessarily chargeable to general average (*z*).

Salvage paid to recaptors, money or goods given as a composition to pirates to save the rest, and expenses incurred in reclaiming the ship, or defending a suit in a foreign court of Admiralty, and obtaining her discharge from an unjust capture or detention, are all the proper subjects of general contribution (*a*). It has been held that the expenditure of ammunition in resisting capture by a privateer, the damage done to the ship in the combat, and the expense of curing the wounded, are not the subject of contribution and general average. The correctness of this decision, however, may be doubted, opposed as it is to the opinions of some of the most eminent writers on maritime law, and to the acknowledged principle of contribution (*b*). "A practice formerly prevailed in this country to value the goods at their invoice price or prime cost, if the loss happened before half the voyage was performed; but, if it happened afterwards, then to value the goods at the clear price which they would have fetched at the place of destination. The last valuation is now adopted in all cases where the average is adjusted after the ship's arrival at the place of destination. But, if the ship is compelled to return to its port of lading, and the average is immediately adjusted, the goods only contribute according to the invoice price" (*c*), or even less, if in all probability they would have arrived in a damaged state; the general rule being that the value of goods jettisoned is to be taken to be the sum which it may fairly be assumed they would have been worth to the owner at the port of adjustment (*d*). As soon as the average has been calculated and the exact amount of contribution ascertained, an action may be brought for its recovery (*e*). Each owner of

(*t*) *Per* Blackburn, J., *Kemp* v. *Halliday*, 6 B. & S. 723; 34 L.J. Q.B. 233.

(*u*) *Wilson* v. *Bank of Victoria*, L.R. 2 Q.B. 203; 36 L.J. Q.B. 89.

(*x*) *Robinson* v. *Price*, 2 Q.B.D. 295; 46 L.J. Q.B. 551.

(*y*) *Whitecross Wire Co.* v. *Savill*, 8 Q.B.D. 653; 51 L.J. Q.B. 426.

(*z*) *Tritton* v. *Ocean Steamship Co.*, 10 App.Cas. 107; 54 L.J. Q.B. 192.

(*a*) Marshall on Insurance (ed. 4) by Shee, J., p. 425.

(*b*) *Taylor* v. *Curtis*, 6 Taunt. 608; *ib.* 638—643; Phillips on Insurance, 337; Benecke, 280.

(*c*) Abbott, 659 (ed. 13).

(*d*) *Fletcher* v. *Alexander*, L.R. 3 C.P. 375; 37 L.J. C.P. 193.

(*e*) *Birkley* v. *Presgrave*, 1 East, 220; see the old form of declaration, *Schloss*

jettisoned goods becomes a creditor of the ship and cargo saved, and has a direct claim against the owners of each for a *pro ratâ* contribution, which he can recover either by direct action or by enforcing through the ship-master, who is his agent for that purpose, a lien on each parcel of goods salved for its proportionate liability (*f*). The obligation to make general average contribution arises from the relation between ship and cargo, and not from an antecedent collision, so that the shipowner cannot recover from the wrong-doing ship the amount of general average contribution which he has had to pay (*g*).

Where there has been a general average loss, the shipowner must take such steps as are necessary upon his part to procure an adjustment of the general average and secure its payment (*h*). He may make out his own average statement, and is not bound to employ an average-stater (*i*). But he cannot insist as a condition for the delivery of the cargo that the consignee should pay a deposit in such a manner that the shipowner should be able to draw on it to discharge claims forming part of the general average expenses (*k*).

Transfer of bills of lading.—The contract evidenced by a bill of lading is transferred by the indorsement and delivery of the instrument to the indorsee, so as to enable the latter to maintain an action, or be sued, upon it (*l*). But where bills of lading were indorsed by the shipper in blank and deposited with the indorsees as security for a loan, and the indorsees did not take possession or deal with the goods, it was held that the property in the goods did not pass to the indorsees so as to make them liable in an action by the shipowner for freight (*m*). If the consignor under a bill of lading, making the goods deliverable to order or assigns, indorses the bill in blank, and deposits it as a security for an advance of money, and on repayment of the advance the bill is re-indorsed and re-delivered to him, he is remitted to all his rights under the original contract as against the shipowners, and may sue them for a breach, whether occurring before or after the re-indorsement (*n*).

Damages for breach of charter-parties.—The measure of damages for the breach of the ordinary contract or covenant in a charter-

v. *Heriot*, 14 C.B. N.S. 59; 32 L.J. C.P. 214.

(*f*) *Strang, Steel & Co.* v. *Scott*, 14 App. Cas. 601; 59 L.J. P.C. 1.

(*g*) *The Marpessa*, (1891) P. 403; 61 L.J. P. 9.

(*h*) *Crooks* v. *Allan*, 5 Q.B.D. 38; 49 L.J. Q.B. 201.

(*i*) *Wavertree Sailing Ship Co.* v. *Love*, (1897) A.C. 373; 66 L.J. P.C. 77.

(*k*) *Huth* v. *Lamport*, 16 Q.B.D. 735; 55 L.J. Q.B. 239.

(*l*) 18 & 19 Vict. c. 111; see *Dracachi* v. *Anglo-Egyptian Navigation Co.*, L.R. 3 C.P. 190; 37 L.J. C.P. 71; *Smurthwaite* v. *Wilkins*, 13 C.B. N.S. 842; 31 L.J. C.P. 214; *The Figlia Maggiore*, L.R. 2 A. & E. 106; 37 L.J. Adm. 52: *The Freedom*, L.R. 3 P.C. 594; 24 Vict. c. 10, s. 6.

(*m*) *Sewell* v. *Burdick*, 10 App. Cas. 74; 54 L.J. Q.B. 156.

(*n*) *Short* v. *Simpson*, L.R. 1 C.P. 248; 35 L.J. C.P. 147.

party to procure and ship a cargo and pay freight (*ante*, p. 898) is to be ascertained by calculating the freight to be earned, and deducting the expense which the shipowner would have been put to, but did not incur, in earning it, and also what the ship earned (if anything) during the period which would have been occupied in performing the voyage if the charter-party had been fulfilled (*o*). If, subsequently to the breach of contract, the shipmaster has been offered a cargo and has refused it, or has neglected an opportunity of receiving cargo and earning freight, the measure of damages will be the amount of freight agreed to be paid, minus what the shipmaster might have earned if he had thought fit (*p*). When goods shipped on board have been sold at an intermediate port to defray expenses necessarily incurred in repairing the vessel, the shipper is not entitled to claim the price they might have realised at the port of delivery unless the ship and cargo arrive there in safety (*q*).

Restrictions on carriage of dangerous goods.—By the Merchant Shipping Act, 1894 (*r*), the master or owner of any vessel may refuse to take on board any package or parcel which he suspects to contain goods of a dangerous nature, and may require it to be opened to ascertain the fact. By sect. 448, sub-sect. 2, where any dangerous goods (*s*), or any goods which, in the judgment of the master or owner of the vessel are of a dangerous nature, have been sent or brought aboard any vessel without being marked or without notice being given as required by the Act (*t*), the master or owner of the vessel may cause such goods to be thrown overboard, together with any package or receptacle in which they are contained; and neither the master nor the owner of the vessel will be subject to any liability in respect of such throwing overboard.

Carriage of passengers and merchandise by land—Injuries to passengers and goods.—All persons who undertake the work of carrying passengers by land for hire impliedly warrant their vehicles, horses, and equipments to be roadworthy, and reasonably sufficient in strength for the accomplishment of the journey, so far as that condition of things can be secured by

(*o*) *Smith* v. *M'Guire*, 3 H. & N. 567; 27 L.J. Ex. 465; *Wilson* v. *Hicks*, 26 L.J. Ex. 242; *Aitken* v. *Ernsthausen*, (1894) 1 Q.B. 773; 63 L.J. Q.B. 559.

(*p*) *Harries* v. *Edmonds*, 1 C. & K. 686.

(*q*) *Atkinson* v. *Stephens*, 21 L.J. Ex. 329; 7 Exch. 567.

(*r*) 57 & 58 Vict. c. 60, s. 448 (1).

(*s*) That is, aqua fortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, any explosives within the meaning of the Explosives Act, 1875, or any other goods of a dangerous nature, sect. 446 (3). See also 38 Vict. c. 17, *post*, p. 945.

(*t*) By sect. 446 (1), the nature of the goods must be marked on the outside of the package, and written notice of their nature and of the name and address of the sender or carrier must be given at or before the time of sending the same to be shipped, or taking the same on board the vessel.

the exercise of skill; but the carrier does not warrant that they shall be perfect for their purpose; and, therefore, he is not responsible for a defect in the vehicle, the existence of which no skill could have detected (*u*), but he ought reasonably to examine the vehicle (*x*). As the work of driving is a work of skill, the carrier impliedly undertakes, if he drives himself, that he will exercise competent skill in driving. If, on the other hand, he accomplishes the work through the medium of inferior agents, he impliedly undertakes to provide fit persons to execute the office. If the driver overloads the carriage, or drives with immoderate speed, or with defective reins, or with reins so loose that he cannot readily command his horses, or if he passes unnecessarily along unsafe parts of the road, or through narrow gateways or dangerous passages, or takes the wrong side of the road, and a collision occurs, the proprietor of the carriage will be answerable for injuries sustained by the passengers (*y*). And if, from the negligence of the driver, or defects in the carriage or equipments, the passenger is placed in so perilous a situation as to render it advisable for him to leap to the ground to avoid a greater peril reasonably to be apprehended, and he sustains an injury in so doing, the coach proprietor is responsible (*z*). In determining the question of negligence in cases of collision, the law or custom of the road as to passing vehicles is to be taken into consideration; but it does not follow that a person who neglects that custom, and is on the wrong side of the road when a collision takes place, is necessarily guilty of negligence. "Circumstances may frequently arise, where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary" (*a*).

Carriers of passengers by railway contract that all persons connected with the carrying and with the means of the carrying, such as the carriages, the road, or signalling, shall use care; but they do not contract that other railway companies who may be entitled to use the railway shall not be guilty of negligence in the management of their trains (*b*).

Every carrier of passengers for hire, whether he be or be not a common carrier, is bound to exercise the greatest care for securing the safety of his passengers, and is answerable for the smallest

(*u*) *Christie* v. *Griggs*, 2 Campb. 81; *Sharp* v. *Grey*, 9 Bing. 457; 2 L.J. C.P. 45; *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169; *Francis* v. *Cockerell*, L.R. 5 Q.B. 501; 39 L.J. Q.B. 291.

(*x*) *Richardson* v. *G. E. Ry.*, L.R. 10 C.P. 486, reversed on the findings on appeal, 1 C.P.D. 342.

(*y*) *Aston* v. *Heaven*, 2 Esp. 535; *Bremner* v. *Williams*, 1 C. & P. 414.

(*z*) *Jones* v. *Boyce*, 1 Stark. 493.

(*a*) *Wayde* v. *Carr* (*Lady*) 2 D. & R. 256; 1 L.J. (O.S.) K.B. 63.

(*b*) *Wright* v. *Midland Ry.*, L.R. 8 Ex. 137; 42 L.J. Ex. 89. As to this, see *post*, p. 993.

negligence on his own part, or on the part of his servants and agents (*c*), but not for unforeseen accidents and misfortunes, which care could not have prevented. He "does not warrant the absolute safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safety." But the breaking down or overturning of a coach is *primâ facie* proof of negligence on the part of the driver, and he must rebut this presumption, if it be unfounded, by showing that "the damage arose from what the law considers a mere accident" (*d*). When the carriage is by railway, the railway company is bound to keep the railway itself in good travelling order, and fit for use, and to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers; and by the 31 & 32 Vict. c. 119, s. 22, to provide in certain cases for means of communication between the passengers and the guard. But the company is not bound, at its peril, to provide a roadworthy carriage, and will not be responsible to a passenger, if the defect in the carriage is such that it could be neither guarded against in the process of construction, nor discovered by subsequent examination (*e*). Every person who receives goods to be carried from one place to another is bound to provide proper covering to protect the goods from injury by rain (*f*).

If the driver of a railway-engine drives at a dangerous speed, or from negligence causes the train to be thrown off the rails, or to come into collision with another train, the railway company is responsible for all damages that may have been sustained by the passengers (*g*). But if a railway-train runs off the line in consequence of the wilful and malicious act of a stranger, who has placed a stone on the railway, then, as there is no negligence on the part of the railway company, they are not responsible for the consequences (*h*).

A railway company will be responsible for an injury sustained by a child between the ages of three and twelve, travelling with its mother, although no separate fare was paid for the child, at all events in the absence of fraud on the part of the mother (*i*), and the company cannot shield itself under the contract with the

(*c*) *Jackson* v. *Tollett*, 2 Stark. 38; *Dudley* v. *Smith*, 1 Campb. 169.

(*d*) *Crofts* v. *Waterhouse*, 3 Bing. 321; 4 L.J. (O.S.) C.P. 75; *Sharp* v. *Grey*, 9 Bing. 457; 2 L.J. C.P. 45; *Harris* v. *Costar*, 1 C. & P. 637.

(*e*) *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169.

(*f*) *Webb* v. *Page*, 6 M. & Gr. 196; 12 L.J. C.P. 327.

(*g*) *Collett* v. *L. & N. W. Ry.*, 16 Q.B. 984; 20 L.J. Q.B. 411; *Skinner* v. *L. B. & S. C. Ry.*, 5 Exch. 787; *East Indian Ry.* v. *Kalidas*, (1901) A.C. 396.

(*h*) *Latch* v. *Rumner Ry.*, 27 L.J. Ex. 155.

(*i*) *Austin* v. *G. W. Ry.*, L.R. 2 Q.B. 442; 36 L.J. Q.B. 201.

mother (*k*). The contract seems to be made by the invitation to take the seat in the train and the acceptance of it, and it is immaterial whether the traveller himself took a ticket or paid the fare (*l*). But where a servant has taken a ticket for himself, the master cannot sue, because the tort arises out of a contract to which the master is not a party, and there is no duty towards the master (*m*). Where part of the ordinary luggage of a servant which he is taking with him as a passenger by a railway is the property of his master, and it is injured whilst in the custody of the railway company by their misfeasance—as, by being negligently overturned in front of a train—the master can maintain an action of tort against the company for the amount of the damage, notwithstanding that the contract of carriage is with the servant alone. Where a servant is a passenger by a railway that is bound to carry the ordinary luggage of a passenger free of charge, his livery is such luggage, although it is the property of his master (*n*). It seems, however, that where the servant has taken a ticket from one company and has been injured by the negligence of another, the master may sue that company with whom neither has contracted (*o*). These cases do not appear to be satisfactory; but it seems that, though generally speaking an action against a railway company for a tort in form is substantially for a breach of contract, where there is a contract express or implied between the parties, yet there is, beyond the contract, a duty which the law imposes upon all, namely, to do no act to injure another (*p*).

When occurrence of railway accident is proof of negligence.—When both the railway itself, and the carriages in which the passengers are conveyed, are under the exclusive control of the company carrying the passengers, the very fact of a train's running off the line has been held to be *primâ facie* proof of negligence on the part of such company, or its officers, and throws upon them the burthen of explaining how it happened, and of showing that it occurred without any fault or neglect of duty on their part (*q*). And it is not sufficient to show that other companies had running powers over their line, without showing affirmatively that it was through

(*k*) *Austin* v. *G. W. Ry.*, *ante*, p. 939.

(*l*) *Marshall* v. *Y. & N. Ry.*, 11 C.B. 655; 21 L.J. C.P. 34; *Austin* v. *G. W. Ry.*, *supra*.

(*m*) *Alton* v. *Midland Ry.*, 19 C.B. N.S. 213; 34 L.J. C.P. 292.

(*n*) *Meux* v. *G. E. Ry.*, (1895) 2 Q.B. 387; 64 L.J. Q.B. 657.

(*o*) *Berringer* v. *G. E. Ry.*, 4 C.P.D. 163; 48 L.J. C.P. 400.

(*p*) *Fleming* v. *M. S. & L. Ry.*, 4 Q.B.D. 81; *Foulkes* v. *Met. Dist. Ry.*, 5 C.P.D. 157; 49 L.J. C.P. 361. As to assaults in railway carriages, see *Pounder* v. *N. E. Ry.*, (1892) 1 Q.B. 385; 61 L.J. Q.B. 136; *Cobb* v. *G. W. Ry.*, (1894) A.C. 419; 63 L.J. Q.B. 629.

(*q*) *Carpue* v. *L. & B. Ry.*, 5 Q.B. 747; 13 L.J. Q.B. 133; *Latch* v. *Rumner Ry.*, *ante*, p. 939; see *Scott* v. *London Dock Co.*, 3 H. & C. 596; 34 L.J. Ex. 220; as to interrogatories in cases of collision, see *Bechervaise* v. *G. W. Ry.*, L.R. 6 C.P. 36; 40 L.J. C.P. 8.

the negligence of such other companies that the accident occurred (*r*). But if the accident is *primâ facie* caused by the negligence of some third person, for whom the defendants are not responsible, *e.g.*, a contractor engaged in placing iron girders over the defendants' line for some third person, it must be shown that the accident resulted from, or might not have occurred but for, the defendants' omitting to take some precaution usually adopted in such cases (*s*). If it appears that the train went off the rails when travelling at a moderate speed, and that the wheels of the carriages and engine were properly constructed, and the railway itself was properly made and in good order, and that the departure of the engine and carriages from the rails might have been occasioned by the malicious trespass of a stranger (*ante*, p. 939), there will be nothing to establish even a *primâ facie* case of negligence against the company (*t*). But if the railway bridges or viaducts have not been properly constructed, or have not been carefully repaired, so as to enable them to resist the violence of storms and floods which may be expected occasionally to occur, and injuries are thereby caused to passengers (*u*), the railway company will be responsible in damages; the mere fact that they may have employed competent engineers and workmen, and have used the best materials in the work, will not relieve them of responsibility (*x*).

Loss of goods or money by the way.—A person who receives things to be carried by him for hire to a certain destination cannot set up a mere loss of them by the way as an answer to an action for the non-delivery of them according to his contract (*ante*, p. 909). Where the plaintiff delivered to the defendant 3*l.*, to be carried to Southwark, for reasonable hire and reward, it was held that the law would imply a promise from the defendant "safely to convey" the money, although he was not a common carrier, and although no sum certain had been agreed to be paid him as the price of the carriage (*y*). And, where a traveller hired a cab for the conveyance of himself and his luggage to a railway station, and the luggage was placed on the outside of the cab, it was held that the law would imply from the acceptance of the luggage by the cabman to be carried, together with the passenger, for hire, a promise from him "safely and securely" to carry it, and that he was responsible for the loss of a portion of it by the way (*z*). This promise to carry safely, which the law implies from all persons who

(*r*) *Ayles* v. *S. E. Ry.*, L.R. 3 Ex. 146; 37 L.J. Ex. 104.
(*s*) *Daniel* v. *Metropolitan Ry.*, L.R. 3 C.P. 591; 37 L.J. C.P. 280; L.R. 5 H.L. 45; 40 L.J. C.P. 121.
(*t*) *Bird* v. *G. N. Ry.*, 28 L.J. Ex. 3.
(*u*) *Gt. West. &c. of Canada* v. *Fawcett*, 1 Moore's P.C. N.S. 101.
(*x*) *Grote* v. *Chester & Holyhead Ry.*, 2 Exch. 255.
(*y*) *Rogers* v. *Head*, Cro. Jac. 262; *Matthews* v. *Hopping*, 1 Keb. 852.
(*z*) *Ross* v. *Hill*, 2 C.B. 877; 15 L.J. C.P. 182.

undertake the carriage of goods for hire, is not understood to mean that the goods shall be delivered safe at all events, but that they shall be kept safe from all such contingencies as might have been guarded against by the exercise of vigilance or skill. The contract is "a contract to carry safely and securely as far as regards the neglect of the carrier himself and his servants, but not to insure the safety of the goods;" and the carrier therefore would not be liable for losses by robbers, or any taking by force; but he is *primâ facie* responsible for a secret theft of them, and can only discharge himself from liability by proving his own care and watchfulness and blamelessness in the matter (*ante*, p. 911).

Where the defendant received eleven boxes of gold dust, under a special contract to carry them and deliver them at the Bank of England, "robbers and dangers of the road excepted," and one of the boxes was secretly stolen, it was held that the defendant was responsible for the loss; that a secret theft or pilfering was not within the exception as to robbers, nor was it a danger of the road within the meaning of the contract (*a*). If the owner accompanies the goods to take care of them, and loses them himself, the carrier is not responsible for the loss (*b*).

Who is to be deemed a common carrier.—Every person who plies with a carriage by land, or a boat or vessel by water, between different places, and professes openly to carry passengers and goods for hire, is a COMMON CARRIER. Such are railway companies, who profess to carry passengers, parcels, and merchandise, stage-coach and stage-waggon proprietors, lightermen, hoymen, barge owners, canal boatmen, and the owners and masters of ships and steamboats employed as general ships trading regularly from port to port for the transportation of all persons offering themselves or their goods to be conveyed for hire to the port of destination (*c*). The owner of a carriage who does not ply regularly for hire to a particular destination, but merely lets out a private carriage, with horses and driver, by the hour, day, or job, to proceed to any destination ordered by the hirer, is not a common carrier. A London cabdriver or hackney coachman, for example, is not a common carrier (*d*), nor is a furniture remover (*e*); but a barge-owner is, although he does not ply between any fixed *termini*, and only lets his barges for a single voyage to one person at a time,

(*a*) *De Rothschild* v. *R. M. St. P. Co.*, 7 Exch. 734; 21 L.J. Ex. 273.

(*b*) *Brind* v. *Dale*, 8 C. & P. 209, 211; 2 Moo. & R. 80; see also cases as to passenger's luggage, *post*, p. 958.

(*c*) *Lovett* v. *Hobbs*, 2 Show. 127; *Robinson* v. *Dunmore*, 2 Bos. & P. 416; *Laveroni* v. *Drury*, 8 Exch. 166; 22 L.J. Ex. 2; *Crouch* v. *L. & N. W. Ry.*, 23 L.J. C.P. 73; 14 C.B. 255.

(*d*) *Brind* v. *Dale*, 8 C. & P. 207; 2 Moo. & R. 80; *Ross* v. *Hill*, 2 C.B. 887; 15 L.J. C.P. 182.

(*e*) *Scaife* v. *Farrant*, L.R. 10 Ex. 358; 44 L.J. Ex. 234, *post*, p. 955.

if he lets out his vessels for the conveyance of the goods of any person who applies to him (*f*). When goods are in the custody of persons as wharfingers and not as carriers, and such persons do not undertake to carry the goods of everybody who ask them, they are not common carriers, and are not liable, in the absence of negligence, for damage arising to the goods (*g*). Railway companies are, apart from statute law or special contract, common carriers, and the Railways Clauses Act, 1845 (*h*), provides that they shall not be liable to any greater extent than common carriers; but their rights and liabilities are further regulated and limited, as we shall see, both by statute and by special contracts. It is the duty of all who hold themselves out to the world as common carriers to carry, for every person who tenders them the proper charge, all goods which they have convenience for carrying, and in respect of which they hold themselves out as carriers, without subjecting the person tendering the goods to any unreasonable or unusual conditions (*i*). By many of the railway Acts it is expressly enacted that railway companies shall act as common carriers, that they shall convey passengers and goods by locomotive engines, and that they shall provide for all persons conveying and sending goods by their railway every reasonable convenience and facility for the loading and unloading of goods (*k*).

Duties of common carrier.—Every common carrier is bound to accept and carry all such things as he publicly professes to carry for all persons who are ready and willing to pay him his customary hire, provided he has room in his cart or carriage for their conveyance, and has declared his intention to set out on his accustomed journey (*l*). He is bound to carry them to and from the places to which he professes to carry, although one of those places may be without the realm (*m*); for whenever a man undertakes the public office of a common carrier of goods he undertakes a public trust for the benefit of the rest of his fellow-subjects, and is bound to serve the subject in all the things that are within the reach of such an office, under pain of an action against him (*n*). A carrier is not bound to carry goods by the shortest route, but only by the route by which he usually carries them, and which he professes to go (*o*). If he journeys by a particular roundabout road between one place

(*f*) *Liver Alkali Co.* v. *Johnson*, L.R. 9 Ex. 338; 43 L.J. Ex. 216; *Hill* v. *Scott*, (1895) 2 Q.B. 713; 65 L.J. Q.B. 87.

(*g*) *Chattock* v. *Bellamy*, 64 L.J. Q.B. 250.

(*h*) 8 & 9 Vict. c. 20, s. 89.

(*i*) *Garton* v. *Brist. & Ex. Ry.*, 1 B. & S. 162; 30 L.J. Q.B. 294.

(*k*) *Pegler* v. *Monmouth Ry.*, 6 H. & N. 644; 30 L.J. Ex. 249.

(*l*) Bac. Abr. Carriers, B.; *Pickford* v. *Grand Junction Ry.*, 8 M. & W. 372; 10 L.J. Ex. 342.

(*m*) *Crouch* v. *L. & N. W. Ry.*, 14 C.B. 290; 23 L.J. C.P. 73.

(*n*) Keilwey, 50, pl. 4.

(*o*) *Per* Willes, J., *Myers* v. *L. & S. W. Ry.*, L.R. 5 C.P. 3; 39 L.J. C.P. 57.

and another, he is not bound to carry by a shorter route; but he is bound to use reasonable dispatch and to deliver within a reasonable time (*p*). If he limits his business to the carriage of particular classes of chattels, he can only be compelled to carry the things he publicly professes to carry, and is in the habit of carrying. If the carriage of certain commodities is attended with inconvenience or some peculiar risk, he may refuse to receive and carry such articles as a common carrier (*q*), but may, nevertheless, accept and carry them under a special contract throwing the risk of damage to them from ordinary accidents during the transit upon the owner or the consignor (*r*). In the absence of a contract to deliver at a particular time, the duty of a common carrier is to deliver at a reasonable time, looking at all the circumstances of the case; and, since his first duty is to carry safely, he is justified in incurring delay, if delay is necessary to secure the safe carriage (*s*). He is not responsible for the consequences of delay arising from causes beyond his control. Where, therefore, the defendants, a railway company, were prevented by an unavoidable obstruction on their line from carrying the plaintiff's goods within the usual time, and the obstruction was caused by an accident resulting solely from the negligence of another company, who had, under an agreement with the defendants, sanctioned by Act of Parliament, running powers over their line, it was held that the defendants were not liable to the plaintiff for damage to his goods caused by the delay (*t*).

As regards dogs and live animals, if the carrier does not, by his public profession and practice undertake to carry them, he may decline to carry them except upon certain special conditions, and under a special contract (*u*). But in the case of a railway or canal company the conditions or special contract must be just and reasonable, must not exempt the company from liability for their own neglect or default, and must be in writing signed by the consignor or his agent (*v*). Where carriers by sea give public notice that they receive goods for shipment on the condition and agreement only of the ship sailing under a bill of lading in the form ordinarily

(*p*) *Hales* v. *L. & N. W. Ry.*, 4 B. & S. 66; 32 L.J. Q.B. 292; *Oxlade* v. *N. E. Ry.*, 15 C.B. N.S. 680.

(*q*) *Johnson* v. *Mid. Ry.*, 4 Exch. 371; 18 L.J. Ex. 366; *McManus* v. *Lanc. & York. Ry.*, 4 H. & N. 327; 28 L.J. Ex. 353.

(*r*) *Peek* v. *North Staff. Ry.*, 10 H.L.C. 473; 32 L.J. Q.B. 241; *Phillips* v. *Edwards*, 28 L.J. Ex. 52; 3 H. & N. 813; *Austin* v. *Manchester Ry.*, 16 Q. B. 600; 20 L.J. Q.B. 440; 10 C.B. 454; 21 L.J. C.P. 179; *Carr* v. *Lanc. & York. Ry.*, 7 Exch. 707; 21 L.J. Ex. 261; *Martin* v. *Gt. Indian Pen. Ry.*, L.R. 3 Ex. 9; 37 L.J. Ex. 27.

(*s*) *Taylor* v. *G. N. Ry.*, L.R. 1 C.P. 385; 35 L.J. C.P. 210.

(*t*) *Taylor* v. *G. N. Ry.*, *supra*.

(*u*) *Harrison* v. *L. B. & S. C. Ry.*, 31 L.J. Q.B. 113; 2 B. & S. 122. See *Dickson* v. *G. N. Ry.*, 18 Q.B.D. 176; 56 L.J. Q.B. 111, *post*, p. 970.

(*v*) 17 & 18 Vict. c. 31, s. 7; *post*, p. 967.

adopted, they are not bound to receive and carry otherwise than in accordance with their published terms (*x*).

The mere posting up at a particular railway station of a list of tolls taken by the company for the carriage of coals, amongst other things, will not constitute the company common carriers of coals from that particular station, if it appears that they have no accommodation there for receiving coals, and do not, in point of fact, carry them from that spot, although they carry them over other parts of their line (*y*).

By the Explosives Act, 1875 (*z*), the carriage of dangerous goods is regulated (*a*). If a carrier is employed to carry an article of such a dangerous nature as to require extraordinary care in its conveyance, the fact must be communicated to him, or the consignor will be responsible for any injury that may result to the carrier or his servants from the want of such communication (*b*).

The Privy Council may make orders on persons carrying animals for hire to cleanse and disinfect the vessels, vehicles, &c., used for such purpose (*c*). Every railway company is also bound, on the written request of the consignor or person in charge of any animals carried by them, to provide the animals with food and water at such stations as the Privy Council may direct, and will have a lien for the reasonable expense of supplying such food and water on the animals so supplied, and also on any other animals carried for the same consignor (*d*).

Every common carrier of passengers with luggage is bound to take the customary quantity of luggage with each passenger, consisting of such things as a traveller, according to the wants of the class to which he belongs, usually carries with him for his own personal convenience, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, but he is not bound to carry merchandise, or articles wholly unconnected with luggage, unless he professes to carry merchandise, or unless the traveller tenders or is ready to pay the customary hire for merchandise (*e*), or unless the carrier knows the luggage is merchandise (*f*). Deeds and money carried by an attorney in his portmanteau for

(*x*) *Phillips* v. *Edwards*, *ante*, p. 944; *Wilton* v. *Royal Atlantic Mail St. Packet Co.*, 10 C.B. N.S. 453; 30 L.J. C.P. 369.

(*y*) *Oxlade* v. *N. E. Ry.*, 15 C.B. N.S. 680; 33 L.J. C.P. 171; *Johnson* v. *Midland Ry.*, 4 Exch. 372; 18 L.J. Ex. 366.

(*z*) 38 & 39 Vict. c. 17.

(*a*) Harbour authorities and railway and canal companies may make bye-laws as to the carriage (ss. 34, 35), and the Secretary of State as to other carriers (s. 37); as to specially dangerous explosives, see s. 43; and as to exemption of carrier where consignor or consignee is in fault, s. 88.

(*b*) *Farrant* v. *Barnes*, 11 C.B. N.S. 553; 31 L.J. C.P. 137.

(*c*) 41 & 42 Vict. c. 74, s. 32; *ib.* c. xxi., s. 62; see *Cox* v. *G. E. Ry.*, L.R. 4 C.P. 181; 38 L.J. C.P. 151; *post*, p. 980.

(*d*) 41 & 42 Vict. c. 74, ss. 33, 66 (5).

(*e*) *G. N. Ry.* v. *Shepherd*, 8 Exch. 30; 21 L.J. Ex. 114; as to passengers' luggage generally, see *post*, p. 958.

(*f*) *Cahill* v. *L. & N. W. Ry.*, 13 C.B. N.S. 818; 31 L.J. C.P. 271.

use in the causes in which he may be engaged are not "ordinary luggage" for which a railway company is responsible (*g*), nor is a child's rocking-horse (*h*), nor sheets and blankets intended for the use of the passenger's household when permanently settled (*i*), but a chronometer is, it seems, luggage for a master mariner (*k*).

Representations by railway companies through their time-tables.—A railway company by the publication of a time-table, represents that a train will run at or about the time specified, and the company will be responsible in damages to all who tender themselves for conveyance at the appointed time and find that no train at all has been provided (*l*); but railway companies do not by their time-tables guarantee the arrival of their trains at intermediate stations, or their departure from them, at the exact time fixed. All they undertake to do is to carry the passengers without any unreasonable delay (*m*). But the fixing up of a table of tolls at the different stations does not imply that the company carries all the things mentioned therein from each station (*n*). The mere taking of a ticket is not sufficient evidence of a contract to convey a passenger to a certain place within a given time; the time-bills must be produced to prove the contract (*o*).

Implied undertaking of railway companies to forward passengers or goods without unnecessary delay.—Every railway company also, which has sold tickets to an intended passenger, impliedly undertakes to provide means of conveyance and forward him to his place of destination with reasonable speed (*p*), and is responsible in damages if the passenger suffers serious personal inconvenience from a breach of this undertaking (*q*). But pecuniary loss sustained by the passenger by reason of his not being able to get to a place, which he could otherwise have arrived at in time to meet persons with whom he had appointments, is too remote (*r*). If one party does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reason-

(*g*) *Phelps* v. *L. & N. W. Ry.*, 34 L.J. C.P. 259; 19 C.B. N.S. 321.

(*h*) *Hudston* v. *Midland Ry.*, 38 L.J. Q.B. 213; L.R. 4 Q.B. 366.

(*i*) *Macrow* v. *G. W. Ry.*, L.R. 6 Q.B. 612; 40 L.J. Q.B. 300.

(*k*) *Le Conteur* v. *L. & S. W. Ry.*, L.R. 1 Q.B. 54; 35 L.J. Q.B. 40.

(*l*) *Denton* v. *G. N. Ry.*, 5 E. & B. 868; 25 L.J. Q.B. 129; two of the judges thought there was a contract, and all three that there was a tort.

(*m*) *Hurst* v. *G. W. Ry.*, 19 C.B. N.S. 310; 34 L.J. C.P. 264.

(*n*) *Oxlade* v. *N. E. Ry.*, 15 C.B. N.S. 680; 33 L.J. C.P. 171; *Lockyer* v. *International Sleeping Car Co.*, 61 L.J. Q.B. 501.

(*o*) *Hurst* v. *G. W. Ry.*, *supra*; and see *Robinson* v. *G. W. Ry.*, 35 L.J. C.P. 123.

(*p*) *G. N. Ry.* v. *Hawcroft*, 21 L.J. Q.B. 178.

(*q*) *Hobbs* v. *L. & S. W. Ry.*, L.R. 10 Q.B. 111; 44 L.J. Q.B. 49; *Burton* v. *Pinkerton*, L.R. 2 Ex. 340; 36 L.J. Ex. 137.

(*r*) *Hamlin* v. *G. N. Ry.*, 1 H. & N. 408; 26 L.J. Ex. 20.

able is to consider whether, according to the ordinary habits of society, a person delayed on his journey would have incurred the expenditure in question on his own account (*s*).

If railways are blocked up and impeded by snow, the company is bound to use all reasonable exertions to forward the passengers, though extra expense must be incurred by the company in so doing, which they have no means of recovering from their passengers; but the owners of goods and cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to forward cattle and goods. "If a snowstorm occurs which makes it impossible to forward cattle except by extraordinary means, involving additional expense, the company are not bound to use such means and to incur such expense" (*t*). So if there be delay in delivering goods by reason of an accident occurring on the defendants' line, such accident being caused wholly by the negligence of another railway company, which had running powers over the defendants' line, the defendants, in the absence of a special contract to deliver within a certain time, are not responsible (*u*).

Negligence of common carriers—Implied undertaking.—Common carriers are bound by the mere fact of their having received passengers, independently of any contract, to take the utmost care for their safe conveyance (*x*); and, if an accident arises causing injury, a common carrier can discharge himself only by proving that the accident was inevitable (*y*), that is, that it did not occur from the want of due care, not only on the part of himself and his servants, but also on the part of any independent contractor who may have been employed by him to construct the means of conveyance (*z*). The carrier, however, is not bound (see *ante*, p. 937) at his peril to provide a carriage absolutely road-worthy at the commencement of the journey; and, if the carriage turns out to be defective, he is not liable to a passenger for the consequences, if the defect was of such a nature that it could neither be guarded against in the process of construction nor discovered by subsequent examination (*a*). It is no part of the duty of a railway company to detain a train in order to allow a passenger, who alleges that he has been robbed in one of their carriages, to give another passenger or any other person into custody (*b*). Where a passenger stood up

(*s*) *Le Blanche* v. *L. & N. W. Ry.*, 1 C.P.D. 286; 45 L.J. C.P. 521.
(*t*) *Briddon* v. *G. N. Ry.*, 28 L.J. Ex. 51.
(*u*) *Taylor* v. *G. N. Ry.*, L.R. 1 C.P. 385; 35 L.J. C.P. 210.
(*x*) *Austin* v. *G. W. Ry.*, L.R. 2 Q.B. 442; 36 L.J. Q.B. 201.
(*y*) *Burns* v. *Cork & Bandon Ry.*, 13 Ir. C.L.R. 543.
(*z*) *Grote* v. *Chester & Holyhead Ry.*, 2 Exch. 251; *Burns* v. *Cork & Bandon Ry.*, *supra*; *Francis* v. *Cockerell*, L.R. 5 Q.B. 184, 501; 39 L.J. Q.B. 291; *John* v. *Bacon*, L.R. 5 C.P. 437; 39 L.J. C.P. 365.
(*a*) *Readhead* v. *Midland Ry.*, L.R. 4 Q.B. 379; 38 L.J. Q.B. 169; *Richardson* v. *G. E. Ry.*, 1 C.P.D. 342.
(*b*) *Cobb* v. *G. W. Ry.*, (1894) A.C.

and looked out of the window, and, by reason of the door being unfastened, fell out and was injured, it was held that there was evidence of negligence by the railway company for which they were liable (*c*). But a passenger may, by special agreement, contract to be carried at his own risk, so as to exempt the company from responsibility for even the gross and wilful negligence of their servants (*d*); and in such a case the company will be exempt from liability not only during the transit, but while the passenger is leaving the company's premises (*e*). Such a special agreement will protect not only the company with which it is made, but also any other company on whose line the passenger may be carried in the course of the journey (*f*).

Invitation to alight.—An invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence (*g*). The opening of the carriage door is an invitation to alight (*h*); and so is the bringing up of a train to a final standstill, for the purpose of the passengers alighting, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out, if he purposes to alight at the particular station (*i*). If the plaintiff, exercising his own discretion, chooses to get out of a train which has overshot the platform, the company are not responsible (*k*), especially when the station is well known to the plaintiff (*l*). Calling out the name of the station before the train has come to a standstill, is not an invitation to alight; nor is merely overshooting the platform negligence (*m*). But if the porter has called out the name of the station, and the engine-driver has overshot the platform, and the train has come to a standstill, and no warning is given not to alight, the jury may very properly say that a passenger is not guilty of negligence in getting out (*n*). Similar considerations arise in cases where the

419; 63 L.J. Q.B. 629. See as to overcrowding, *ib.* and *Pounder* v. *N. E. Ry.*, (1892) 1 Q.B. 385; 61 L.J. Q.B. 136.

(*c*) *Gee* v. *Metropolitan Ry.*, L.R. 8 Q.B. 161; 42 L.J. Q.B. 105; commenting on *Adams* v. *L. & Y. Ry.*, L.R. 4 C.P. 739; 38 L.J. C.P. 277.

(*d*) *McCawley* v. *Furness Ry.*, L.R. 8 Q.B. 57; 42 L.J. Q.B. 4.

(*e*) *Gallin* v. *L. & N. W. Ry.*, L.R. 10 Q.B. 212; 44 L.J. Q.B. 89.

(*f*) *Hall* v. *N. E. Ry.*, L.R. 10 Q.B. 437; 44 L.J. Q.B. 164; as to how far this applies to carriage of goods, see *post*, pp. 968, 970.

(*g*) *Cockle* v. *S. E. Ry.*, L.R. 7 C.P. 321; 41 L.J. C.P. 140.

(*h*) *Praeger* v. *Bristol & Exeter Ry.*, 24 L.T. N.S. 105; *L. & N. W. Ry.* v. *Hellawell*, 26 L.T. N.S. 557; *Gill* v. *G. E. Ry.*, 26 L.T. N.S. 945.

(*i*) *Cockle* v. *S. E. Ry.*, *supra*; *Bridges* v. *L. & N. W. Ry.*, L.R. 7 H.L. 213; 43 L.J. Q.B. 151; *Rose* v. *N. E. Ry.*, 2 Ex.D. 248; 46 L.J. Ex. 374.

(*k*) *Siner* v. *G. W. Ry.*, L.R. 4 Ex. 117; 38 L.J. Ex. 67; but see per Brett, L.J., on this case in *Robson* v. *N. E. Ry.*, 2 Q.B.D. 86; 46 L.J. Q.B. 50; and see *Weller* v. *L. B. & S. C. Ry.*, *infra*, and *Rose* v. *N. E. Ry.*, *supra*.

(*l*) *Lewis* v. *L. C. & D. Ry.*, L.R. 9 Q.B. 66; 43 L.J. Q.B. 8.

(*m*) *Lewis* v. *L. C. & D. Ry.*, *supra*; *Cockle* v. *S. E. Ry.*, L.R. 7 C.P. 321; 41 L.J. C.P. 140.

(*n*) *Weller* v. *L. B. & S. C. Ry.*, L.R. 9 C.P. 126; 43 L.J. C.P. 137.

door of a railway carriage is slammed by a porter upon the hand of the plaintiff, and which may or may not be the negligence of the company or of the plaintiff, according to circumstances (*o*).

Loss of goods by common carriers.—The law, observes Holt, C. J., charges every person exercising the public employment of a common carrier, common hoyman, or master of a ship "intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable" (*p*).

By the term "act of God" is meant something in opposition to the act of man, such as storms, lightning, tempests, and inevitable accidents not resulting from human agency. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the non-delivery of the goods (*q*). Thus, where a fire broke out in a building adjoining a booth under which the carrier had placed some hops, and consumed them, without any neglect on the part of the carrier himself, it was held that, inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster constituted no answer to the action (*r*). If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the common carrier has neglected to provide proper covering for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss occasioned thereby is a loss from the act or negligence of man, and the common carrier is consequently responsible therefor (*s*).

If a barge-owner who carries goods for hire on a canal accepts certain goods to be carried for hire, and rats gnaw a hole in the barge, and cause a leak, and the goods are injured, the barge-owner is responsible for the damage (*t*). He is not, of course, responsible for any deterioration in the value of the goods resulting from the negligence of the owner or the consignor, such as defective

(*o*) *Fordham* v. *L. B. & S. C. Ry.*, L.R. 4 C.P. 619; 38 L.J. C.P. 324; *Richardson* v. *Mel. Ry.*, 37 L.J. C.P. 300; *Maddox* v. *L. C. & D. Ry.*, 38 L.T. N.S. 458; *Coleman* v. *S. E. Ry.*, 4 H. & C. 699; *Met. Ry.* v. *Jackson*, 3 App.Cas. 193; 47 L.J. C.P. 303.

(*p*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909; 1 Smith's L.C. 167 (ed. 10).

(*q*) *Oakley* v. *Portsmouth Steam Packet Co.*, 11 Exch. 622; 25 L.J. Ex. 99.

(*r*) *Forward* v. *Pittard*, 1 T.R. 33; *Hyde* v. *Trent Nav. Co.*, 5 T.R. 399.

(*s*) *Nugent* v. *Smith*, 1 C.P.D. 423, 436; 45 L.J. C.P. 697; Doct. & Stud. Dial. 2, ch. 38; Noy, ch. 43.

(*t*) *Dale* v. *Hall*, 1 Wils. 281.

packing, nor for losses occasioned by an inherent defect in the article causing its destruction. If, however, the defective packing of goods is patent and visible, and easily remedied, and he accepts the goods for conveyance, he is bound to take all reasonable means to provide against the defect. Where a dog, with a string about his neck, was delivered to a common carrier to be carried, and was tied by the string in a watch-box, and shortly afterwards the dog slipped his head through the noose, and escaped and was never seen afterwards, and an action was brought to recover the value of the dog, and it was contended that the owner ought to have taken care that the cord was properly secured round the dog's neck, it was held that as the common carrier had the means of seeing that the dog was insufficiently secured, he ought to have locked him up or taken other proper means to secure him, and that he was responsible for the loss (*u*). Where, however, a greyhound, secured in the way ordinarily adopted and obviously intended by the owner to be used, viz., by a collar and strap, was delivered to a railway company to be carried, and the greyhound during the journey slipped his head through the collar and was lost, it was held that the company was not responsible (*x*).

Common carriers are not responsible for the "inherent vice" of the goods which they carry, so that where animals are injured by their own acts and without any negligence on the part of the carrier, the carrier is not liable (*y*). Nor are they liable for an inherent tendency of goods to decay or ignite (*z*).

If a cargo or load of goods weighing a certain weight be delivered to a common carrier to be carried for hire, and the cargo on its arrival at its destination is deficient in weight, there is a *primâ facie* presumption of negligence on the part of the carrier, which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control (*a*).

If the accident or casualty causing the loss of the goods is occasioned by the misconduct of a third person, and not by any fault or neglect on the part of the common carrier himself, the latter is, nevertheless, responsible to the owner for the loss, as he has himself a remedy over against the offending party (*b*). But if the misconduct of the third person is caused by the orders of the owner of the goods, the carrier of course will not be responsible (*c*).

(*u*) *Stuart* v. *Crawley*, 2 Stark. 324.

(*x*) *Richardson* v. *N. E. Ry.*, L.R. 7 C.P. 75; 41 L.J. C.P. 60.

(*y*) *Blower* v. *G. W. Ry.*, L.R. 7 C.P. 655; 41 L.J. C.P. 268; *Kendal* v. *L. & S. W. Ry.*, L.R. 7 Ex. 373; 41 L.J. Ex. 184; *Gill* v. *Manchester, Sheffield and Lincolnshire Ry.*, L.R. 8 Q.B. 186; 42 L.J. Q.B. 89.

(*z*) *Alston* v. *Herring*, 11 Exch. 822; 25 L.J. Ex. 177; *Rohl* v. *Parr*, 1 Esp. 444; *Boyd* v. *Dubois*, 3 Camplb. 133.

(*a*) *Hawkes* v. *Smith*, Car. & M. 72.

(*b*) *Trent Nav. Co.* v. *Ward*, 3 Esp. 130.

(*c*) *Butterworth* v. *Brownlow*, 34 L.J. C.P. 266; 19 C.B. N.S. 409.

If a man professes to be a common carrier of passengers merely, and only receives occasionally, and at his own option, some trifling articles of luggage with such passengers, to be carried gratuitously for the accommodation of the latter, he cannot be charged as a common carrier of goods for the loss of them. He is, in such a case, a gratuitous bailee of the goods, and chargeable only with the liabilities and responsibilities of a person who gratuitously undertakes to carry goods for another. Such is an omnibus proprietor, who professes only to carry passengers and receives his hire solely therefor, but occasionally receives and carries gratuitously small bundles and parcels for the accommodation of his passengers. As he does not profess to carry goods for hire, he cannot be compelled to receive them as a common carrier of goods, neither can he be charged except as a gratuitous bailee for the loss of them. And if luggage is carried free, upon the express terms that the passenger shall himself take charge of it, and that it shall be taken at his risk, he cannot make the carrier responsible for the loss of it (*d*). If, however, the carrier or coach-proprietor professes to carry both passengers and luggage, he is clothed, as regards the conveyance of the luggage, with the obligations and responsibilities of a common carrier of goods for hire (*e*), whether the hire is paid by the passenger or by some other person on his behalf or for his benefit (*f*).

Contributory negligence.—If goods delivered to be carried are lost or stolen by the way, and the conduct of the bailor or consignor himself has substantially conduced to the loss, he has no ground at common law for seeking compensation at the hands of the common carrier (*g*). Thus, where a man hid one hundred pounds sterling in some hay in an old nail-bag, and delivered it to a common carrier to be carried to a banker, and the money was lost, it was held that the common carrier was not responsible for the loss, as the consignor had neglected to inform the carrier of the exceeding value of the bag, and had thereby prevented him from taking proper care of it (*h*).

So, where the consignor concealed a quantity of guineas in an ordinary brown paper parcel tied with a string (*i*), and a number of sovereigns in a packet of tea (*k*), and several hundred pounds' worth of bank-notes and gold in an ordinary schoolboy's box, and the money so sent was lost by the way, it was held that the

(*d*) *Stewart* v. *L. & N. W. Ry.*, 33 L.J. Ex. 199; 3 H. & C. 135; as to passengers' luggage generally, see *post*, p. 958.

(*e*) *Brooke* v. *Pickwick*, 4 Bing. 218; 5 L.J. (O.S.) C.P. 158.

(*f*) *Marshall* v. *York and Newcastle Ry.*, 11 C.B. 655; 21 L.J. C.P. 24.

(*g*) *Butterworth* v. *Brownlow*, 34 L.J. C.P. 266; 19 C.B. N.S. 409.

(*h*) *Gibbon* v. *Paynton*, 4 Burr. 2298.

(*i*) *Clay* v. *Willan*, 1 H. Bl. 298.

(*k*) *Bradley* v. *Waterhouse*, 3 C. & P. 318.

common carrier was not responsible for the loss of it (*l*). And if glass, china, or fragile articles are delivered to a carrier to be carried, and no notice is given of the peculiar nature of the articles, and the things are damaged in the course of the transit, the carrier is not bound to make good the damage, as the consignor has himself directly contributed to the injury by concealing the peculiar nature of the articles, and the amount of care requisite for their safe conveyance. Contributory negligence, it must be borne in mind, is that sort of negligence which being a cause of the injury, is of such a character that its effect could not have been counteracted or avoided by the ordinary care of the defendant (*m*). Contributory negligence in actions against carriers is frequently set up where the plaintiff alleged that he was injured in alighting from a train (*n*), or in getting his hand trapped upon entering the carriage (*o*), or while travelling from the flying open of the carriage door (*p*).

Limitation of the liability of common carriers by public notice—Carriage of valuables, &c.—Common Carriers Act—Declaration of value by consignors.—The Carriers Act (*q*), by sect. 1, exempts common carriers by land from liability for the loss of (*r*), or injury to, gold or silver, precious stones, jewellery, watches, clocks, trinkets, bills, orders, notes, or securities for payment of money, stamps, maps, writings (*s*), title-deeds, paintings (*t*), engravings, pictures (*u*), plated articles, glass (*x*), china, silks (*y*), in a manufactured or unmanufactured state, furs (*z*), lace (*a*), wrought up or not wrought up with other materials (*b*), contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any public conveyance, when the value of such articles or property contained

(*l*) *Batson* v. *Donovan*, 4 B. & Ald. 37; *Mayhew* v. *Eames*, 3 B. & C. 601; 3 L.J. (O.S.) K.B. 108.

(*m*) *Radley* v. *L. & N. W. Ry.*, 1 App. Cas. 754; 46 L.J. Ex. 573; as to the negligence of a third party, see *Ayles* v. *S. E. Ry.*, L.R. 3 Ex. 146; 37 L.J. Ex. 104; *Daniel* v. *Met. Ry.*, L.R. 5 H.L. 45; 40 L.J. C.P. 121.

(*n*) See the cases, *ante*, p. 948.

(*o*) See the cases, *ante*, p. 949.

(*p*) *Adams* v. *L. & Y. Ry.*, L.R. 4 C.P. 739; 38 L.J. C.P. 277; *Gee* v. *Met. Ry.*, L.R. 8 Q.B. 161; 42 L.J. Q.B. 105.

(*q*) 11 Geo. 4 & 1 Will. 4, c. 68.

(*r*) *Hearn* v. *L. & S. W. Ry.*, 10 Exch. 801; 24 L.J. Ex. 180; *Millen* v. *Brasch*, 10 Q.B.D. 142; 51 L.J. Q.B. 127.

(*s*) If they are of value at the time of carriage: *Stoessigger* v. *S. E. Ry.*, 23 L.J. Q.B. 293; 3 E. & B. 549.

(*t*) *I.e.*, paintings which are works of art: see *Woodward* v. *L. & N. W. Ry.*, 3 Ex. D. 121; 47 L.J. Ex. 263.

(*u*) Where framed pictures are sent by a carrier, the frames as well as the pictures are within the Act: *Henderson* v. *L. & N. W. Ry.*, L.R. 5 Ex. 90; 39 L.J. Ex. 55.

(*x*) As to a glass frame, see *Treadwin* v. *G. E. Ry.*, L.R. 3 C.P. 308; 37 L.J. C.P. 83.

(*y*) Silk guards and silk dresses are included under the term silks: *Bernstein* v. *Baxendale*, 6 C.B. N.S. 259; 28 L.J. C.P. 265; overruling *Davey* v. *Mason*, Car. & M. 50; so, also, is elastic silk webbing, made as described in *Brunt* v. *Midland Ry.*, 2 H. & C. 889; 33 L.J. Ex. 187.

(*z*) Felt hats are not furs: *Mayhew* v. *Nelson*, 6 C. & P. 58.

(*a*) By 28 & 29 Vict. c. 94, s. 1, the term "lace" is not to include machine-made lace.

(*b*) See *Brunt* v. *Midland Ry.*, *supra*.

in such parcel or package shall exceed the sum of TEN POUNDS, unless, at the time of the delivery thereof for the purpose of being carried or of accompanying the person of any passenger, the value and nature of such articles or property shall have been DECLARED by the person sending or delivering the same, and the increased charge thereinafter mentioned (sect. 2), or an engagement to pay the same, accepted by the person receiving such parcel or package. Pictures placed in a waggon with wooden sides, but without a top, so that they could be seen to be pictures, but their exact character could not be seen, were held to be contained in a parcel or package (*c*). Mere mention of the value to a station-master is no declaration of value within the meaning of the Act, if it was not intended to operate as a declaration of value (*d*). When the declaration is formally made, the carrier is entitled, if the value exceeds 10*l.*, and he has a notice of the increased rate of charge for parcels exceeding the value of 10*l.* put up in his office, to demand the increased rate of charge; but, if he does not think fit to notify the increased rate of charge, he cannot demand it; and, if he has notified it, but fails to demand it, he must be taken to have received the goods subject to his common law liability as an insurer of their safe conveyance, and will not be entitled to the protection of the statute (*e*). The consignor is bound by his declaration, and cannot afterwards show that the value of the goods exceeded that declared (*f*). If the journey is to be performed partly by land and partly by sea, the contract is divisible, and the carrier is entitled to the protection of the Merchant Shipping Act, as far as the journey is to be performed by sea (*g*), and to the protection of the Carriers Act so far as it is to be performed by land (*h*); and he will not lose such protection by having received the goods under a special contract, unless its terms are inconsistent with the goods having been received by him in his capacity of a common carrier (*i*).

Statutory fixing up notice.—By s. 2, when any parcel or package containing any of the specified articles shall be delivered, and its value and contents declared, and such value shall exceed ten pounds, it shall be lawful for such common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or receiving-house where such parcels are

(*c*) *Whaite* v. *L. & Y. Ry.*, L.R. 9 Ex. 67; 43 L.J. Ex. 47.
(*d*) *Robinson* v. *S. W. Ry.*, 19 C.B. N.S. 51; 34 L.J. C.P. 234.
(*e*) *Behrens* v. *G. N. Ry.*, 31 L.J. Ex. 299; 7 H. & N. 950.
(*f*) *M'Cance* v. *L. & N. W. Ry.*, 3 H. & C. 343; 34 L.J. Ex. 39.
(*g*) *L. & S. W. Ry.* v. *James*, L.R. 8 Ch. 241; 42 L.J. Ch. 337.
(*h*) *Le Conteur* v. *L. & S. W. Ry.*, L.R. 1 Q.B. 54; 35 L.J. Q.B. 40.
(*i*) *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 244; 38 L.J. Q.B. 137.

received by them for the purpose of conveyance, stating the increased rate of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels containing such valuable articles at such office shall be bound by such notice, without further proof of the same having come to their knowledge. By s. 3, when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, the person receiving such increased rate of charge, or accepting such engagement, shall, if required, sign a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice shall not have been affixed, the common carrier shall not be entitled to any benefit or advantage under the Act, but shall be responsible as at common law, and be liable to refund the increased rate of charge. No public notice or declaration is (s. 4) to limit, or in anywise affect the liability at common law of any such common carriers.

Every office, warehouse, or receiving-house, which shall be used or appointed by any common carrier for the receiving of parcels to be conveyed, is (s. 5) to be deemed and taken to be the receiving-house, warehouse, or office of such common carrier. And where any parcel shall have been delivered at any such office, and the value and contents declared, and the increased rate of charge paid, and such parcel shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled (s. 7) to recover back such increased charges, in addition to the value of such parcel.

Nothing in the Act is (s. 6) to annul or affect any special contract between such common carriers and any other parties for the conveyance of goods and merchandise;—but this section only applies to contracts, the provisions of which are inconsistent with the exemption claimed by the carrier under the first section (*k*); nor (s. 8) to protect any common carrier for hire from liability to answer for loss or injury to any goods or articles arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c., from liability for any loss or injury occasioned by his own personal neglect or misconduct.

The fourth section of the Carriers Act (cited *supra*) enacts that no public notice or declaration shall be deemed or construed to limit, or in anywise affect, the liability at common law of any

(*k*) *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 244; 38 L.J. Q.B. 137.

common carriers in respect of any articles or goods to be carried or conveyed by them, but that they shall be liable, as at common law, to answer for the loss of, or injury to, any articles and goods in respect whereof they may not be entitled to the benefit of that Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding. This statute is confined to public notices, such as were very common before the Act—notices addressed to the public at large, raising a question in every case whether the notice was brought home to the particular person. It is not applicable to a notice specifically delivered to form the basis of a special contract with him (*l*). Where the common carrier is not a common carrier of the particular description of goods tendered him for conveyance, and has the option of receiving them or rejecting them at his own good will and pleasure, he may prescribe his own terms of conveyance; and, if the party delivering goods to be carried has been personally served with a notice of the terms on which the common carrier carries goods, and after seeing the notice sends the goods, he must be taken to agree that they shall be carried on those terms, and there is then a special contract between him and the common carrier for their conveyance (*m*), unless the carriage is by railway or canal so as to necessitate a signed special contract under the Railway and Canal Traffic Act (*n*). But this is not the case with regard to such articles as the common carrier is bound by his public profession and employment to carry. With regard to them, the owner has a right to insist that the common carrier shall receive the goods subject to all the responsibilities incident to his employment (*o*). If the delivery of goods under such circumstances authorises an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier (*p*). A remover of furniture for hire is not generally as it should seem a common carrier, and at all events, where a special contract is entered into between the owner of the furniture and the carrier, it would exclude any question of liability as a common carrier (*q*). Special contracts with railway and canal companies must, as we shall presently see, be authenticated by a signed writing (*post*, p. 967).

Common carriers may protect themselves by special contract from

(*l*) *Walker* v. *York & North Mid. Ry.*, 2 E. & B. 750; 23 L.J. Q.B. 73; *Van Toll* v. *S. E. Ry.*, 31 L.J. C.P. 241; 12 C.B. N.S. 75.

(*m*) Wightman, J., 2 E. & B. 760.

(*n*) *Post*, p. 967.

(*o*) Ld. Kenyon, *Kirkman* v. *Shawcross*, 6 T.R. 17; *Garton* v. *Bristol & Exeter Ry.*, 1 B. & S. 162; 30 L.J. Q.B. 276.

(*p*) *Crouch* v. *L. & N. West. Ry.*, 23 L.J. C.P. 148; 9 Exch. 556.

(*q*) *Scaife* v. *Farrant*, L.R. 10 Ex. 358; 44 L.J. Ex. 234.

loss by fire and sea risks, and may carry goods on the terms that they are not to be held responsible at all for such losses (*r*).

Stipulations exempting common carriers by water from loss of luggage, unless bill of lading signed for it.—Where the Atlantic Mail Steam Navigation Company issued passengers' tickets on which was printed a notice or condition "that the ship will not be accountable for luggage, goods, or other descriptions of property, unless bills of lading have been signed therefor, each passenger allowed twenty cubic feet of luggage free," it was held that the company had a right to impose this condition on their passengers, provided it was imposed upon all alike; that the passenger, therefore, was bound to get a bill of lading for all the luggage for which he intended to make the ship accountable, but that he had the option of taking luggage under his own personal control without any bill of lading, carrying it, in that case, at his own risk (*s*). If the company does not impose the same terms upon all passengers alike, or the passenger offers to sign a bill of lading and is unable to obtain it, the company cannot avail themselves of the condition as protecting them from liability (*t*).

When carrier may by special contract exempt himself from all responsibility for damage to certain classes and descriptions of goods in transitu.—Whenever a man enters into a contract for the carriage of goods, he impliedly grants some labour and care in return for the hire; and it was formerly held that he could not enter into the contract, and at the same time say that he would bestow no labour or care at all in return for his hire. It is impossible so to construe a special contract for the carriage of goods, as to make the carrier say, "We will receive your goods; but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious" (*u*). In the case of articles of a perishable nature, such as fish, or of a very delicate and fragile nature, such as statuary, sculptured alabaster, or marble, which the common carrier does not commonly profess to carry, and which may be readily injured, the common carrier may refuse to receive and carry such articles, except under a special contract exonerating him from all responsibility for damage done to them *in transitu* not occasioned by the neglect or default of himself or his servants (*x*). So, with regard to horses, it is said to be very reason-

(*r*) *Maving* v. *Todd*, 1 Stark. 74; *Collins* v. *Bristol and Exeter Ry.*, 11 Exch. 790; 7 H.L.C. 205.

(*s*) *Wilton* v. *Royal Atl. Mail St. Packet Co.*, 10 C.B. N.S. 453; 30 L.J. C.P. 369.

(*t*) *G. W. Ry. Co.* v. *Goodman*, 12 C.B. 313; 21 L.J. C.P. 197.

(*u*) *Lyon* v. *Mells*, 5 East, 438; Doct. & Stud. Dial. 2, ch. 39; Noy's Maxims, ch. 43, 92.

(*x*) *Beal* v. *South Devon Ry.*, 5 H. & N. 875; 29 L.J. Ex. 441; *Peek* v. *N. Staff.*

able that common carriers by railway should be allowed to make agreements for the purpose of protecting themselves against the peculiar risks arising from the rapid motion and strange noises, which are calculated to alarm horses and cause them to kick and break the carriage, and do themselves injury. It was, therefore, held, before the passing of the Railway and Canal Traffic Act (*post*, p. 967), that railway companies might, by special contract, throw the risk of the conveyance of a horse by railway upon the owner of the horse, so that, if the horse was injured in the transit from any ordinary railway casualty, the owner would have no remedy against the company for the loss (*y*).

The notices commonly given by common carriers before the passing of the Carriers Act, that they would not be responsible for the loss of or damage to parcels above a certain value, unless the value was declared and a premium of insurance paid, were held to apply only to the responsibilities and liabilities of the carrier as an INSURER of the safety of the goods, and did not and could not exempt him, in the absence of fraudulent concealment of value or risk on the part of the consignor, from the consequences of misconduct or negligence of himself or persons in his employ (*z*).

Void limitations of liability.—A person who undertakes the public employment of a common carrier of merchandise or of passengers and luggage has no more right, it is apprehended, to engraft upon his contract or employment the terms that "all merchandise received by him to be carried is carried at the risk of the owners," or that "all luggage delivered to him by his passengers is carried at the risk of the passengers," and that "he will not be responsible if it is lost or damaged by the way," than a common innkeeper has to refuse to receive guests, except on the terms that he shall not be responsible for the safe keeping of their goods and luggage deposited in his inn. The consignor of merchandise or the passenger has a right to reject these terms, and to insist that merchandise, such as is ordinarily carried by the common carrier, or the customary allowance of luggage for a passenger, shall be taken at the common carrier's risk, provided the consignor makes the declaration of value, and is ready to pay the premium of insurance, in those cases where the declaration and payment are required by law. Where the carriage of particular articles is attended with any peculiar or extraordinary risk, the common carrier is entitled, as we have seen, to refuse to receive

Ry., 32 L.J. Q.B. 241; 10 H.L.C. 473; *Leeson* v. *Holt*, 1 Stark. 186; but see *Sutton* v. *Ciceri*, 15 App.Cas. 145.

(*y*) *Carr* v. *Lanc. & York. Ry.*, 7 Exch. 707; 21 L.J. Ex. 261; *Harrison* v. *L. B. & S. C. Ry.*, *ante*, p. 944, overruled by *Peek* v. *North Staff. Ry.*, *supra*.

(*z*) *Wyld* v. *Pickford*, 8 M. & W. 443; 10 L.J. Ex. 382; see per Lord Blackburn, *M. S. & L. Ry.* v. *Brown*, 8 App. Cas. 703, 709; 53 L.J. Q.B. 124; *Peek* v. *N. Staff. Ry.*, *supra*, at p. 499.

and carry such articles, unless the nature and value of the articles are declared, and an increased charge paid for insurance; but he may, at the same time, receive and carry them under a special contract, providing that they shall be carried at the risk of the owner at a lower rate of charge (*ante*, p. 955). And, if he is a common carrier of passengers merely, and does not profess to carry and does not receive for carriage luggage with his passengers, but allows them to carry with them, under their own care, a small quantity of personal luggage, he is not responsible for the loss of it (*a*). Where the carrier seeks to set up a special contract limiting his liability, he must show that the terms of it have been brought to the consignor's notice. The most frequent illustrations of this are to be found in the conditions printed upon luggage tickets (*b*), where the luggage is left in the cloak-room, the railway company being no longer carriers but warehousemen. Where a passenger took a ticket in the form of a book of coupons, and inside the book was a condition limiting the responsibility of the company to their own trains, and the passenger was injured in France, the jury found that the condition was not brought to his notice; but it was held that the whole book was the contract, and was accepted by the passenger, and he was bound by the condition (*c*).

Loss of passengers' luggage by railway companies.—The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller, has led from the earliest times to the practice, on the part of the carriers of passengers for hire, of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger.

Under the older system of travelling by stage-coaches, canal-boats, or other vessels, the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various Acts of Parliament under which railways have been established. By these Acts the right of the passenger is expressly limited to ordinary luggage, which must be taken to mean the personal luggage of the traveller; and the amount which he is entitled to take free of charge is ascertained. Whatever the passenger takes

(*a*) See *infra*.

(*b*) See *infra*.

(*c*) *Burke* v. *S. E. Ry.*, 5 C.P.D. 1; 49 L.J. C.P. 107; some doubt seems thrown on this decision (although it is not specifically overruled) by the House of Lords in *Richardson, Spence & Co.* v. *Rowntree*, (1894) A.C. 217; 63 L.J. Q.B. 283.

with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered as personal luggage; this would include not only all articles of apparel whether for use or ornament, but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying (*d*); but not, it would seem, a bicycle (*e*). On the other hand, what is carried for the purposes of business, such as merchandise or the like (*f*), or for larger or ulterior purposes than those of the journey, such as articles of furniture or household goods (*g*), will not come within the description of ordinary luggage; unless the company (with knowledge) choose to take without extra payment that which is not ordinary luggage, in which case they will be responsible for the loss (*h*); so also upon any limit in point of weight, if the company choose to allow a passenger to carry more, they will be liable (*i*). The liability of common carriers, in respect of articles carried as passengers' luggage, is that of carriers of goods as distinguished from that of carriers of passengers. Most of the Railway Acts provide that, without extra charge, it shall be lawful for every passenger by railway to take with him ordinary luggage or articles of clothing of a certain weight and dimensions, and that the company shall not be responsible for the safe carriage or custody of, or for any loss of or injury to, articles carried upon the railway with, or accompanying the person of, or belonging to, any passenger, or delivered for the purpose of being carried, other than such passenger's articles of clothing. But these enactments do not prevent railway companies from running excursion trains for passengers only, without luggage (*k*). If a railway company starts an excursion train for passengers merely, but allows each passenger to carry with him a small quantity of luggage free at his own risk, and passengers avail themselves of the privilege, and the luggage is lost, the company is not responsible for the loss of it (*l*). Where a railway company made a bye-law to the effect

(*d*) *Macrow* v. *G. W. Ry.*, L.R. 6 Q.B. 612; 40 L.J. Q.B. 300.

(*e*) *Britten* v. *G. N. Ry.*, (1899) 1 Q.B. 243; 68 L.J. Q.B. 75.

(*f*) *Cahill* v. *L. & N. W. Ry.*, 13 C.B. N.S. 818; 31 L.J. C.P. 271; *G. N. Ry.* v. *Shepherd*, 8 Exch. 30; 21 L.J. Ex. 286; *Belfast & Ballymena Ry.* v. *Keys*, 9 H.L.C. 556.

(*g*) *Hudston* v. *Midland Ry.*, L.R. 4 Q.B. 366; 38 L.J. Q.B. 213.

(*h*) *G. N. Ry.* v. *Shepherd*, 8 Exch. 30; 21 L.J. Ex. 271.

(*i*) *Rumsey* v. *N. E. Ry.*, 14 C.B. N.S. 461; 32 L.J. C.P. 244.

(*k*) *Stewart* v. *L. & N. W. Ry.*, 33 L.J. Ex. 199; 3 H. & C. 135.

(*l*) *Williams* v. *G. W. Ry.*, 10 Exch. 15; *Munster* v. *S. E. Ry.*, 4 C.B. N.S. 698; 27 L.J. C.P. 308.

that they "would not be responsible for the care of luggage, unless booked and paid for," it was held that the bye-law was null and void (*m*). Railway companies are responsible for the acts and omissions of their porters in the management and delivery of passengers' luggage (*n*). But if a passenger packs merchandise in carpet-bags and portmanteaus, and passes it off as luggage, he cannot recover for the loss of it, as he is guilty of an unfair concealment towards the company, in preventing them from making the charge they would be entitled to make for the carriage of merchandise (*n*). A railway company is, in general, liable for the loss of a passenger's luggage, though carried in the carriage in which he himself is travelling (*o*). But the passenger must take ordinary care of it; and therefore, where the passenger left the carriage in which his luggage was for another in the course of the journey, and his portmanteau was stolen, it was held that the company was not responsible (*p*). Where the passenger retains his own personal control over the luggage, the company are no longer insurers of its safety, but are liable for negligence only (*q*). But where a passenger on arriving at a station gave a bag to a porter, who agreed to take care of it, and to put it into the carriage with the passenger, and while the passenger was taking a ticket the bag was lost, it was held that the company were responsible (*r*). Where luggage is received as luggage of a servant, but it turns out to be the master's, who is following by another train, the company are not liable for the loss (*s*).

Charge for luggage by excursion trains.—Where a passenger by an excursion train, knowing that the railway company did not allow passengers to carry luggage by such trains, nevertheless secretly put luggage into the train, it was held that the law would imply a promise from the wrongdoer to pay the company for the carriage of it (*t*).

Application of Act—Condition precedent.—The Carriers Act, it will be observed, applies solely to common carriers *by land*. Where, however, the contract for carriage is divisible, and applies to carriage partly by water and partly by land, and the loss occurs

(*m*) *Midland Ry.* v. *Bromley*, 17 C.B. 375; 25 L.J. C.P. 94.

(*n*) *Cahill* v. *L. & N. W. Ry.*, 13 C.B. N.S. 818; 31 L.J. C.P. 271; *Belfast & Ballymena Ry.* v. *Keys*, 9 H.L.C. 556; *G. N. Ry.* v. *Shepherd*, 8 Exch. 30; 21 L.J. Ex. 286.

(*o*) *Le Conteur* v. *L. & S. W. Ry.*, L.R. 1 Q.B. 54; 35 L.J. Q.B. 40.

(*p*) *Talley* v. *G. W. Ry.*, L.R. 6 C.P. 44; 40 L.J. C.P. 9. With respect to luggage deposited in a cloak-room, see *ante*, p. 800.

(*q*) *Talley* v. *G. W. Ry.*, *supra*; *Bergheim* v. *G. E. Ry.*, 3 C.P.D. 221; 47 L.J. C.P. 318. See, however, *G. W. Ry.* v. *Bunch*, *infra*; as to where luggage is in his control, see *Richards* v. *L. B. & S. C. Ry.*, 7 C.B. 839; 18 L.J. C.P. 251; *Kent* v. *Mid. Ry.*, L.R. 10 Q.B. 1; 44 L.J. Q.B. 18; *Mid. Ry.* v. *Bromley*, 17 C.B. 372; 25 L.J. C.P. 24.

(*r*) *G. W. Ry.* v. *Bunch*, 13 App.Cas. 31; 57 L.J. Q.B. 361.

(*s*) *Becher* v. *G. E. Ry.*, L.R. 5 Q.B. 241; 39 L.J. Q.B. 122.

(*t*) *Rumsey* v. *N. E. Ry.*, 32 L.J. C.P. 245; 14 C.B. N.S. 641.

during the carriage by land, the carrier is entitled to the benefit of the statute (*u*); and where the contract is to carry by land and sea also, it is divisible, so as to afford a defence to the carrier if the loss in fact occurs during the carriage by land (*x*). The effect of the Act is to prevent the owner or consignor from recovering from the common carrier the value of any of the enumerated articles when the value of the contents of the parcel or package in which they are inclosed exceeds 10*l*., and the value has not been declared, and the increased rate of charge paid by the consignor pursuant to the statute. The declaration of value must be made by the consignor, whether the common carrier has or has not put up in his office a notice or tariff of charges for the increased risk of conveyance of such articles, and whether the articles are delivered at the office of the common carrier, at the sender's house, on the road, or anywhere else. The Act requires the person who sends the goods to take the first step, by giving that information which he alone can give, and if he does not take that first step, then he cannot maintain an action for the value of the lost article by reason of the first section of the statute, which expressly says that the common carrier shall not be liable unless the declaration is made (*y*). As soon, however, as this has been done, the common carrier is entitled to demand an increased rate of remuneration, which is in the nature of a premium for insurance, provided he has a tariff or notice affixed in his office of the sums he charges above the usual rate of charge. If there is no tariff, he has then no right to charge the increased rate, and he loses (provided the declaration of value has been duly made by the consignor) the protection of the Act (*z*). The declaration of value having been made, the common carrier has no right to know the exact nature of the contents of the parcel, unless he has reasonable grounds for believing that it contains articles of a dangerous character (*a*). And if, after the declaration has been made, he receives the goods without demanding an increased rate of charge, he is not protected by the statute (*b*). The mention of the value incidentally is no declaration of value within the statute (*c*).

Person to make declaration of value and pay increased rate of carriage.—In a case before the passing of the Common Carriers Act, it was held that where a tradesman at Gosport received an order in writing for goods to be forwarded to Plymouth, he had an

(*u*) *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 244, *ante*, p. 954.

(*x*) *Le Conteur* v. *L. & S. W. Ry.*, *ante*, p. 960.

(*y*) *Pianciani* v. *L. & S. W. Ry.*, 18 C.B. 226.

(*z*) *Baxendale* v. *Hart*, 21 L.J. Ex. 123; 6 Exch. 789.

(*a*) *Crouch* v. *L. & N. W. Ry.*, 14 C.B. 295; 23 L.J. C.P. 73.

(*b*) *Behrens* v. *G. N. Ry.*, 31 L.J. Ex. 299; 7 H. & N. 950; see *ante*, pp. 943, 953.

(*c*) *Robinson* v. *S. W. Ry.*, 34 L.J. C.P. 234; 19 C.B. N.S. 51.

implied authority to do all that was necessary to be done to insure them a safe conveyance; and, therefore, that when it was necessary to declare their value, and pay an increased charge for insurance, it was his duty to make the declaration and the payment, so as to enable the consignee, in case of loss, to secure his indemnity from the common carrier (*d*); but the limitation of the liability of common carriers in respect of the carriage of glass, china, and the articles mentioned in the Carriers Act, being now established by Act of Parliament, must be taken to be known to consignees and consignors alike throughout the kingdom; and it is not the practice, nor, it is apprehended, is it in general the duty, of the consignor, to pay the carriage and insure articles directed to be forwarded by his customers, unless he receives express directions so to do (*e*). If, indeed, the articles are of an extremely fragile character, or if they are of unusual value, it would be the duty of the consignor to declare their nature and value to the common carrier, that proper care might be taken of them (*ante*, p. 952); and it would be prudent for the consignor, before forwarding goods of this description, to require instructions from the consignee as to the insurance of them.

Articles to which Act extends (*f*).—The statute extends to all the articles enumerated in the first section, although not within the words of the preamble, "an article of great value in a small compass." It is not sufficient for the owner to describe in writing on the outside of a parcel or box the nature of the contents. The carrier must have distinct information thereof, and an opportunity of demanding the increased rate of carriage (*g*). If the contents of a parcel or package exceeding 10*l.* in value are of a miscellaneous character, consisting partly of enumerated articles and partly of things not mentioned or comprised in the Act, the common carrier is released from all liability in respect of the former, but, as regards the latter, his common law liability remains the same as before the passing of the statute. Thus, if a trunk containing linen and wearing apparel, jewellery, and trinkets, exceeding 10*l.* in value, be delivered to a carrier to be carried for the ordinary hire, or to accompany the person of a passenger, and such trunk is lost by the way, the carrier is not liable for the value of the jewellery and trinkets (*h*), but he remains responsible for the value of the trunk and linen and wearing apparel, as at common law before the

(*d*) *Clarke* v. *Hutchins*, 14 East, 476.

(*e*) *Cothay* v. *Tute*, 3 Campb. 129; *Bailey* v. *Sweeting*, 30 L.J. C.P. 150; 9 C.B. N.S. 843.

(*f*) See also the notes to the section, *ante*, p. 952.

(*g*) *Owen* v. *Burnett*, 2 Cr. & M. 353; 3 L.J. Ex. 76; *Boys* v. *Pink*, 8 C. & P. 361.

(*h*) *Bernstein* v. *Baxendale*, 6 C.B. N.S. 251; 28 L.J. C.P. 265.

passing of the Act. If, however, the contents of the parcel or package consist entirely of the enumerated articles, the common carrier is by the express terms of the Act freed from all responsibility and liability in respect of the loss thereof, if the consignee has not declared the nature and value of the article, and paid, or agreed to pay, the increased charge specified in the notice, although the loss may have been occasioned by gross negligence (*i*). If an uninsured parcel or package consists entirely of enumerated articles, the plaintiff would not be entitled to recover even the value of the box or case in which they are contained (*k*), but if there are articles in it to which the statute does not apply he would (*l*).

If the consignor, after he has made the declaration of value, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value, at the ordinary rate of carriage for parcels of similar bulk and weight, the carrier may, if he pleases, waive his right to the increased remuneration or premium of insurance, and agree to carry for a smaller sum, upon the terms that he is not then to be responsible upon the customary liability of a common carrier, as an insurer against robbery and the dangers and accidents of the road. This "limitation," observed Parke, B., "it is competent for a carrier to make, because being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own" (*m*). And if, after the declaration has been made, the carrier receives the parcel without demanding the increased rate or charge, he receives it as an insurer of its safe conveyance; and the same result follows if he has failed to notify his increased rate of charge in accordance with the terms of the statute (*n*).

Losses covered by the statute.—The term "loss" in the statute means loss of things by the carrier, or his servants, in the course of the carriage of them, either by losing them from their vehicles, or mislaying them, so that it was not known where to find them when they ought to have been delivered; and not the loss that may be sustained by an owner or consignee by reason of the non-delivery of the chattel in due time, or by reason of great delay in its delivery (*o*).

(*i*) *Hinton* v. *Dibbin*, 2 Q.B. 646; 11 L.J. Q.B. 113.

(*k*) *Wyld* v. *Pickford*, 8 M. & W. 443; 10 L.J. Ex. 382.

(*l*) *Treadwin* v. *G. E. Ry.*, L.R. 3 C.P. 308; 37 L.J. C.P. 83. A framed picture is one entire thing, and cannot be divided so as to charge the carrier for the loss of the frame: *Henderson* v. *L. & N. W. Ry.*, L.R. 5 Ex. 90; 39 L.J. Ex. 55.

(*m*) *Wyld* v. *Pickford*, *supra*.

(*n*) *Behrens* v. *G. N. Ry.*, 7 H. & N. 950; 31 L.J. Ex. 299.

(*o*) *Hearn* v. *L. & S. W. Ry.*, 10 Exch. 801; 24 L.J. Ex. 180; *Millen* v. *Brasch*, 10 Q.B.D. 142; 51 L.J. Q.B. 127.

Loss of goods from theft by common carrier's servants.—Nothing contained in the Carriers Act is (see s. 8) to protect any common carrier for hire from liability to answer for loss of, or injury to, any goods or articles arising from the felonious act of any servant in the carrier's employ. If, therefore, the common carrier relies upon the statute as a defence, contending that there was not any declaration of value of the article alleged to have been lost, the defence is rebutted by showing that the loss arose from the felonious act of the carrier's servant (*p*).

When the goods have been accepted by a carrier under a special contract for the carriage of them, the statute does not apply. Where, therefore, a common carrier has given express notice to the consignor that he will not be responsible for parcels or packages above the value of 10*l.*, unless the value is declared, and an increased rate of remuneration paid according to a printed tariff, and the common carrier afterwards accepts a parcel to be carried, knowing it to be worth more than 10*l.*, without demanding the premium for insurance, and the parcel is purloined by his own servant, he is not necessarily responsible for the theft (*q*). Having received the goods under a special contract, and not upon his customary liability as an insurer of safe conveyance, he is chargeable only for negligence and want of ordinary care. The loss by theft indeed is *primâ facie* proof of negligent keeping, but it is not absolutely conclusive, and the carrier may exonerate himself from liability for the theft, by showing that there was no want of any proper precaution on his part to guard against theft by his servants. If the consignor, observes Lord Tenterden, has concealed the value of the parcel from the carrier, and has adopted a disguise for it "likely to prevent the carrier from taking any particular care of the parcel, and yet not so completely concealing its nature as to prevent it from being likely to be selected for depredation by a dishonest servant," and the loss is the consequence of the means he has adopted, then he cannot maintain an action in respect of the loss (*r*). In order to establish the fact of theft by the common carrier's servants, it is not enough that there is a greater degree of probability that the carrier's servants took the goods than that a stranger took them by reason of their greater facility of access and opportunities of stealing them (*s*). It is not necessary, however, to show that some particular servant has committed a felony; it is sufficient if some evidence is given which raises a *primâ facie* case

(*p*) *Metcalfe* v. *L. & B. Ry.*, 4 C.B. N.S. 307; 27 L.J. C.P. 205.

(*q*) *Butt* v. *G. W. Ry.*, 11 C.B. 140; 20 L.J. C.P. 241; *G. W. Ry.* v. *Rimell*, 27 L.J. C.P. 201.

(*r*) *Bradley* v. *Waterhouse*, M. & M. 154.

(*s*) *McQueen* v. *G. W. Ry.*, L.R. 10 Q.B. 569; 44 L.J. Q.B. 130.

that the goods were stolen by some or one of the carrier's servants (*t*). All persons who are actually, though casually and incidentally, employed by the common carrier in doing the work of carrying, are the servants of the latter, although they may be the regular servants of some other persons, receiving wages from them and not from the carrier (*u*).

Liabilities of common carrier's servants.—Sect. 8 of the Carriers Act provides, that the Act shall not protect the coachman, guard, bookkeeper, or other servant of the common carrier, from liability for losses or injuries occasioned by their own personal neglect and misconduct. This applies to liabilities *ex delicto;* for the coachman, guard, or other servant is not, by the common law, liable in any way *ex contractu* to the owner of the goods for loss or damage arising from his own personal negligence. The contract for the carriage of them is made with the common carrier or coach-proprietor who carries on the business, and not with a mere servant or agent who has no interest in the concern, and does not share in the profits of the trade. Thus, where an action was brought against a coach-porter for the value of a parcel lost by him, and also against the driver of a stage-coach for the loss of a trunk, it was held that, as the defendant in each case had received the article as the servant and agent of the coach-proprietor, and not on his own account, he could not be sued by the owner of the goods for the loss (*x*).

Losses occasioned by consignor's defective packing.—If the loss has been occasioned by the negligence of the consignor or his servants, in not properly packing or securing the goods, the carrier is not responsible for the loss. If wine or spirits escape by reason of a defective bung in a cask, the carrier will not be answerable (*y*), unless it be shown that the carrier had notice of the leakage, and had the means of stopping it and neglected to do so (*z*). If the defective packing of goods is patent and visible, and easily remedied, and the common carrier accepts the goods for conveyance, he is bound to take all reasonable means to provide for their safety (*a*). But if the mode of packing is that in ordinary use, and the carrier is led by the sender's conduct to conclude that it is safe, the carrier, at any rate if he is not a common carrier, will not be responsible for injury to the goods arising from such packing (*b*).

Railway and Canal Act—Inability of railway, canal, and steam-

(*t*) *Vaughton* v. *L. & N. W. Ry.*, L.R. 9 Ex. 93; 43 L.J. Ex. 75.

(*u*) *Machu* v. *L. & S. W. Ry.*, 2 Exch. 415; 17 L.J. Ex. 271; *Stephens* v. *L. & S. W. Ry.*, 18 Q.B.D. 121; 56 L.J. Q.B. 171.

(*x*) *Cavenagh* v. *Such*, 1 Pr. 331; *Williams* v. *Cranston*, 2 Stark. 82.

(*y*) *Hudson* v. *Baxendale*, 2 H. & N. 575; 27 L.J. Ex. 93.

(*z*) *Beck* v. *Evans*, 16 East, 244.

(*a*) *Stuart* v. *Crawley*, 2 Stark. 32.

(*b*) *Richardson* v. *N. E. Ry.*, L.R. 7 C.P. 75; 41 L.J. C.P. 60.

boat companies to exonerate themselves from liability for their own neglect, default, or breach of duty by notice, condition, or declaration. —By s. 7 (*c*) of the Railway and Canal Traffic Act, 1854 (*d*),—which by 26 & 27 Vict. c. 92, s. 31, extends, so far as its provisions are applicable, "to steam vessels and to the traffic carried on thereby,"—every railway company and canal company is made liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things in the receiving (*e*), forwarding, and delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration, being thereby declared to be null and void. But it is provided that nothing therein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable (*f*), and that they shall not be liable to a greater extent than certain sums named in the section for injuries to horses, cattle, &c., unless the sender has declared them to be of greater value at the time of delivery, and paid an increased charge accordingly (*g*). The neglect or default of a railway company or its servants does not extend to acts of a servant beyond the scope of his employment, such as theft. A railway company carrying goods can therefore, like other carriers, protect itself by special contract against theft of the goods even by its own servants, and the statutory requirement that the contract shall be reasonable does not apply (*h*).

Where an Act of Parliament authorized a railway company to make regulations respecting passengers' luggage, and the company, by their regulations, required the passengers to see their luggage marked with the company's labels, and stated that the company would not be responsible for the loss or detention of any article of luggage not so marked and properly addressed, and the plaintiff, who was a passenger, required the company's porter to label and take into the luggage van some wearing apparel wrapped in a shawl and properly addressed, and the porter refused, as the com-

(*c*) See *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 254; 38 L.J. Q.B. 137; 51 & 52 Vict. c. 25.

(*d*) 17 & 18 Vict. c. 31, s. 7.

(*e*) As to when a horse is "received," see *Hodgman* v. *West Mid. Ry.*, 35 L.J. Q.B. 85; 6 B. & S. 560.

(*f*) As to the construction of this section, see *Peek* v. *North Staff. Ry.*, 10 H.L.C. 473; 32 L.J. Q.B. 241, *post*, p. 968.

(*g*) The section does not apply to a railway company whose special Acts were passed before 26 & 27 Vict. c. 92: *The Stella*, (1900) P. 162; 69 L.J. P. 70.

(*h*) *Shaw* v. *G. W. Ry.*, (1894) 1 Q.B. 373.

pany had made it a rule not to label shawls, it was held that the company was responsible for the porter's refusal to receive the shawl; and that the company could not make regulations having the effect of divesting them of their common law liability to receive and carry the article as personal luggage (*i*).

In cases where railway companies under the Carriers Act, or the Railway Traffic Act, are entitled to receive an increased rate of charge for insuring the safe conveyance of particular articles, and the consignor objects to the increased rate of charge, and it is agreed that the company shall receive and forward certain articles uninsured, this may be taken as doing away with their common law liability as insurers of the safe conveyance of the articles, but does not exempt them from responsibility for losses by negligence through their own default (*k*), *e.g.*, for delay in not forwarding the articles (*l*).

If goods are accepted for conveyance under a special contract, whereby the carrier exempts himself from liability for loss or damage of a particular character, such as leakage or breakage, this will not exempt him from responsibility if the leakage or breakage has been caused by his own negligence, or the negligence of his servants in storing the goods (*m*). And the rule is the same, where the suit is brought in the Admiralty Division against the vessel (*n*). It seems that it makes no difference that a contract of carriage was made with another person, if the plaintiff alleges that his goods were lawfully in the possession of the defendants, and were lost or injured through their negligence (*o*). Where the plaintiff's goods on board ship were injured by oil during the voyage, and it was shown that there was no oil amongst the cargo, but that there were two donkey engines on board in which oil was used, and which were near the plaintiff's goods, it was held that this raised a presumption of negligence against the owners of the vessel (*p*).

Special contracts with railway and canal companies for carriage of goods and chattels.— By the Railway and Canal Traffic Act, 1854 (*q*), it is further enacted by the same section (s. 7), that no special contract between any railway or canal company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party unless the same be signed by him, or by the

(*i*) *Munster* v. *S. E. Ry.*, 4 C.B. N.S. 676; 27 L.J. C.P. 312.

(*k*) *Peek* v. *North Staff. Ry.*, *ante*, p. 966.

(*l*) *Robinson* v. *G. W. Ry.*, 35 L.J. C.P. 123.

(*m*) *Phillips* v. *Clark*, 26 L.J. C.P. 168; 2 C.B. N.S. 163; *M'Manus* v. *Lancashire & Yorkshire Ry.*, 4 H. & N. 327; 28 L.J. Ex. 353.

(*n*) *Ohrloff* v. *Briscall*, 35 L.J. P.C. 63; *sub nom. The Helène*, L.R. 1 P.C. 231.

(*o*) *Martin* v. *Great Indian Peninsular Ry.*, L.R. 3 Ex. 9; 37 L.J. Ex. 27.

(*p*) *Czech* v. *Gen. Steam Nav. Co.*, L.R. 3 C.P. 14; 37 L.J. C.P. 3.

(*q*) 17 & 18 Vict. c. 31, s. 7.

person delivering such animals, articles, goods, or things respectively, for carriage; but nothing therein contained is to alter or affect the rights, privileges, or liabilities of any such company, under the Carriers Act, with respect to articles of the description mentioned in that Act. Special contracts with railway and canal companies, therefore, for the carriage of merchandise and chattels, are placed under the control of the judges, so that the conditions imposed by the contract must be just and reasonable; and no condition, however just and reasonable, can protect the company, unless it be contained in a contract signed in accordance with the statute (*r*). But no special contract signed according to the statute is necessary to define the nature and extent of the public profession of the common carrier and of the duties he undertakes in favour of the public at large (*s*); and a contract not signed is valid as against the company (*t*).

Before the statute, every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law; so that every notice, condition, and declaration, under the statute, however reasonable, must be made in writing, and be signed in the mode provided by the statute, in order to be binding in law upon the person sought to be affected by it (*u*). If a man has an opportunity of reading the conditions, and chooses to sign them without reading them, he is nevertheless bound by them, if they are reasonable (*v*). But the Act does not apply to traffic beyond the company's own lines or canals, so that a condition printed on a passenger's through ticket from London to Paris, that the company would not be responsible for loss, &c., except on the company's own lines, is valid, although not signed by the passenger (*x*).

Unjust and unreasonable conditions in special contracts for carriage of chattels by railway or canal.—The reasonableness of the condition will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company was bound by the common law, or by statute, to carry the articles on being

(*r*) *Peek* v. *North Staff. Ry.*, 10 H.L.C. 473; 32 L.J. Q.B. 241; *Aldridge* v. *G. W. Ry.*, 15 C.B. N.S. 582; 33 L.J. C.P. 161; *Allday* v. *G. W. Ry.*, 34 L.J. Q.B. 5; 5 B. & S. 903; *L. & N. W. Ry.* v. *Dunham*, 18 C.B. 826; 26 L.J. C.P. 25; *M'Manus* v. *Lanc. & York. Ry.*, *ante*, p. 967.

(*s*) *Ante*, p. 942.

(*t*) *Baxendale* v. *G. E. Ry.*, L.R. 4 Q.B. 244, 251; 38 L.J. Q.B. 137.

(*u*) *M'Manus* v. *Lanc. & York. Ry.*, *supra*; *Peek* v. *North Staff. Ry.*, *supra*; *Simons* v. *G. W. Ry.*, 18 C.B. 805; 26 L.J. C.P. 25; *Beal* v. *South Devon Ry.*, 5 H. & N. 875; 29 L.J. Ex. 441.

(*v*) *Lewis* v. *G. W. Ry.*, 5 H. & N. 867; 29 L.J. Ex. 425.

(*x*) *Zunz* v. *S. E. Ry.*, L.R. 4 Q.B. 539; 38 L.J. Q.B. 209.

paid the customary hire, or whether it was in its power to reject them altogether and refuse to carry them upon any terms (*y*). Whenever, in order to bring a railway or canal company within the protection of a condition or special contract, it is necessary to construe it as excluding responsibility for losses occasioned by the company's negligence and misconduct, the condition or special contract is unreasonable and unjust, and therefore void, unless an option is given to the customer to have the goods carried on the ordinary terms, at the ordinary rate (*z*). Where the terms of the condition are unconditional, and would, if valid, protect the company even in the case of the wilful misconduct of the defendant's own servants, the condition is unreasonable (*a*). A regulation that the company will not be responsible for any passenger's luggage unless fully and properly addressed with the name and destination of the owner is unreasonable, because it does not except even the misconduct or felony of the company's own servants (*b*). The plaintiff sent a cow and a heifer by the defendants' railway, and signed a cattle ticket, on the back of which were conditions that the company were to be free from all risk with respect to any loss or damage arising in the loading, transit, &c., or from any other cause whatever, and the owner was required to see to the efficacy of the waggons, and make complaint in writing before the waggon left the station. The cow fell out of the truck. It was held that the whole of these conditions were unreasonable, as they showed a determination not to be held liable for any loss whatever; but conditions may some of them be reasonable and some not; and the plaintiff will be bound by those which are reasonable (*c*). Where the plaintiff sent a valuable dog by the defendants' line, and signed a ticket, which stated that the company would not be common carriers of dogs, and would not receive dogs for conveyance except on the terms that they should not be responsible for any damages for the loss thereof or for injury thereto, beyond the sum of 2*l.*, unless a higher value should be declared at the time of delivery, and percentage of 5 per cent. on the value of the dog over 2*l.* be paid, it was held that although the

(*y*) *Pardington* v. *South Wales Ry.*, 1 H. & N. 392; 26 L.J. Ex. 105; *Simons* v. *G. W. Ry.*, *supra*; *Garton* v. *Bristol & Exeter Ry.*, E. B. & E. 112; 30 L.J. Q.B. 273. As to what is a reasonable percentage charge on declared value, see *Harrison* v. *L. B. & S. C. Ry.*, 31 L.J. Q.B. 113; 2 B. & S. 122.

(*z*) *Peek* v. *North Staff. Ry.*, *supra*; *Lloyd* v. *Waterford & Lim. Ry.*, 15 Ir. C.L.R. 37; *Allday* v. *G. W. Ry.*, 34 L.J. Q.B. 5; 5 B. & S. 903; *Rooth* v. *N. E. Ry.*, L.R. 2 Ex. 173; 36 L.J. Ex. 83.

(*a*) *Ashendon* v. *L. B. & S. C. Ry.*, 5 Ex.D. 190, where *Harrison* v. *L. B. & S. C. Ry.*, 31 L.J. Q.B. 113; 2 B. & S. 122, is said to be overruled by *Peek* v. *N. S. Ry.*, *supra*. See *Brown* v. *M. S. & L. Ry.*, 8 App.Cas. 703; 53 L.J. Q.B. 124.

(*b*) *Cutler* v. *N. L. Ry.*, 19 Q.B.D. 64; 56 L.J. Q.B. 648.

(*c*) *Gregory* v. *West Mid. Ry.*, 2 H. & C. 944; 33 L.J. Ex. 155; *McCance* v. *L. & N. W. Ry.*, 34 L.J. Ex. 39; 3 H. & C. 343; *Simons* v. *G. W. Ry.*, 18 C.B. 805; 26 L.J. C.P. 25; *ante*, p. 968.

company were not bound to be common carriers of dogs, yet they were bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for their carriage, and that such a condition was not reasonable (*d*); and, where a railway company received goods to be carried under a condition absolving them from all liability for the loss of, or damage to, goods insufficiently or improperly packed, marked, directed, or described, the condition was held to be unreasonable and unjust, as insufficient packing, marking, or directing, &c. of goods constituted no sufficient ground for relieving the company from all liability respecting the performance of the duty they had undertaken to fulfil (*e*).

Where horses were delivered to be forwarded by a cattle-truck from Liverpool to York for reward, and the owner was required to sign a ticket containing a memorandum to the effect that the ticket was issued subject to the owner's undertaking all risk of conveyance, loading and unloading, as the company would not be responsible for any injury or damage, however caused, occurring to live stock travelling upon the railway, or in their vehicles, and the defendants' servants provided a truck which, in external appearance, and, so far as the defendants' servants knew, was sound, and sufficient for the conveyance of the horses, but it was, in fact, unsound, and of insufficient strength for the purpose, and a hole was made in the bottom of the truck during the journey, and one of the horses got his leg through the hole and was injured, it was held that the railway company was responsible for the damage done to the horse, notwithstanding the terms of the special contract signed by the owner of the horse (*f*). A stipulation that goods shall be carried "at owner's risk" only exempts the company from the ordinary risks incurred by goods in going along the railway, and does not cover injury from delay caused by the negligence of the company (*g*). It is the duty of every railway or canal company setting up a condition in qualification and restriction of their common law liability to make out that the condition is just and reasonable; and, if they make an extra charge for insuring the safe conveyance of live animals, they must show that the extra charge is reasonable and just (*h*). It was held that where there was a contract that goods were to be carried "at owner's risk," the railway company were responsible for delay in

(*d*) *Dickson* v. *G. N. Ry.*, 18 Q.B.D. 176; 56 L.J. Q.B. 111.

(*e*) *Simons* v. *G. W. Ry.*, *ante*, p. 969; *L. & N. W. Ry.* v. *Dunham*, *ante*, p. 968; *Garton* v. *Bristol & Exeter Ry.*, 1 B. & S. 112; 30 L.J. Q.B. 273.

(*f*) *M'Manus* v. *Lanc. & York. Ry.*, 4 H. & N. 327; 28 L.J. Ex. 353; *M'Cance* v. *L. & N. W. Ry.*, 34 L.J. Ex. 39; 3 H. & C. 343.

(*g*) *Robinson* v. *G. W. Ry.*, 35 L.J. C.P. 123; *D'Arc* v. *L. & N. W. Ry.*, L.R. 9 C.P. 325.

(*h*) *Harrison* v. *L. B. & S. C. Ry.*; *Garton* v. *Bristol & Exeter Ry.*; *Peek* v. *North Staff. Ry.*, *ante*, p. 968; *Dickson* v. *G. N. Ry.*, 18 Q.B.D. 176; 56 L.J. Q.B. 111.

delivery, although a lower charge than usual was made (*i*). But where there was a similar contract, but the company were to be liable for the wilful misconduct of their servants, it was held that the company were not responsible, there being no wilful misconduct, and that the contract was reasonable (*k*). Where the company were not to be liable in respect of any loss or "detention," except by wilful misconduct, it was held that a purposed detention through a negligent mistake in supposing the carriage had not been paid, although not amounting to wilful misconduct, was a "detention" for which the company was liable (*l*).

Just and reasonable conditions.—It has been held that a condition that all claims for loss or damage should be made within seven days after the time when the goods have been delivered is just and reasonable (*m*), also a condition that a railway company will not undertake to forward goods by any particular train, or be answerable for their non-arrival in time for any particular market (*n*), and that they will not be responsible, under any circumstances, for loss of market or other loss or injury arising from detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud (*o*), or that they will not be responsible for the risks attendant upon the carriage by railway of perishable articles, live animals and chattels, such as accidents occasioned by the fright or restiveness of horses, or from the wheel of a carriage taking fire (*p*), or loss arising from delay in forwarding fish, where it is impossible to know the exact condition of the fish at the time of its delivery to be carried, and where the slightest delay in its transmission may occasion a vast loss (*q*), or to loss or damage to fragile materials, such as statuary or sculptured marbles, not occasioned by the negligence of the company or its servants (*r*). If the company offer the consignor a *bonâ fide* practical choice, either to have his goods carried in the usual way, at a reasonable rate, or at his own risk at a lower rate, and he elects the latter, the condition is not unreasonable (*s*). A

(*i*) *D'Arc* v. *L. & N. W. Ry.*, L.R. 9 C.P. 325.

(*k*) *Lewis* v. *G. W. Ry.*, 3 Q.B.D. 195; 47 L.J. Q.B. 131; see *Gordon* v. *G. W. Ry.*, 8 Q.B.D. 44; 51 L.J. Q.B. 58.

(*l*) *Gordon* v. *G. W. Ry.*, *supra*. If the defendants intended to say that they were not to be liable for such "detention," then the condition was unreasonable.

(*m*) *Lewis* v. *G. W. Ry.*, 29 L.J. Ex. 425; 5 H. & N. 867.

(*n*) *Beal* v. *South Devon Ry.*, 5 H. & N. 875; 29 L.J. Ex. 441; *White* v. *G. W. Ry.*, 2 C.B. N.S. 7; 26 L.J. C.P. 158; *Lord* v. *Midland Ry.*, L.R. 2 C.P. 339; 36 L.J. C.P. 170.

(*o*) *Beal* v. *South Devon Ry.*, 3 H. & C. 337.

(*p*) *Austin* v. *Manchester Ry.*, 10 C.B. 454; 21 L.J. C.P. 179.

(*q*) *Beal* v. *South Devon Ry.*, *supra*; *Wren* v. *Eastern Counties Ry.*, 35 L.T. 5.

(*r*) *Peek* v. *North Staff. Ry.*, *ante*, p. 968.

(*s*) Blackburn, J., *ib.*; *Lewis* v. *G. W. Ry.*, *supra*; *Brown* v. *M. S. & L. Ry.*, 8 App.Cas. 703; 53 L.J. Q.B. 124; *G. W. Ry.* v. *M'Carthy*, 12 App.Cas. 218; 56 L.J. Ch. 3.

condition annexed to a contract for the carriage of meat that the company will not be responsible for loss of a market, is reasonable (*t*). The question as to what is reasonable is a question for the judge (*u*).

Sect. 7 of 17 & 18 Vict. c. 31, is extended by sect. 31 of 26 & 27 Vict. c. 92, to steam-vessels employed by railway companies, as auxiliary to their line of railway, and to the traffic carried on by means of such steam-vessels, but it does not apply to a railway company whose special Acts were passed before the extending Act (*x*). It applies to passengers' luggage (*y*), but not to goods received by the company for safe custody, and not for carriage (*z*). Nor does it apply to a contract exempting a company from liability for loss on a railway not belonging to or worked by the company (*a*). Sect. 12 of 34 & 35 Vict. c. 78, applies where the carriage is by a vessel not belonging to nor worked by the company (*b*).

Liability of railway company during sea transit.—When a railway or canal company contracts by through-booking to carry any animals, luggage, or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage by sea of such animals, luggage, or goods from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, will, if published in a conspicuous manner in the office when such through-booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, luggage, or goods, be valid, as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition (*c*).

Where a railway company, under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the company, they will be answerable in damages in respect of loss of life or personal injury, or in respect of loss or damage to such animals or goods during the carriage in

(*t*) *Lord* v. *Midland Ry.*, L.R. 2 C.P. 339; 36 L.J. C.P. 170.

(*u*) Per Lord Herschell, in *G. W. Ry.* v. *M'Carthy*, *ante*, p. 971.

(*x*) *The Stella*, (1900) P. 162; 69 L.J. P. 70.

(*y*) *Cohen* v. *S. E. Ry.*, 2 Ex.D. 253; 46 L.J. Ex. 417.

(*z*) *Van Toll* v. *S. E. Ry.*, 12 C.B.N.S. 75; 31 L.J. C.P. 241.

(*a*) *Zunz* v. *S. E. Ry.*, L.R. 4 Q.B. 539; 38 L.J. Q.B. 209.

(*b*) *Doolan* v. *Midland Ry.*, 2 App.Cas. 792.

(*c*) 31 & 32 Vict. c. 119, s. 14, *post*, p. 977.

such vessel, in like manner, and to the same amount, as they would be answerable if the vessel had belonged to them (*d*).

Implied authority of servants of railway company to bind company by special contract.—"It is the duty of railway companies to have some person capable of giving directions and of dealing with everything that the exigency of the traffic may require, and of granting any reasonable demand. The persons who are said to be general superintendent and managing director have power to bind the company as to all things within the scope of the business of the company by any contract within the limits of their employment" (*e*). If they act beyond the scope of their ordinary business, it must be shown, in order to bind the company, that they are acting under a special authority from the company, that is, the board of directors (*f*). But, if there is a particular course of dealing with which the consignor is acquainted, he must be taken to know that the servants have no power to bind the company on any but the usual terms (*g*).

Commencement and duration of liability—Damage or loss of goods in warehouses.—When the common carrier of goods carries on the business both of a warehouseman and a common carrier, the extent of his liability will depend upon the character in which he holds the goods at the time of the loss. If they are received into his warehouse to await the future orders of the owner or consignor as to their destination, he is clothed only with the ordinary duties and responsibilities of a warehouseman or bailee for hire (*h*). Goods received at the cloak-room of a railway company, therefore, are not received by the company in their capacity of common carriers, but simply as bailees for hire (*i*). But if the destination is marked out, and the carrier has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may occur to the goods in the warehouse, as they are then *in transitu* in contemplation of law (*k*). Whenever the common carrier receives goods to be kept until called for, or until he has orders from the consignee to forward them, he holds them as a bailee for hire, and not as a gratuitous bailee, although he does not charge warehouse rent (*l*).

(*d*) 34 & 35 Vict. c. 78, s. 12, *post*, p. 977.

(*e*) *Brown* v. *Bristol and Exeter Ry.*, 4 L.T. 830; *Robinson* v. *G. W. Ry.*, 35 L.J. C.P. 123.

(*f*) *Taff Vale Ry.* v. *Giles*, 23 L.J. Q.B. 43; 2 E. & B. 822.

(*g*) *Slim* v. *G. N. Ry.*, 23 L.J. C.P. 166; 14 C.B. 647.

(*h*) *Cairns* v. *Robins*, 8 M. & W. 258; 10 L.J. Ex. 452; *Garside* v. *Trent Navigation Co.*, 4 T.R. 582.

(*i*) *Van Toll* v. *S. E. Ry.*, 31 L.J. C.P. 241; 16 C.B. N.S. 75.

(*k*) *Forward* v. *Pittard*, 1 T.R. 27; Buller, J., in *Hyde* v. *Trent and Mersey Nav. Co.*, 5 T.R. 398. See *Barrow, Ex parte*, 6 Ch.D. 783; 46 L.J. Bankr. 71. As to accidental fires in warehouses, see Addison on Torts, 371 (ed. 7).

(*l*) *White* v. *Humphery*, 11 Q.B. 43.

Delivery of goods at place of destination.—The common carrier of goods is bound, in common with all carriers for hire, to carry the goods intrusted to him for conveyance to their place of destination with reasonable expedition (*m*), and deliver them into the hands of the consignee, or of some person expressly or impliedly authorized by him to receive them; and he must, of course, in all cases, take especial care that they are delivered into the hands of the right person (*n*). If, however, carriers are imposed upon by a fictitious order, they will not be responsible, if they act according to the usual custom of business, and in accordance with their instructions (*o*). When the carriage is by land, the goods must be sent to the residence of the consignee, for the common carrier is not released from responsibility by leaving them at the coach-office, or at an inn by the roadside at which the coach usually stops, unless he has received directions from the consignee so to do (*p*). If he tenders them at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid he is not bound to part with the possession of the goods: but he may lawfully take them back to his own warehouse, or place of business; and he holds them thenceforward not as a common carrier, but as a bailee for hire, or (if he is not entitled to charge, or does not charge, warehouse rent) as a gratuitous bailee (*q*), and is only liable, therefore, to act with reasonable care with respect to the goods (*r*). And if the consignee, having no warehouse of his own, asks him to keep the goods till he can conveniently send for them, the common carrier thenceforth holds the goods only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for his custody of them (*s*). Upon the arrival of the goods at their destination, and tender of them to the consignee, the carrier is no longer a common carrier in the sense of being an insurer, but is bound nevertheless to take care of the goods (*t*); and if he is put to expense in so doing by reason of the default of the consignee in not receiving the goods, the carrier may recover such expenses (*u*). Where goods are delivered to be carried to a certain place for a named consignee, such consignee is entitled to delivery at any other

(*m*) *Raphael* v. *Pickford*, 6 Sc. N.R. 478; 12 L.J. C.P. 176; *Black* v. *Baxendale*, 1 Exch. 410; 17 L.J. Ex. 50.

(*n*) *Golden* v. *Manning*, 3 Wils. 433; 2 W. Bl. 916; *Birkett* v. *Willan*, 2 B. & Ald. 356; *Duff* v. *Budd*, 6 Moore, 469; *Stephenson* v. *Hart*, 4 Bing. 476; 6 L.J. (O.S.) C.P. 97.

(*o*) If they are imposed upon by a fictitious order, see *McKean* v. *McIvor*, L.R. 6 Ex. 36; 40 L.J. Ex. 30.

(*p*) *L. & N. W. Ry.* v. *Bartlett*, 7 H. & N. 400; 31 L.J. Ex. 92.

(*q*) *Storr* v. *Crowley*, M'Clel. & Y. 136.

(*r*) *Heugh* v. *L. & N. W. Ry.*, L.R. 5 Ex. 51; 39 L.J. Ex. 48.

(*s*) *Webb*, *In re*, 8 Taunt. 449. See *Shepherd* v. *Bristol & Exeter Ry.*, L.R. 3 Ex. 189; 37 L.J. Ex. 113.

(*t*) *G. N. Ry.* v. *Swaffield*, L.R. 9 Ex. 132; 43 L.J. Ex. 89; *Chapman* v. *G. W. Ry.*, 5 Q.B.D. 278; 49 L.J. Q.B. 420; *Cooper*, *Ex parte*, 11 Ch.D. 68; 48 L.J. Bankr. 49.

(*u*) *G. N. Ry.* v. *Swaffield*, *supra*.

place, and the carrier is not responsible for loss after such delivery (*x*). The carrier is protected by the Carriers Act after the goods have been negligently carried beyond the destination (*y*). When the carriage is by water, the delivery at a wharf is not a delivery to the consignee, unless it is made so by the usage and practice of the port where the delivery takes place; but the master is bound to give the consignee notice of the arrival of the goods, and is not released from his responsibility for their safety until a reasonable time has elapsed after the giving of the notice for the consignee to come and fetch them. He cannot escape from his liability as a common carrier by immediately landing the goods at a public wharf, without giving notice to the consignee, and giving him an opportunity of receiving them from the ship's side; and if he does so land them, and they are destroyed upon the wharf by an accidental fire before the consignee has had an opportunity of taking them away, the shipowners will be responsible for the loss (*z*).

Delivery of luggage at railway stations.—In the case of the carriage of passengers with luggage by railway, if it is the usual course for the luggage to be taken from the train by the company's servants and delivered to the passengers on the platform, the company is bound to deliver it there. And if the company choose to provide a more convenient mode of delivering luggage to passengers by employing porters to carry it across the platform to the vehicles by which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty (*a*). The passenger must be allowed a reasonable time to claim his luggage at the destination (*b*); but if after claiming it he leaves it with a porter for a time the company will not be responsible if it be lost (*c*). Passengers' luggage is within s. 7 of the Railway and Canal Traffic Act, 1854, and a notice or condition that the company will not be responsible is void (*d*).

Acceptance of goods and passengers to be carried beyond limits of ordinary destination.—When a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance (*e*),

(*x*) *Cork Distillers' Co.* v. *Great Southern Ry., Ireland*, L.R. 7 H.L. 269.

(*y*) *Morritt* v. *N. E. Ry.*, 1 Q.B.D. 302; 45 L.J. Q.B. 289.

(*z*) *Bourne* v. *Gatliffe*, 3 Sc. N.R. 1; 8 *ib.* 604; 7 M. & Gr. 850; *Syeds* v. *Hay*, 4 T.R. 260; *Wardell* v. *Mourillyan*, 2 Esp. 693.

(*a*) *Richards* v. *L. B. & S. C. Ry.*, 7 C.B. 839; 18 L.J. C.P. 251; *Butcher* v. *L. & S. W. Ry.*, 16 C.B. 13. See *ante*, p. 960.

(*b*) *Patscheider* v. *G. W. Ry.*, 3 Ex.D. 153.

(*c*) *Hodkinson* v. *L. & N. W. Ry.*, 14 Q.B.D. 228.

(*d*) *Cohen* v. *S. E. Ry.*, 2 Ex.D. 253; 46 L.J. Ex. 417.

(*e*) That such a limitation is a reasonable one, see *Aldridge* v. *G. W. Ry.*, 33 L.J. C.P. 161; 15 C.B. N.S. 582.

that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade of a carrier. His responsibility, therefore, continues to the door of the address to which the goods are destined, and he cannot release himself from such responsibility by transferring the goods to another carrier, or sending them by another conveyance (*f*). If a railway company, for example, accepts goods for conveyance to a particular destination, beyond the limits of its own line of railroad, and the goods are lost whilst in the hands of another railway company, to whom they have been delivered to be forwarded on their journey, the first railway company is the party to be sued by the owner of the goods for the loss of them (*g*), but the company may by express contract limit its liability to loss and damage occurring on its own line of railway (*h*). A railway company which accepts goods for carriage by a named route is liable to the consignor in damages for loss occasioned to him owing to the goods being carried by a different route. A clause in the consignment note exempting the company from liability for loss, damage, misdelivery, delay or detention of the goods, except upon proof that such loss, &c. arose from wilful misconduct on the part of its servants, has no application to such a case (*i*).

In the absence of special circumstances, the responsibility of a railway company in and about the conveyance of goods accepted by them for delivery at a particular destination is the same, whether their own line extends the whole distance or stops at an intermediate point, and the railway companies carrying the goods beyond the limits of the first line of railway are, in respect of the conveyance and delivery of such goods, to be regarded as the agents of the railway company which originally received the goods (*k*). The same principle applies to the conveyance of passengers (*l*), who are injured during the journey, although the negligence be that of the company over whose line the defendant company have running powers, and not of the defendants them-

(*f*) *Garnett* v. *Willan*, 5 B. & Ald. 53.

(*g*) *Muschamp* v. *Lanc. & Preston Ry.*, 8 M. & W. 421; 10 L.J. Ex. 460; *Watson* v. *Ambergate Ry.*, 15 Jur. 448; *Collins* v. *Bristol & Exeter Ry.*, 11 Exch. 790; 25 L.J. Ex. 185; *Bristol & Exeter Ry.* v. *Collins*, 7 H.L.C. 234; 29 L.J. Ex. 41; *Wilby* v. *West Corn. Ry.*, 2 H. & N. 703; 27 L.J. Ex. 181; *Mytton* v. *Midland Ry.*, 4 H. & N. 615; 28 L.J. Ex. 385; *Coxon* v. *G. W. Ry.*, 5 H. & N. 274; 29 L.J. Ex. 165; *Hayes* v. *S. W. Ry.*, 9 Ir. C.L.R. 474; *Webber* v. *G. W. Ry.*, 34 L.J. Ex. 170; 3 H. & C. 771.

(*h*) *Fowles* v. *G. W. Ry.*, 7 Exch. 699; 22 L.J. Ex. 76; *Aldridge* v. *G. W. Ry.*, *supra*. See *Zunz* v. *S. E. Ry.*, L.R. 4 Q.B. 539; 38 L.J. Q.B. 209, *ante*, p. 968.

(*i*) *Mallett* v. *G. E. Ry.*, (1899) 1 Q.B. 309; 68 L.J. Q.B. 256.

(*k*) *Crouch* v. *G. W. Ry.*, 27 L.J. Ex. 345; 3 H. & N. 183; *Scothorn* v. *South Staff. Ry.*, 8 Ex. 345; 22 L.J. Ex. 121.

(*l*) *Blake* v. *G. W. Ry.*, 7 H. & N. 987; 31 L.J. Ex. 346; *Buxton* v. *N. E. Ry.*, L.R. 3 Q.B. 549; 37 L.J. Q.B. 258.

selves (*m*). And it applies to the commencement of the journey as well as its termination. Where, therefore, the contract was to carry the plaintiff from the shore to a hulk, and there wait till a vessel came to carry him to his destination, and he was injured while on board the hulk, it was held that the defendants were responsible, though the hulk did not belong to them, and they had only acquired by agreement the right to use it for the purpose of embarking passengers on board their vessels (*n*).

Railway companies may also enter into such arrangements with one another as to become agents for one another, and responsible for each other's acts, so that a contract to carry and deliver cattle made with one company may render the other liable for a breach occurring on the line of the latter (*o*). If one railway company receives goods to carry part of the way, and then transfers them to another company to carry them to the place of destination, the agents of the latter company are agents of the first company for receiving notice of countermand; and, if they receive such notice and pay no attention to it, the first company is responsible for the neglect (*p*). The consignee may receive the goods at any stage of the journey, and may alter their destination at his pleasure (*q*).

By sect. 14 of 31 & 32 Vict. c. 119, where a railway or canal company, or the lessees, owners, or managers of such company, by through-booking, contract to carry any animals, luggage, or goods partly by railway and partly by sea or canal, a condition exempting the company from liability for any loss or damage arising during the carriage by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers, or steam, and all other accidents of seas, rivers, and navigation of whatever kind, shall, if published in a conspicuous manner in the office where the through-booking is effected, and legibly printed on the receipt or freight note, be valid as part of the contract between the consignor and the company (*r*). The section does not operate to prevent a railway company from making conditions with a passenger travelling with a free pass, which will exempt the company from liability for the loss of his luggage, although no notice has been posted in the company's office (*s*).

By sect. 12 of 34 & 35 Vict. c. 78, where a railway company

(*m*) *Thomas* v. *Rhymney Ry.*, L.R. 6 Q.B. 266; 40 L.J. Q.B. 89. See *Foulkes* v. *Met. Ry.*, 5 C.P.D. 157; 49 L.J. C.P. 361.

(*n*) *John* v. *Bacon*, L.R. 5 C.P. 437; 39 L.J. C.P. 365.

(*o*) *Gill* v. *Manchester, &c. Ry.*, L.R. 8 Q.B. 186; 42 L.J. Q.B. 89.

(*p*) *Scothorn* v. *South Staff. Ry.*, 8 Exch. 345; 22 L.J. Ex. 121; *Crouch* v. *G. W. Ry.*, 27 L.J. Ex. 345; 3 H. & N. 183.

(*q*) *L. & N. W. Ry.* v. *Bartlett*, 7 H. & N. 400; 31 L.J. Ex. 92; *Butterworth* v. *Brownlow*, 19 C.B. N.S. 409; 34 L.J. C.P. 266.

(*r*) See 51 & 52 Vict. c. 25, s. 28.

(*s*) *The Stella*, (1900) P. 162; 69 L.J. P. 70.

under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages, in respect of loss of life, or personal injury, or in respect of loss of or damage to animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company, provided that such loss of life, or personal injury, or loss, or damage to animals or goods, happens to the person, animals or goods (as the case may be), during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company.

Effect of giving carrier wrong direction for delivery of goods.—If, after the carrier has fulfilled his part of the contract by conveying the goods to the place to which they are directed, it should appear that there is no such person as the one to whom the goods are addressed, or if the consignee refuses them (*t*), then an entirely new contract arises by implication of law between the carrier and the consignor; the carrier holds the goods as the bailee of the consignor, and is bound to take due and ordinary care of them and to deliver them to the consignor, on being paid his fair and reasonable charges (*u*), but he is not liable for a subsequent mis-delivery of the goods if he acts with reasonable care (*x*).

Refusal of consignee to receive goods—Liability of carrier as bailee.—If the consignee refuses to receive the goods, or cannot be found, the carrier is not thereby exonerated from the duty of taking reasonable care of them, and doing what is reasonable in the matter for the benefit of the consignor, or the owner of them. If the person to whom they are addressed is not ready to receive them at the place of delivery, the carrier must keep them a reasonable time, if he has a convenient place of deposit there, and if he has no place of deposit he must deal with them as any reasonably prudent person might be expected to deal with his own property. If the consignor or owner of the goods is known to him, it would be reasonable to expect that he would give him notice of the refusal of the consignee to receive them, and seek instructions for the disposal of the property. If the consignor or owner is unknown to him, no such notice can, of course, be given, or be reasonably expected (*y*); but he should deposit the goods in some place of safety, and ought not at once to send back the goods to the place from whence they came (*z*).

(*t*) See *infra*.

(*u*) *Metcalfe* v. *L. & B. Ry.*, 4 C.B. N.S. 318; 38 L.J. C.P. 335; *Heugh* v. *L. & N. W. Ry.*, L.R. 5 Ex. 51; 39 L.J. Ex. 48; *McKean* v. *M'Ivor*, L.R. 6 Ex. 36; 40 L.J. Ex. 30.

(*x*) *Heugh* v. *L. & N. W. Ry.*, *supra*.

(*y*) *Hudson* v. *Baxendale*, 27 L.J. Ex. 93; 2 H. & N. 575.

(*z*) *G. W. Ry.* v. *Crouch*, 3 H. & N.

Payment of fare or hire—Carrier's lien.—When credit has not, by the express contract of the parties, been given for the payment of the price of the carriage of goods, the delivery of the goods to the consignee and the payment of the price of the carriage are concurrent acts to be performed at the same time, so that the carrier is entitled to retain possession of the things he has carried until he is tendered his hire for their conveyance. If the consignee refuses to pay the sum demanded for the carriage of them, the carrier is not justified in at once sending them back to the place from whence they came, but must hold them a reasonable time, to see if the consignee will accept and pay for them (*a*). If he still refuses, the carrier then holds them at the disposal of the consignor, and is entitled to look to the latter for the payment of his hire. The carrier holds the goods first that he may get payment of the freight, and then to deal with them as the consignee may direct (*b*). The transit is not at an end so long as the carrier holds the goods as carrier, nor until by agreement between him and the purchaser he holds them not as carrier, but as the purchaser's agent (*c*). Where a carrier delivers part of the goods, it may be assumed that he has not abandoned his lien upon the rest for his unpaid freight. He is bound to deliver up to the extent of the freight which has been paid; but the moment he has delivered enough to satisfy that, he has his lien upon the whole of the remainder of the cargo for the unpaid balance of the freight (*d*). If a railway company makes and posts at the offices and stations a bye-law to the effect that every passenger who loses his ticket shall be liable to pay the full fare from the most distant station on the line, the company has no power to enforce the bye-law by detaining the person of a passenger who has lost his ticket and refuses to pay the specified amount (*e*), or by forcibly removing him from the carriage in which he is travelling (*f*).

The common law accords to common carriers, who are bound, as we have seen, to receive and carry the goods of persons who tender them for conveyance, and are ready and willing to pay the customary hire, a right to retain the goods and chattels of such persons until they have received the customary remuneration for the services they have been compelled to render them, whether the goods are the property of the persons who have tendered them for

183; 27 L.J. Ex. 345; *Heugh* v. *L. & N. W. Ry.*, *supra*.

(*a*) *G. W. Ry.* v. *Crouch*, 3 H. & N. 201; 27 L. J. Ex. 345.

(*b*) *Barrow*, *Ex parte*, 6 Ch. D. 783; 46 L.J. Bankr. 71.

(*c*) *Cooper*, *Ex parte*, 11 Ch. D. 68; 48 L.J. Bankr. 49.

(*d*) *Cooper*, *Ex parte*, *supra*.

(*e*) *Chilton* v. *London & Croydon Ry.*, 16 M. & W. 212; 16 L.J. Ex. 89; *Poulton* v. *L. & S. W. Ry.*, L.R. 2 Q.B. 534; 36 L.J. C.P. 294. See Addison on Torts, 107, 118 (ed. 7).

(*f*) *Butler* v. *M. S. & L. Ry.*, 21 Q.B.D. 207; 57 L.J. Q.B. 564.

conveyance, or the property of third parties from whom they have been fraudulently taken or stolen. Thus, where goods were stolen and delivered to a carrier to be carried to Exeter, and the owner finding them in the possession of the carrier demanded them of him, and the carrier refused to deliver them without being paid the price of their carriage, it was held that he was justified in so doing, "for when the robber brought them to him he was obliged to receive them and carry them, and therefore since the law compelled him to carry them it will give him remedy by retainer for the price of the carriage" (*g*).

But the carrier has no right of lien by the common law for anything beyond the price of the carriage of the goods conveyed. He cannot detain them until he has received payment of a general balance due to him from the owners of such goods. Common carriers have oftentimes attempted to obtain a lien of this description, and to secure the payment of debts due to them for the previous conveyance of goods, by giving notices to the effect that all goods delivered to them for conveyance will be held as a security for the payment of such debts, as well as for the payment of the price of their own carriage (*h*). But the common carrier has no right to make any such bargain or stipulation. He is bound, as we have already seen, so long as he has room in his cart or carriage, to convey the goods of all persons on being tendered his hire for the carriage of the particular goods sought to be conveyed; and if he does obtain a promise from the consignor to the effect that he shall, if he carries the goods, have a right to retain them in his hands as a security for the payment of an antecedent debt, such promise is a mere *nudum pactum*, of no force or effect in the eye of the law (*i*). Where an Order in Council under an Act of Parliament (*k*) directed, that every cattle-truck should be disinfected once in every twenty-four hours during its use, it was held that the railway company had no lien for the expense of such cleansing upon the person sending cattle by the truck, as it was not a service done for such person individually as distinguished from the rest of the public (*l*).

Section 97 of 8 Vict. c. 20, gives no lien upon goods for tolls or charges due to a railway company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages (*m*).

(*g*) *Exeter Carriers' case*, cited 2 Ld. Raym. 867.

(*h*) *Wright* v. *Snell*, 5 B. & Ald. 353.

(*i*) *Butler* v. *Woolcott*, 2 Bos. & P. N. R. 64; *Oppenheim* v. *Russell*, 3 Bos. & P. 47; *Rushforth* v. *Hadfield*, 6 East, 527; 7 *ib.* 227.

(*k*) 11 & 12 Vict. c. 107. This Act is repealed by the 32 & 33 Vict. c. 70; and see now 41 & 42 Vict. c. 74, *ante*, p. 945.

(*l*) *Cox* v. *G. E. Ry.*, L.R. 4 C.P. 181; 38 L.J. C.P. 151.

(*m*) *Wallis* v. *L. & S. W. Ry.*, L.R. 5 Ex. 62; 39 L.J. Ex. 57. See *Brown*

If a person goes to a coach-office and orders a place to be booked for him by a particular coach, and that be done, and he then leaves his portmanteau at the coach-office, the coach-proprietor will, it seems, have a lien upon the portmanteau for his reasonable and customary remuneration and charge for booking; but if the person merely leaves his portmanteau, and no place is booked, the coach-proprietor has no lien upon the portmanteau at all (*n*). When goods delivered to be carried are received from the waggon of the common carrier by the consignee, and are merely carried into the warehouse to be weighed, the carrier has no right to charge for warehouse-room; and if the goods are taken up on the road, and have never been booked, he has no right to charge for the booking of them; and if, after tender of the price of the carriage, he detains them for these small charges, the detention is unlawful, and an action may be brought against him in respect thereof (*o*). A common carrier of passengers and luggage has a right of lien upon the luggage for the payment of the fare of the passenger as well as for the carriage of his effects, but he has of course no right to detain the person of the passenger or the clothes he is actually wearing (*p*). And if the carrier once parts with the possession of the goods he loses his lien, as in other cases. But if he loses the possession by fraud, the lien revives if possession is recovered (*q*).

Common carrier's charges—Railway charges.—The statutes requiring justices of the peace to assess and fix the price of all land carriage of goods have long since been repealed (*r*); but the hire or charge for the carriage must be fair and reasonable, and must not exceed the ordinary and customary rate of remuneration. If a person sends to a carrier's office to know his rate of charge, the carrier is bound by the representation there made by his clerks; and, if goods are sent upon the faith of such representation, the carrier cannot charge more than the sum named, although the clerk may have inadvertently fallen into a mistake (*s*). When, by a railway Act, it is enacted that the word "toll" shall include the charge for goods conveyed by the railway, whether for the use of the railway or for the moving power, or for the use of the carriage, *primâ facie* it includes everything that a carrier does, and for which he is entitled to charge (*t*). By the Acts of Parliament under

v. *G. W. Ry.*, 9 Q.B.D. 744; 51 L.J. Q.B. 529; but see *M. S. & L. Ry.* v. *North Central Wagon Co.*, 13 App.Cas. 554; 58 L.J. Ch. 219.

(*n*) *Higgins* v. *Bretherton*, 5 C. & P. 2. Whether, if the place be booked, the coach proprietor would also have a lien for the full amount of the fare, *quære*, S. C.

(*o*) *Lambert* v. *Robinson*, 1 Esp. 119.

(*p*) *Wolf* v. *Summers*, 2 Campb. 631.

(*q*) *Wallace* v. *Woodgate*, Ry. & M. 194.

(*r*) 7 & 8 Geo. 4, c. 39 (repealed).

(*s*) *Winkfield* v. *Packington*, 2 C. & P. 600.

(*t*) *Pegler* v. *Monmouth Ry. & Canal Co.*, 6 H. & N. 644; 30 L.J. Ex. 249.

which railway companies are incorporated, it is generally provided that the charges for the carriage of goods shall be reasonable and equal to all persons (*infra*).

Duty of railway and canal companies to afford reasonable facilities for carriage of passengers, merchandise, and chattels.—By sect. 2 of the Railway and Canal Traffic Act, 1854, every railway company and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (*u*); and every railway company and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one, near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals to the other, without any unreasonable delay, and without any such preference or advantage, or prejudice, or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public. It has been held, however, that the above section applies only to the "receiving," "forwarding," and "delivering," of traffic, and not to facilities for storing goods after they have been delivered to the consignees. Where, therefore, a railway company let the surplus land adjoining their station to one coal merchant to the exclusion of others, it was held that another coal merchant had no ground of complaint, although the first-named merchant did not require or use the whole of the surplus land for the purpose of storing his coals (*x*). A cloakroom has been held to be a reasonable facility (*y*).

(*u*) The provisions of the section are made applicable to through traffic by 51 & 52 Vict. c. 25, s. 25, and to sea traffic by s. 28. *G. W. Ry.* v. *Sutton*, L.R. 4 H.L. 226; 38 L.J. Ex. 177; see *post*, p. 985.

(*x*) *West* v. *L. & N. W. Ry.*, L.R. 5 C.P. 622; 39 L.J. C.P. 282, per Montague Smith and Brett, JJ., diss. Bovill, C.J., and Keating, J. See *E. & W. India Dock Co.* v. *Shaw, Savill & Albion Co.*, 39 Ch.D. 524; 57 L.J. Ch. 1038.

(*y*) *Singer Manufacturing Co.* v. *L. & S. W. Ry.*, (1894) 1 Q.B. 83; 64 L.J.

Where a railway company acted as a common carrier of goods, and issued certain scales of charge for the carriage, including the collection, loading, unloading, and delivery, and also carried goods for other carriers, to whom they made certain allowances for collection, &c., but in their dealings with a particular carrier they refused to make these allowances, it was held that the charges to the latter were not equal or reasonable, and that he might recover from the company divers extra charges paid by him over and above what had been charged to other carriers and to the public, such payments not being voluntary, but made in order to induce the company to do that which they were by law bound to do without requiring such payments (*z*). No distinction must be made by the company between one class of persons and another (*a*). The company cannot, therefore, charge a person, who is himself a common carrier, for a parcel or package, whatever may be its contents, more than it would charge one of the public (*b*). Charges for collection and delivery of parcels cannot be included in the general charge for the carriage, so as to impose upon parties who do not require these services and do not avail themselves of them the burthen of paying for them (*c*). No unreasonable preference or advantage can lawfully be given to any particular person or company, or to any particular description of traffic (*d*). But the fair interests of the railway company must be taken into consideration; and they are entitled to make a difference in their charges, where it is shown that there is a difference in the cost of carriage to the company, and in the labour and expense incurred by them in the delivery of the goods (*e*).

If overcharges are made they may be recovered back (*f*).

Q.B. 411; as to providing waterclosets, see *West Ham Corporation* v. *G. E. Ry.*, 64 L.J. Q.B. 340; as to through booking, see *Didcot, Newbury, &c. Ry.* v. *G. W. Ry.*, (1897) 1 Q.B. 33; 66 L.J. Q.B. 33.

(*z*) *Parker* v. *G. W. Ry.*, 7 M. & Gr. 253; 13 L.J. C.P. 105; 11 C.B. 545; 21 L.J. C.P. 57; *Parker* v. *Bristol & Exeter Ry.*, 6 Exch. 702; *L. & N. W. Ry.* v. *Evershed*, 3 App.Cas. 1029; 48 L.J. Q.B. 22; *Denaby Main Colliery Co.* v. *M. S. & L. Ry.*, 11 App.Cas. 97; 55 L.J. Q.B. 181.

(*a*) See *Ransome* v. *East. Co. Ry.*, 26 L.J. C.P. 91; 1 C.B. N.S. 437; see *post*, pp. 985 *et seq.*; it seems that the convenience of the public is an element in the consideration of what may constitute an "undue" preference: see *Palmer* v. *L. B. & S. C. Ry.*, L.R. 6 C.P. 194; 40 L.J. C.P. 133.

(*b*) *Parker* v. *G. W. Ry.*; *Parker* v. *Bristol & Exeter Ry.*; *L. & N. W. Ry.* v. *Evershed*, *supra*.

(*c*) *Baxendale* v. *G. W. Ry.*, 16 C.B. N.S. 137; 33 L.J. C.P. 197; *Garton* v. *Bristol & Exeter Ry.*, 1 B. & S. 112; 30 L.J. Q.B. 273.

(*d*) 17 & 18 Vict. c. 31, s. 2; 51 & 52 Vict. c. 25, s. 27; see *L. & N. W. Ry.* v. *Evershed*, *supra*.

(*e*) *Ransome* v. *East. Co. Ry.*, *supra*; *Oxlade* v. *N. E. Ry.*, 26 L.J. C.P. 129; 1 C.B. N.S. 454; *Baxendale* v. *East. Counties Ry.*, 4 C.B. N.S. 81; 27 L.J. C.P. 137; *Denaby Main Colliery Co.* v. *M. S. & L. Ry.*, *supra*; 51 & 52 Vict. c. 25, s. 27 (2). As to tonnage rates and parcel rates, see *Parker* v. *G. W. Ry.*, 6 E. & B. 77; 25 L.J. Q.B. 209; as to foreign goods, see *Mansion House Assoc.* v. *L. & S. W. Ry.*, (1895) 1 Q.B. 927; 64 L.J. Q.B. 529.

(*f*) *Pegler* v. *Monmouth, &c. Ry.*, 6 H. & N. 644; 30 L.J. Ex. 249; *Garton* v. *Bristol & Exeter Ry.*, *supra*; *L. & N. W. Ry.* v. *Evershed*, *supra*.

Therefore, where a railway company charged a certain rate upon the *aggregate* weight of several packages, if addressed to the same consignee at the same place, it was held that they could not charge a common carrier *separately* upon the weight of the packages consigned to him, although, in addition to the carrier's address on the packages, there was also labelled the address of the person to whom the carrier (through his agent) intended to deliver them (*g*). However, this will not prevent a railway company from charging through-rates to places beyond their termini, at a rate lower in proportion than that charged for part of the distance, although such part is the whole of their line, and a common carrier is not, therefore, entitled to have his packages carried over the line for such lower rate (*h*).

Sect. 16 of 31 & 32 Vict. c. 119 provides for equal charges to passengers, where a railway company is authorized to maintain and work steam vessels in communication with their railway, and prohibits any reduction or advance in the fare in consequence of the persons using the steamboat having travelled, or being about to travel, by the railway or not (*i*). Where an aggregate sum for the fare by boat and rail is charged, the ticket must distinguish the amount charged for each (*Ib.*). Where two railways are worked by one company the calculation of charges by distance must be reckoned as if it was one railway (s. 18). As to agreements between railway and canal companies, see 36 & 37 Vict. c. 48, s. 16; 51 & 52 Vict. c. 25, s. 36.

Carriage of packed parcels.—A railway company has no right to make an increased charge for packed parcels, in order to prevent carriers from entering into competition with them in the conveyance of goods; and there is no difference between a packed parcel sent to an individual containing parcels belonging to a variety of people, and parcels sent to an individual all the contents being his own (*k*). But in certain cases an extra charge might be made for increased risk (*l*); and, if the company has to make separate deliveries to several different persons, they are entitled to make an additional charge in respect of the increased trouble (*m*). When the duty of making equal charges to all persons is not imposed upon the company, they may impose a different rate of carriage for packed parcels from what they charge for ordinary packages (*n*).

(*g*) *Baxendale* v. *L. & S. W. Ry.*, L.R. 1 Ex. 137; 35 L.J. Ex. 108.

(*h*) *Baxendale* v. *L. & S. W. Ry.*, *supra*.

(*i*) See 51 & 52 Vict. c. 25, s. 28.

(*k*) *Pickford* v. *Grand Junc. Ry.*, 10 M. & W. 399; *Crouch* v. *G. N. Ry.*, 11 Exch. 742; 25 L.J. Ex. 137; *Piddington* v. *S. E. Ry.*, 5 C.B. N.S. 111; 27 L.J. C.P. 295; *Baxendale* v. *L. & S. W. Ry.*, *supra*; *Garton* v. *Bristol & Exeter Ry.*, 4 H. & N. 49; 28 L.J. Ex. 169; *G. W. Ry.* v. *Sutton*, L.R. 4 H.L. 226; 38 L.J. Ex. 177.

(*l*) *Garton* v. *Bristol & Exeter Ry.*, *supra*.

(*m*) *Baxendale* v. *East. Counties Ry.*, *supra*.

(*n*) *Branley* v. *S. E. Ry.*, 30 L.J. C.P. 286; 12 C.B. N.S. 63.

In some cases which decided that an extra charge may be made for packed parcels, the company claimed to charge extra to carriers for packed parcels, and not to charge extra to customers who were not carriers, for what they called inclosures, which were in reality packed parcels, and the courts have held that an extra charge for a packed parcel to a carrier was against the statutes, imposing upon railway companies the duty of charging equally to all persons in respect of all goods of a like description (*o*); but the company has a right to divide goods into classes by descriptions appropriate to the different classes it chooses to make, and to make different charges for the different classes (*p*). By 31 & 32 Vict. c. 119, s. 17, it is provided that, on application in writing to the secretary of the company, by any person who has paid for the conveyance of goods, the company shall render an account to the applicant distinguishing how much of the charge is for conveyance—including tolls for the use of the railway, the use of carriages, and for locomotive power—and how much for loading and unloading, covering collection delivery, and other expenses, but without particularising the items of such last-mentioned charge.

Injunction against railway companies to enforce compliance with Railway and Canal Traffic Act.—By 17 & 18 Vict. c. 31, s. 3, it is enacted, that it shall be lawful for any company, or person complaining against any railway company or canal company of anything done, or any omission made in contravention of the Railway and Canal Traffic Act, to apply in a summary way to the court (see note (*r*), p. 986), and that it shall be lawful for the court to hear and determine the matter of the complaint, and to make inquiry, in the mode therein directed, and to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of the Act, and enjoining obedience to the same (*q*); and in case of disobedience of any such writ of injunction or interdict, to order that a writ of attachment or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict, and to make an order directing the payment by any one or more of such companies of a sum of money not exceeding for

(*o*) *Parker* v. *G. W. Ry.*, 11 C.B. 545; 21 L.J. C.P. 57; *Crouch* v. *G. N. Ry.*, 11 Exch. 742; 25 L.J. Exch. 137; *G. W. Ry.* v. *Sutton*, L.R. 4 H.L. 226; 38 L.J. Ex. 177.

(*p*) Erle, J., *Branley* v. *S. E. Ry.*, 12 C.B. N.S. 63; 31 L.J. C.P. 290.

(*q*) See *Ransome* v. *East. Co. Ry.*, 26 L.J. C.P. 91; 1 C.B. N.S. 437. As to whether a cause of action can arise from a breach of sect. 2 of the Act, see *Denaby Main Colliery Co.* v. *M. S. & L. Ry.*, 11 App.Cas. 97; 55 L.J. Q.B. 181. As to defence and counter-claim, see *Lanc. & Yorkshire Ry.* v. *Greenwood*, 21 Q.B.D. 215; 58 L.J. Q.B. 16; *Rhymney Ry.* v. *Rhymney Iron Co.*, 25 Q.B.D. 146; 59 L.J. Q.B. 414.

each company the sum of 200*l.* for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict, such moneys to be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to his Majesty; and payment thereof may, without prejudice of any other mode of recovering the same, be enforced by attachment, or order, in the nature of a writ of execution; and, in any such proceeding, the court or judge may order and determine that all or any costs thereof or thereon incurred shall be paid by or to the one party or the other, as the court or judge shall think fit (*r*).

"It is abundantly clear," observes Cockburn, C. J., "from the statutory enactments which enjoin on railway companies the obligation to afford accommodation on equal and reasonable terms, and from the provisions of the statute by which jurisdiction is given to this Court of Common Pleas against the affording of undue preference, or the imposing of undue prejudice or disadvantage, that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines; but in return for the great powers which it has conceded to them, and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public;" and they cannot promote their own interest as carriers at the expense of the right of the public to that equality (*s*), or give to one individual greater advantages at their stations (*t*), or upon their line, than they allow to another (*u*).

Where a railway company, in order to compete with a particular carrier in the collection and delivery of parcels, makes a man who has his own waggons and horses, and therefore does not require the company to collect and deliver parcels for him, pay more than he ought to pay for the transit on the railway, it is a case of undue prejudice against the person not wanting the accommodation; the company have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services of which they do not desire to avail themselves (*x*). So if a number of tradesmen

(*r*) These powers are now exercised by the Railway and Canal Commission established by 51 & 52 Vict. c. 25.

(*s*) *Baxendale* v. *G. W. Ry.*, 5 C.B. N.S. 350; 28 L.J. C.P. 69.

(*t*) *Marriott* v. *L. & S. W. Ry.*, 1 C.B. N.S. 499; 26 L.J. C.P. 154; *Beadell* v. *East. Counties Ry.*, 2 C.B. N.S. 509; 26 L.J. C.P. 250; *Baxendale* v. *Bristol & Exeter Ry.*, 11 C.B. N.S. 787.

(*u*) *Baxendale* v. *North Devon Ry.*, 3 C.B. N.S. 324; see 31 & 32 Vict. c. 119, s. 16, *ante*, p. 984.

(*x*) Cockburn, C.J., *Garton* v. *G. W. Ry.*, 5 C.B. N.S. 678; 28 L.J. C.P. 303; *Baxendale* v. *G. W. Ry.*, 16 C.B. N.S.

in a country town request a railway company to deliver all goods addressed to them to a local carrier for distribution by him, the company cannot, in order to compete with that carrier, under the pretence of requiring a special order as to each packet, in effect cause the delivery by such carrier to be so delayed as to become impracticable (*y*). Nor can a railway company exclude carriers' vans from the delivery of goods at a station after a certain hour, if they admit vans, with goods collected from their own receiving houses, after that hour (*z*).

In execution of the powers conferred on them by this statute, the courts will issue writs of injunction, enjoining railway companies proved to have given an undue preference to one person or set of persons over another in respect of the conveyance of particular classes or descriptions of commodities, to desist from giving such undue preference (*a*). But the operation of the statute is confined to undue preferences given to one person or class of persons over another in the traffic along the same railway or canal (*b*), and travelling between the same places, and not to superior advantages which may be given to one town over another town on the same line of railway (*c*). And it has been held that the statute is not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities, and full train-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of the carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee (*d*).

Before the court will put the powers of the Railway and Canal Traffic Act in motion, as regards the granting of an injunction, it must in general be satisfied that some substantial injury or inconvenience is sustained by the public by the act complained of, and that the complaint is *bonâ fide* made on behalf of the public (*e*). It was formerly held that the exercise of this special jurisdiction being then subject to no review (*f*), and depending in each instance upon the special facts of the case, cases previously decided under it are

137; 33 L.J. C.P. 197; see 31 & 32 Vict. c. 119, s. 17, *ante*, p. 985.

(*y*) *Parkinson* v. *G. W. Ry.*, L.R. 6 C.P. 554.

(*z*) *Palmer* v. *L. B. & S. C. Ry.*, L.R. 6 C.P. 195.

(*a*) *Harris* v. *Cockermouth Ry.*, 3 C.B. N.S. 693; 27 L.J. C.P. 162; *Ransome* v. *East. Co. Ry.*, 8 C.B. N.S. 709; 27 L.J. C.P. 166; *Cooper* v. *L. & S. W. Ry.*, 27 L.J. C.P. 324; 4 C.B. N.S. 738.

(*b*) *Bennett* v. *Manch., Sheff. & Line. Ry.*, 6 C.B. N.S. 707.

(*c*) *Jones* v. *East. Co. Ry.*, 3 C.B. N.S. 718.

(*d*) *Nicholson* v. *G. W. Ry.*, 5 C.B. N.S. 366; 28 L.J. C.P. 89; *Strick* v. *Swansea Canal Co.*, 31 L.J. C.P. 240; 16 C.B. N.S. 245.

(*e*) *Painter, Ex parte*, 2 C.B. N.S. 702; *Caterham Ry., In re*, 1 C.B. N.S. 410; 26 L.J. C.P. 161.

(*f*) But see now 51 & 52 Vict. c. 25, s. 17.

not binding on the court in the same way that precedents in law are binding (*f*).

Passenger fares—Right of passenger to alight at intermediate stations.—Where a railway company, under the influence of competition, charged a low rate of fare to a distant locality, and sought to prevent passengers from getting down at intermediate stations, to which a higher fare was charged, on the ground that they had not paid the fare to such intermediate station, and were answerable to a bye-law, subjecting to a penalty any person who should enter a carriage without having previously paid his fare, it was held that the bye-law was wholly inapplicable; that the passenger had paid his fare; and that the company had no right to prevent him from getting down at any intermediate station (*g*). Where a railway company had issued a ticket on which a notice was printed that it was only to be used to the station named thereon, it was held that the passenger holding such ticket, provided the notice was brought home to him, was not entitled to travel beyond such station and merely pay the ordinary single fare for the extra journey travelled; such a ticket constituted a special contract between the railway company and the passenger (*h*). Where a passenger had lost his ticket, and on being required to pay the fare from the station whence the train started, declined to do so, it was held that the company were not justified in removing him from the carriage in which he was travelling (*i*).

Season ticket—Conditions—Forfeiture of deposit.—The plaintiff purchased a season ticket, and agreed to be bound by certain conditions, one of which was that the ticket was to be considered the property of the company, to be delivered to them on the day after expiry; another was that the ticket and the deposit should be forfeited on breach of any of the conditions; a few days after expiry of the ticket the plaintiff delivered it to the company and claimed a return of the deposit; and it was held that the plaintiff could not recover the deposit (*k*).

Ruinous and insecure railway bridges, viaducts, and embankments.—Every railway company in the actual occupation of its line of railway is responsible for the preservation of all its bridges, viaducts, and embankments, so that if any injuries are sustained either by persons travelling along a highway under a bridge or

(*f*) *Palmer* v. *L. & S. W. Ry.*, L.R. 1 C.P. 588; 35 L.J. C.P. 289; diss. Willes and Keating, JJ.

(*g*) *Reg.* v. *Frere*, 4 E. & B. 598; 24 L.J. M.C. 68; as to the construction of this bye-law, see *Jennings* v. *G. N. Ry.*, L.R. 1 Q.B. 7; 35 L.J. Q.B. 15; *Dearden* v. *Townsend*, L.R. 1 Q.B. 10; 35 L.J. M.C. 50.

(*h*) *G. N. Ry.* v. *Palmer*, (1895) 1 Q.B. 862; 64 L.J. Q.B. 316.

(*i*) *Butler* v. *Manchester, Sheffield & Lincolnshire Ry.*, 21 Q.B.D. 207; 57 L.J. Q.B. 564.

(*k*) *Cooper* v. *L. B. & S. C. Ry.*, 4 Ex.D. 88; 48 L.J. Ex. 434.

viaduct (*l*), or by passengers travelling along the line, from the insecure state of such bridge or viaduct, the railway company will be responsible for the injury, whether it arose from their own neglect in not providing needful reparations, or from original faulty construction of the fabric by their engineer or contractor (*m*). If a railway embankment has been injured by some extraordinary flood, and the rails give way, and the passengers are injured without any neglect or default on the part of the company, the company is not responsible for the injuries that may be sustained by the passengers (*n*); but it would seem that every railway company is bound to construct and maintain its embankments and earthworks in such a manner as to be capable of resisting all the violence of the weather, which may be expected at some time or another, though rarely, to occur, and if it fails in this duty it will be responsible in damages for negligence (*o*).

Duties and responsibilities of common ferrymen.—A common ferryman is a common carrier, and is bound to provide safe ferry-boats and landing-stages, and all proper means for the safe transit of persons who may have occasion to use the ferry for themselves, or for the transit of their horses and carriages, luggage, and merchandise. Where, therefore, the defendants, as ferrymen, used steamboats for transit across the river Mersey, from which passengers and animals could not safely land without landing-stages, and they provided an insecure hand-rail to a landing-stage, which broke and caused the death of the plaintiff's mare, it was held that they were bound to make good the loss (*p*).

Loss of goods by common ferrymen and common hoymen.—Common ferrymen and common hoymen, being common carriers, are responsible for the safe delivery of goods intrusted to them for conveyance, unless they have been prevented by storm, lightning, or inevitable accident (*q*).

Notice of action to railway companies.—When an Act of Parliament incorporating a railway company provides that no action shall be brought against the company for anything done or omitted to be done pursuant to the Act, or in execution of the powers and authorities given by the Act, unless previous notice in writing shall have been given by the party intending to prosecute such action, or unless

(*l*) *Kearney* v. *L. B. & S. C. Ry.*, L.R. 6 Q.B. 759; 40 L.J. Q.B. 285.

(*m*) *Grote* v. *Chester & Holyhead Ry.*, 2 Exch. 251; as to bridges at stations for passengers to cross by, see *Longmore* v. *G. W. Ry.*, 35 L.J. C.P. 135.

(*n*) *Withers* v. *North Kent Ry.*, 27 L.J. Ex. 417.

(*o*) *Gt. West. Ry. Co. of Canada* v. *Fawcett*, 1 Moore's P.C.C. N.S. 120; see also 8 & 9 Vict. c. 20, s. 46.

(*p*) *Willoughby* v. *Horridge*, 12 C.B. 751; 22 L.J. C.P. 90.

(*q*) *Amies* v. *Stevens*, 1 Str. 128; Bac. Abr. CARRIERS, B.; *Oakley* v. *Portsmouth, &c. Steam Packet Co.*, 11 Exch. 622; 25 L.J. Ex. 22, *ante*, p. 949. As to loss of goods by overloading ferry boat, see *Mouse's case*, 12 Co. 63.

such action shall have been brought within a certain limited period, the enactment does not in general extend to actions *ex contractu*, and does not affect the liability of the company upon contracts entered into by it in its character of a common carrier. The omission by a plaintiff, consequently, to give such notice does not preclude him from recovering damages against the company for its negligence or misconduct, or for a breach of those duties and obligations which result from the nature of its employment as a common carrier (*r*). But, where the parties were trying, in an action *ex contractu*, the right of the company to make certain charges under the particular provisions of their Act of Parliament, the action was considered to be brought for something done under the Act, and notice of action was held to be necessary (*s*).

Parties to be made plaintiffs in actions against carriers for loss of, or injury to, goods.—The action against a carrier for the loss of goods entrusted to him for conveyance should, in the absence of an express contract for the carriage of them, be brought by the owner of the goods; for with him, as the party damnified, is the implied contract for their safe conveyance deemed to be made. When goods are delivered to a carrier in execution of a contract of sale, for the purpose of transmission to an intended purchaser, and no express contract founded upon a pecuniary consideration moving from the consignor has been entered into between the carrier and the consignor for the carriage of them, the law raises an implied promise for their safe conveyance in favour of the party in whom the right of property in the goods is at the time vested. If, therefore, the right of property and the risk of loss have, by a previous contract of purchase and sale, or a contract to send the goods in satisfaction and discharge of a debt due from the consignor to the consignee, passed to the consignee, the latter is the only party entitled to sue the carrier for an injury to the goods, whether such carrier be a carrier by land or a carrier by water, and whether he be named by the purchaser or chosen by the vendor (*t*). If, on the other hand, from fraud or non-compliance with the requisites of the Statute of Frauds, no actual sale has taken place so as to transfer the right of property and the risk of loss from the consignor to the consignee, the consignor is the proper party to maintain the action (*u*). So, if a tradesman merely sends goods

(*r*) *Palmer* v. *Grand Junc. Ry.*, 4 M. & W. 749; 8 L.J. Ex. 129; *Carpue* v. *L. & B. Ry.*, 5 Q.B. 747; 13 L.J. Q.B. 133. See, however, the cases, *ante*, p. 939.

(*s*) *Kent* v. *G. W. Ry.*, 3 C.B. 714; 16 L.J. C.P. 72.

(*t*) *Dawes* v. *Peck*, 8 T.R. 332; *Dutton* v. *Solomonson*, 3 Bos. & P. 584; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600; *Brown* v. *Hodgson*, 2 Campb. 36; *King* v. *Meredith*, *ib.* 639; *Fragano* v. *Long*, 4 B. & C. 219; 3 L.J. (O.S.) K.B. 177; *Coxe* v. *Harden*, 4 East, 217; *Evans* v. *Nichol*, 4 Sc. N.R. 43; 11 L.J. C.P. 6.

(*u*) *Coombs* v. *Bristol & Ex. Ry.*, 3 H.

for approval to a particular customer, or on terms of "sale or return," or sends goods of the value of 10*l.* and upwards pursuant to an oral order or an oral contract of sale, to a person who has not given "earnest" or made a part payment, or accepted any part of the goods, and the contract is void by reason of non-compliance with the provisions of the Statute of Frauds, then, as there has been no actual sale so as to transfer the right of property and the risk of loss to the consignee, the consignor is the party to sue the carrier (*x*). But, when a special contract has been entered into between the carrier and the consignor, whereby the carrier, in consideration of a sum of money paid or agreed to be paid by the consignor as the price of the carriage of goods, agrees with him to convey them to the consignee, it is no answer to an action brought by the consignor against the carrier upon such special contract to say that he is not the owner of the goods. In such a case the action may be brought, either by the consignor with whom the express engagement was made, or by the consignee as the owner of the goods in whose behalf it was made (*y*).

So also, the bailee of the goods, who has a special property in them, may enforce the express contract entered into with the carrier, unless his principal interferes to prevent him. "The rule is, that either the bailor or the bailee may sue; and whichever first obtains damages, it is a full satisfaction" (*z*). But a settlement for loss or damage, made with a person bringing the goods to the carrier, which person has no property or interest in the goods, will not be an answer to an action by the owner (*a*).

Every person who has been injured by the negligent performance of the work of carrying may maintain an action for damages against the carrier, although the work was done under a special contract to which he is no party (see *ante*, p. 938). A servant, for example, may maintain an action against a railway company, or other carrier, for injuries sustained by him from the negligent management of a train by which he was a passenger, or from the negligent execution of the work of carrying, although the contract for his conveyance was made, and the hire or fare paid, by his master, the duty of carrying carefully being a duty which arises independently of the contract (*b*). So, where a railway company

& N. 510; 27 L.J. Ex. 401; *Duff* v. *Budd*, 6 Moore, 469; *Stephenson* v. *Hart*, 4 Bing. 476; 6 L.J. (O.S.) C.P. 97.

(*x*) *Coats* v. *Chaplin*, 3 Q.B. 489; 11 L.J. Q.B. 315.

(*y*) *Davis* v. *James*, 5 Burr. 2680; *Bell* v. *Chaplain*, Hard, 321; *Moore* v. *Wilson*, 1 T.R. 659; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600. See also *G. W. Ry.* v. *Bagge*, 15 Q.B.D. 625; 54 L.J. Q.B. 599.

(*z*) *Nicolls* v. *Bastard*, 2 Cr. M. & R. 660; 5 L.J. Ex. 7; *Joseph* v. *Knox*, 3 Campb. 320; *Sargent* v. *Morris*, 3 B. & Ald. 277; *Freeman* v. *Birch*, 1 N. & M. 420.

(*a*) *Coombs* v. *Brist. & Ex. Ry.*, 3 H. & N. 1; 27 L.J. Ex. 269.

(*b*) *Marshall* v. *York, Newcastle, & Berwick Ry.*, 11 C.B. 655; 21 L.J. C.P. 34; and see the cases, *ante*, p. 940.

were bound by statute to carry the mails, and the officers of the post-office who accompanied them, it was held that the company must exercise a reasonable care in performing the duty cast upon them by the statute, and were bound to carry safely; so that if any officer of the post-office was injured by the negligent management of their trains, he was entitled to maintain an action against them for damages, although the contract for his conveyance had been entered into between the company and the Postmaster-General (*c*).

Joint bailments to common carriers.—Where a box delivered to a carrier to be carried contained things belonging to each of the plaintiffs separately, but none in which they had a joint ownership, it was held that nevertheless there was a joint bailment in respect of which they might sue jointly (*d*).

Parties to be made defendants.—When goods have been delivered to the driver of a stage coach to be carried, and have been lost by the way, an action *ex contractu* for negligence should be brought against the coach proprietor, and not the mere servant or agent (*e*). But as all who participate in a wrongful act are responsible *ex delicto* for the injurious consequences of it, the servant may be sued for the breach of duty as well as the master or the employer. Section 8 of the Carriers Act (*ante*, p. 954) provides that the Act shall not protect the coachman, guard, book-keeper, or other servants of the common carrier from liability for losses or injuries occasioned by their own personal neglect or misconduct.

Every railway company is responsible for the detention or conversion, by its servants, of the property which has come into the hands of such servants in the course of their employment in the business of the company. There must be some one authorized on the part of the company at every station to receive and deliver out goods, and to do things promptly that require immediate attention, and whoever is permitted by the company to have dominion over their stations, and to exercise authority over their property, and over their porters and servants, will be presumed to be clothed with the necessary authority, and his acts, done within the scope of his ordinary employment, will be binding on the company. Thus, where some young quicks were forwarded by railway to the plaintiff, and the general superintendent of the company, at the request of the plaintiff, in order to keep the quicks alive, permitted them to be put into the company's ground at the railway station, where they remained under the control of the superintendent, and the latter subsequently refused to deliver them up to the plaintiff,

(*c*) *Collett* v. *L. & N. W. Ry.*, 16 Q.B. 989; 20 L.J. Q.B. 411; explained in *East India Ry.* v. *Kallidas*, (1901) A.C. 396; 70 L.J. P.C. 63.

(*d*) *Metcalfe* v. *L. & B. Ry.*, 4 C.B. N.S. 318; 27 L.J. C.P. 335.

(*e*) *Williams* v. *Cranston*, 2 Stark. 82.

it was held that the railway company was responsible for the unlawful detention of the property by their servant (*f*).

The common carrier cannot limit his liability in respect of the negligence of his servants, in the carrying of the goods, by any private arrangement as to remuneration out of the profits of the business or otherwise, between himself and such servants. "If a common carrier should allow his driver of the carriages some small things as perquisites, the master would, without all doubt, be still liable; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages" (*g*).

Parties to be made defendants—Carriage of goods and passengers over distinct lines of railway.—We have already seen (*ante*, p. 975), that, where goods are received by a railway company to be carried to a particular destination, the company receiving the goods is the party to be sued for the loss of or damage to them, although the loss or damage has been sustained on the line of a second or third railway company, to whom they have been delivered by the first railway company to be carried to their place of destination. The contract is made with the first railway company to whom they have been delivered, and to whom the hire for the entire journey has been paid (*h*); but both companies may, under certain circumstances, become joint contractors for the conveyance of the goods (*i*). The same rule prevails with regard to the passenger and his luggage, so that if one fare is paid and one ticket given for the entire journey, the contract is with the company issuing the ticket and receiving the money, and not with a second or third railway company over whose line the passenger is travelling in order to reach his destination (*k*); and the company with which the contract is made will be liable for the negligence of such other railway company, the contract being that due care shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management (*l*). But every railway company which allows its railway to remain open for public traffic is responsible to passengers who sustain

(*f*) *Taff Vale Ry.* v. *Giles*, 23 L.J. Q.B. 43; 2 E. & B. 822.

(*g*) Page, J., Cas. temp. Hard. 90; and see *Hyde* v. *Trent & Mersey Nav. Co.*, 5 T.R. 397.

(*h*) *Brist. & Exeter Ry.* v. *Collins*, 7 H.L.C. 231; 29 L.J. Ex. 41; *Coxon* v. *G. W. Ry.*, 5 H. & N. 274; 29 L.J. Ex. 165.

(*i*) *Hayes* v. *South Wales Ry.*, 9 Ir. C.L.R. 474.

(*k*) *Mytton* v. *Mid. Ry.*, 4 H. & N. 621; 28 L.J. Ex. 385; *G. W. Ry.* v. *Blake*, 7 H. & N. 687; 31 L.J. Ex. 346; *Buxton* v. *N. E. Ry.*, L.R. 3 Q.B. 549; 37 L.J. Q.B. 258.

(*l*) *Thomas* v. *Rhymney Ry.*, L.R. 6 Q.B. 266; 40 L.J. Q.B. 89. See, however, *Taylor* v. *G. N. Ry.*, L.R. 1 C.P. 385; 35 L.J. C.P. 210, *ante*, p. 947; *Wright* v. *Midland Ry.*, L.R. 8 Ex. 137; 41 L.J. Ex. 89, *ante*, p. 938.

injury from the line being unsafe, although such persons are conveyed along it in the carriages of some other company (*m*).

Damages in actions against carriers.—In all actions against common carriers for unlawfully refusing to carry a passenger or goods, substantial damages are recoverable, as there is an injury to a right; and if the plaintiff, in consequence of the wrongful refusal (*n*) of the common carrier to carry him, has been obliged to take a special conveyance, and incur extraordinary expenses to reach the place to which he ought to have been carried, all such expenses (if reasonable) are recoverable, if claimed by the plaintiff, and specified in his claim as part of the damage he has sustained. So if a common innkeeper unlawfully refuses to receive and provide accommodation for a traveller, substantial damages are recoverable for the injury done to the plaintiff's right as a traveller to have shelter and accommodation in the common inn; and if he has been put to expense in seeking accommodation elsewhere, and has been obliged to hire conveyances to reach it, he is entitled to recover such special damage, if claimed. But the expenses incurred must be such as he would probably have incurred on his own account (*o*).

All persons are responsible for all the natural consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look at all the surrounding circumstances, and at the conduct of the parties, to see where the blame is, and to assess the damages according to the way in which the parties have conducted themselves (*p*).

The amount of damages recoverable from common carriers for loss of, or injury to, goods, is regulated by the several Acts of Parliament, requiring consignors in certain cases to declare the value of the article at the time it is delivered to the common carrier to be carried (*ante*, p. 966). No greater damages than 50*l.* are to be recovered for loss of, or injury to, a horse through the neglect or default of a railway company or its officers; 15*l.* per head for neat cattle; and 2*l.* per head for sheep and pigs; unless the person sending or delivering the animals to the company shall, at the time of delivery, have declared them to be of higher value (*q*). Proof of the value and of the amount of injury lies in all cases upon the person claiming compensation. If the value of horses has been declared at the time of the delivery of the animals to a railway company to be carried, and the contract between the

(*m*) *Birkett* v. *Whitehaven, &c. Ry.*, 4 H. & N. 738; 28 L.J. Ex. 348.

(*n*) *Le Blanche* v. *L. & N. W. Ry.*, 1 C.P.D. 286; 45 L.J. C.P. 521.

(*o*) *Le Blanche* v. *L. & N. W. Ry.*, *supra*.

(*p*) *Davis* v. *N. W. Ry.*, 4 Jur. N.S. 1303.

(*q*) 17 & 18 Vict. c. 31, s. 7.

parties has been made upon that basis, the plaintiff is bound by his declaration of value, and cannot recover beyond the declared value (*r*).

Generally speaking, when articles of merchandise, such as corn, hops, hemp, &c., are delivered to a carrier to be carried to a market town, and the carrier fails to deliver them in the ordinary course, and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold if they had been carried according to contract, and their marketable value at the earliest period at which they could have been brought to market after their delivery to the consignee, will be the measure of damages recoverable (*s*). If the goods have been lost altogether, the consignee is not restricted to the value of the goods at the place where they were delivered to the carrier to be carried; but, if their marketable value was greater at the place of destination than at the place of consignment, the consignee is entitled to recover that difference, as being a loss likely to arise in the ordinary course of trade (*t*). If there is no market at the place of delivery, the damages must be ascertained by taking into consideration, in addition to the cost price and expense of transit, the reasonable profit of the importer. Where goods were delivered to a carrier by sea to be carried from Glasgow to Vancouver's Island, and on the arrival of the ship at the latter place they could not be found, it was held that the true measure of damages was the cost of re-placing the lost articles in Vancouver's Island, with interest at 5 per cent. on the amount until judgment by way of compensation for the delay (*u*).

In an action on a charter-party for loss of goods the damages are the value of the goods at the port of discharge at the time when they should have arrived minus the accruing freight (*x*). Where the charter-party provides for advanced freight, in estimating the damages for non-delivery only, the unpaid freight must be deducted from the value of the goods, not the advanced freight as well (*x*). And where goods were shipped under a charter-party which provided that the whole freight should be advanced, and it was advanced, and the amount thereof insured, and the plaintiff bought the goods at a price covering the freight and insurance, it was held that they were entitled to recover the advanced freight and the insurance for the benefit of the underwriters and insurers (*y*).

(*r*) *M'Cance* v. *L. & N. W. Ry.*, 7 H. & N. 477; 34 L.J. Ex. 39; 3 H. & C. 343.

(*s*) *Rice* v. *Baxendale*, 30 L.J. Ex. 371; 7 H. & N. 96; *O'Hanlan* v. *G. W. Ry.*, 6 B. & S. 484; 34 L.J. Q.B. 154.

(*t*) *O'Hanlan* v. *G. W. Ry.*, *supra*.

(*u*) *Collard* v. *S. E. Ry.*, 30 L.J. Ex. 393; 7 H. & N. 79; *British Columbia Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 499; 37 L.J. C.P. 235.

(*x*) *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67; 56 L.J. Q.B. 202.

(*y*) *Dufourcet* v. *Bishop*, 18 Q.B.D. 373; 56 L.J. Q.B. 497.

In an action against a common carrier for loss sustained by long delay in the delivery of articles of merchandise intrusted to him to be carried, whereby the consignee had lost the season for selling them to advantage, and the marketable value of the articles was seriously diminished, it was held that the carrier was answerable for this loss, it being such as might naturally be expected to result from great delay in delivering articles of merchandise (*z*). So, where a railway company contracted with the plaintiff, who showed goods at agricultural shows, to carry the goods to another show-ground on a particular day, the court, although nothing was said by the parties as to the purpose for which the goods were to be carried, inferred that the defendants must have known it, and that the plaintiff was entitled to damages for loss of profit which was a natural result, and that no evidence was necessary to show that he had a prospect of making profit at the particular show (*a*). But where shoe manufacturers agreed to supply a London firm with shoes for the French army, to be delivered on the 3rd of February, and gave notice that they were under contract to deliver on the 3rd, and that, if not, the shoes would be thrown on their hands, but not that there was anything exceptional otherwise in the contract, it was held that the carriers were not liable for the difference between the price the consignors had to sell the shoes at, and the agreed price, as the difference was extraordinary, and it was not such a loss as naturally arose or could be reasonably contemplated (*b*).

When the consignor has been guilty of no intentional deception to conceal the risk, and his own conduct or omission to declare the nature and value of the article has not in any way conduced to the loss, but the loss has been caused solely by the negligence of the common carrier, the latter is bound by the common law to make compensation for the loss so occasioned, to the extent, at all events, of the apparent or presumable value of the article at the time it was bailed to him to be carried. But he is not, it seems, responsible for any extraordinary value which may have accidentally been imparted to it, and which could not, from the nature and appearance of the thing, be fairly presumed to exist. Thus, where the plaintiff had put a 50*l.* bank-note into his carpet-bag amongst his wearing apparel, and got on a coach and delivered the carpet-bag to the coachman, and on arrival of the coach at its place of destination the bag was lost, the jury gave a verdict for the value

(*z*) *Wilson* v. *Lanc. & York. Ry.*, 9 C.B. N.S. 632; 30 L.J. C.P. 232; *Schulze* v. *G. E. Ry.*, 19 Q.B.D. 30; 56 L.J. Q.B. 442.

(*a*) *Simpson* v. *L. & N. W. Ry.*, 1 Q.B.D. 274; 45 L.J. Q.B. 182.

(*b*) *Horne* v. *Midland Ry.*, L.R. 8 C.P. 131; 42 L.J. C.P. 59; *The Parana*, L.R. 2 P.D. 118; 45 L.J. P. 108.

of the wearing apparel, but not for the value of the note, and the court afterwards refused to increase the verdict by the amount of the note (*c*). In other cases, however, the plaintiff has recovered the full value of the article lost (*d*).

But the plaintiff is not entitled to recover damages for loss of wages of workmen kept unemployed by reason of the non-arrival of the goods, or for loss of profit which might have been made if the goods had been delivered in due course, if the carrier had no notice of the purpose for which the goods were wanted (*e*); and, if the carrier held the goods at the time of the loss in the character of a warehouseman, he cannot, in general, be made responsible for more than the actual value of the goods (*f*).

Where a warehouseman warehoused part of the goods at a place other than that agreed upon, and they were destroyed without negligence, it was held that the damages were not too remote (*g*). And so where an innkeeper contracted to stable horses, and then let the stables to another who turned out the plaintiff's horses which caught cold and were damaged, such damage was held not too remote (*h*).

Where the plaintiff complained that the defendant had hired him to carry a load of timber, and that he carried the timber, but the defendant would give no directions as to the place of deposit, and made the plaintiff's horses, which were heated, stay so long in the waggon that they took cold, and some of them died, and the rest were injured, it was held that the proximate cause of the injury to the horses was the plaintiff's own neglect, in not having them taken out of the waggon and put into a stable, and that the original wrongful act of the defendant, in not finding a place of deposit for the timber, was not sufficiently connected with the loss of the horses to render the defendant responsible for such loss (*i*).

Damages in respect of delay in delivery.—If by reason of goods not having been delivered in due time, the season for finding customers for them has passed away, and they are consequently of less value to the plaintiff, the deterioration in value may be considered in estimating the amount of damage, but not the profit

(*c*) *Miles* v. *Cattle*, 6 Bing. 743; 8 L.J. (O.S.) C.P. 271.

(*d*) *Sleat* v. *Fagg*, 5 B. & Ald. 342; *Walker* v. *Jackson*, 10 M. & W. 161; 12 L.J. Ex. 165; see Angell on Carriers, s. 262.

(*e*) *Le Peintur* v. *S. E. Ry.*, 2 L.T. 170; *Hadley* v. *Baxendale*, 23 L.J. Ex. 179; 9 Exch. 341; *Watson* v. *Ambergate, &c. Ry.*, 15 Jur. 448; and see *Horne* v. *Midland Ry.*, L.R. 8 C P. 131; 42 L.J. C.P. 59.

(*f*) *Henderson* v. *N. E. Ry.*, 9 W. R. 519.

(*g*) *Lilley* v. *Doubleday*, 7 Q.B.D. 510; 51 L.J. Q.B. 310.

(*h*) *McMahon* v. *Field*, 7 Q.B.D. 591; 50 L.J. Q.B. 552; disapproving *Hobbs* v. *L. & S. W. Ry.*, L.R. 10 Q.B. 111; 44 L.J. Q.B. 49; where plaintiff's wife catching cold was held too remote.

(*i*) *Virtue* v. *Bird*, 2 Lev. 196.

which would have been made upon the sale of them if they had been delivered at the proper time (*k*); or, where the goods consist of machinery, the presumed profit which would have been made by the use of them, during the time it took to replace them (*l*). The right measure is the market value of the goods at the place and time at which they ought to have been delivered, or, if there is no market, then the price at the place of manufacture, with the cost of carriage, and a reasonable sum for importer's profit (*m*). Hotel expenses incurred by the consignee while waiting for the delivery of the goods by the carrier are not recoverable (*n*).

Damages in cases of personal injuries.—A new trial will be granted in an action for personal injuries arising from a railway accident, where the damages found by the jury are so small as to show that they must have omitted to take into consideration some of the elements of damage (*o*), as well as where they are unreasonably large. The jury are to consider "what the plaintiff's income would probably have been, how long that income would probably have lasted, and all other contingencies to which a practice is liable" (*p*). The measure of damages is the loss of time, expense incurred, pain and suffering, and permanent injury causing pecuniary loss (*q*).

Claims against a common carrier for refusing to carry should show that the defendant is a common carrier of goods plying for hire between the place where the goods were tendered to him for conveyance and the place to which they were addressed; that the plaintiffs tendered to the defendant certain goods to be carried from one place to the other; that the defendant had room and the means of receiving and carrying them, and the plaintiffs were ready and willing to pay him his customary hire, yet the defendant would not receive and carry the goods, whereby the plaintiffs were put to great loss and inconvenience, setting forth any special damage that may have been sustained, and concluding with a claim for damages (*r*).

Defences to actions.—Where the defendant denies the receipt of the goods to be conveyed by him as a common carrier, or denies his receipt of them altogether, he must, by special defence, allege

(*k*) *Wilson* v. *Lanc. & York. Ry.*, 9 C.B. N.S. 632; 30 L.J. C.P. 232; *Simmons* v. *S. E. Ry.*, 7 Jur. N.S. 849; *G. W. Ry.* v. *Redmayne*, L.R. 1 C.P. 329; *Schulze* v. *G. E. Ry.*, 19 Q.B.D. 30; 56 L.J. Q.B. 442.

(*l*) *British Columbia Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 499; 37 L.J. C.P. 235.

(*m*) *O'Hanlan* v. *G. W. Ry.*, 6 B. & S. 484; 34 L.J. Q.B. 154.

(*n*) *Woodger* v. *G. W. Ry.*, L.R. 2 C.P. 318; 36 L.J. C.P. 177.

(*o*) *Phillips* v. *L. & S. W. Ry.*, 5 Q.B.D. 78, 280; 49 L.J. Q.B. 233.

(*p*) *Per* Jessel, M.R., *ib.*

(*q*) *Blake* v. *Mid. Ry.*, 18 Q.B. 93; 21 L.J. Q.B. 233; *Armsworth* v. *S. E. Ry.*, 11 Jur. 758. As to damages under Lord Campbell's Act, see Addison on Torts, 608 (ed. 7).

(*r*) *Pickford* v. *Grand Junction Ry.*, 8 M. & W. 372; 10 L.J. Ex. 382.

that he did not receive the goods to be carried as in the claim mentioned; if the plaintiff has claimed against him upon his liability as a common carrier, insuring the safe conveyance of the things he carries, and it appears that the things were delivered to him under a special contract, the cause of action will be disproved under this defence (*s*). If he denies the plaintiff's title or right to the possession of the property, he must allege that the property was not, at the time he received it to be carried, the property of the plaintiff (*t*); or, admitting that the plaintiff was the owner of the property at the time it was delivered to him, he may show that the plaintiff's right to the possession of it ceased, or had been determined, and that some third party had, since the bailment, become entitled to the property, and had demanded it of the defendant (*u*).

If the defendant relies upon the Common Carriers Act, he must by his defence show that the articles delivered to him for conveyance were of the description mentioned in the statute, and that at the time of the delivery of them to him to be carried, the value and nature of the goods were not declared by the plaintiff (*x*).

Evidence at trial—Proof of bailment.—To charge the common carrier for the loss of goods, however occasioned, it must of course be shown that the goods were either actually or constructively bailed to him or his servants to be carried. They must either have been delivered into his hands or into the hands of his servant or agent, or some person authorized by him to receive them. If they were merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or were placed in his cart, vessel, or carriage, without his knowledge and acceptance, or that of his servants or agents, there has of course been no bailment of the goods to him (*y*), and he cannot consequently be made responsible for the loss of them. If the common carrier's servant has been induced by the consignor to depart from the usual course of dealing, and to receive goods which he was not bound to receive and carry, under circumstances of hazard known to the consignor, but not disclosed to the carrier's servant, or on terms different from those on which alone he was authorized to receive them, the carrier will either not be responsible for the loss of the goods, as never having been delivered to him, or, at all events, not on his common-law

(*s*) *White* v. *G. W. Ry.*, 2 C.B. N.S. 7; 26 L.J. C.P. 158.

(*t*) *Cheesman* v. *Exall*, 6 Exch. 341; 20 L.J. Ex. 209.

(*u*) *Sheridan* v. *New Quay Co.*, 4 C.B. N.S. 618; 28 L.J. C.P. 58; *Europ. & Austral. R. M. Co.* v. *R. M. St. P. Co.*, 30 L.J. C.P. 246.

(*x*) *Pianciani* v. *L. & S. W. Ry.*, 18 C.B. 226; *Hart* v. *Baxendale*, 6 Exch. 789; 21 L.J. Ex. 123.

(*y*) *Selway* v. *Holloway*, 1 Ld. Raym. 46; *Buckman* v. *Levi*, 3 Campb. 414; *Lovett* v. *Hobbs*, 2 Show. 128.

liability of an insurer (*z*). If the consignor has made a private bargain with the driver of the cart of the common carrier for the conveyance of a parcel for a gratuity which was not intended by the parties to find its way into the pocket of the carrier, there has been then no bailment to the latter, and he is not consequently liable in case the parcel is lost; the bailment in such a case is a bailment to the driver alone, and he alone is responsible for the loss (*a*). If the plaintiff has merely hired the cart of the common carrier, and has sent his own servants with the goods to take charge of them, and there has been no actual bailment of the goods to the carrier, the latter is not responsible for their safety (*b*). If a passenger travelling on the outside of a stage-coach has kept a parcel under his own care, or taken it with him into the interior of the vehicle, without the knowledge of the carrier or his servants, and the thing is lost, the carrier is not responsible for the loss, as the article was never in any way intrusted to his keeping. But if the thing has been tendered to the carrier for conveyance, and the latter has directed the passenger to place it in any portion of the vehicle, there has been a constructive bailment of the goods, so as to charge the carrier for the loss of them. If luggage is placed with the knowledge of the carrier or his servants under the seat on which the passenger sits, the carrier will be responsible for its safe conveyance to the place of destination (*c*). A delivery of goods to a person sent or appointed by the carrier to receive them is, of course, a delivery to the carrier himself (*d*).

Proof of special contract.—We have seen that every special contract, notice, or condition, respecting the acceptance and carriage of goods by railway and canal companies, must be signed by the party sought to be affected thereby (*ante*, p. 967); and the signature must be fairly obtained, for where a person who was unable to read was told by a clerk of the company that the paper was a mere matter of form and of no consequence, and he signed the paper relying upon this assurance, it was held that the paper so foisted upon him was not binding (*e*).

Proof of jus tertii by common carrier.—A carrier who has received goods from a consignor is not estopped from denying the title of the latter to the goods. Common carriers are bound to receive goods properly tendered to them for carriage, and can make no inquiries into the ownership of them. The law protects them

(*z*) *Edwards* v. *Sherratt*, 1 East, 604; *Slim* v. *G. N. Ry.*, 23 L.J. C.P. 166; 14 C.B. 647.

(*a*) *Butler* v. *Basing*, 2 C. & P. 613; *Bignold* v. *Waterhouse*, 1 M. & S. 259; *Middleton* v. *Fowler*, 1 Salk. 282.

(*b*) *East India Co.* v. *Pullen*, 2 Str. 690.

(*c*) *Richards* v. *L. B. & S. C. Ry.*, 7 C.B. 848; 18 L.J. C.P. 251; and other cases, *ante*, pp. 958 *et seq.*

(*d*) *Syms* v. *Chaplin*, 5 Ad. & E. 634; 6 L.J. K.B. 25.

(*e*) *Simons* v. *G. W. Ry.*, 2 C.B. N.S. 620.

against the real owner if they have delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the pseudo-owner, from whom they could not refuse to receive the goods in the event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a common carrier furnishes ample ground for so holding (*f*).

(*f*) *Sheridan* v. *New Quay Co.*, 4 C.B. N.S. 618, 650; 28 L.J. C.P. 58; *Cheesman* v. *Exall*, 6 Exch. 341; 20 L.J. Ex. 209, overruling *Laclouch* v. *Towle*, 3 Esp. 114.

CHAPTER V.

OF CONTRACTS OF INDEMNITY.

SECTION I.

PRINCIPAL AND SURETY.

Contract of suretyship.—The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act, in case of the failure of another person, who is himself primarily responsible for the payment of such debt, or the performance of the act. To the contract of suretyship it is essential that there be a principal or third party primarily liable. If, therefore, no contract has been entered into with the third party on whose account the covenantor professes to act as surety, no liability attaches to the latter, as he cannot be made primarily liable upon a contract by which he has expressly imposed upon himself only a secondary liability as surety. From the terms of some contracts, a doubt frequently arises as to whether the contract is the contract of a surety coming in aid only of a principal debtor, and undertaking a secondary liability upon the default of the principal, or whether it is the contract of a principal contracting party stipulating for some benefit for a third party, who is not bound by the contract, and to whom no liability whatever attaches (*a*). When a man wishing to procure credit for his friend writes a letter to a shopkeeper, requesting him to supply such friend with goods, saying, "If *he* does not pay you, I will," the undertaking is the undertaking of a surety. If he says, "I will be answerable," or, "I will see you paid," the expressions are equivocal; and then we ought to look at the surrounding circumstances to see what the contract really was (*b*). If, upon examination of those circumstances, it should appear that the party to whom the goods have been furnished has been treated as the

(*a*) *Ante*, p. 28; *Spark* v. *Heslop*, 28 L.J. Q.B. 197; 1 E. & E. 563.

(*b*) Bayley, B., *Simpson* v. *Penton*, 2 Cr. & M. 433; 3 L.J. Ex. 126.

principal contracting party: as, for example, if the credit has been given to him in the tradesman's books, and he has been applied to for payment: then the promisor can only be made liable as a surety after default on the part of such principal contracting party. If the promisor is himself interested in the subject-matter of the promise or the transaction to which it relates, he will stand in the position of a principal contracting party (*c*). But, where B. verbally promised that, if M. would supply C. with iron, and take C.'s acceptances, he would discount them, it was held that this was a promise to answer for the default of another, and that M. could not recover against B. on his refusing to discount the acceptances (*d*).

Authentication of guarantees.—The legislature has thought fit to require the engagement to be authenticated by writing; and it has been enacted, as previously mentioned, by sect. 4 of the Statute of Frauds (*ante*, pp. 28—31), that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the AGREEMENT upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorised (*dd*). Formerly, if the guarantee or undertaking was made by simple contract or by writing not under seal, the consideration for the promise, as well as the promise itself, must have been disclosed upon the face of the writing; but, by the 19 & 20 Vict. c. 97, s. 3, no special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the person to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. But parol evidence is not admissible to explain the promise; and, therefore, the whole promise must be in writing, or the memorandum will be insufficient (*e*). If the writing is so vague that the nature of the undertaking cannot be made out from the terms of the instrument, it will not constitute a sufficient memorandum of the promise (*f*). If, therefore, the name of the principal intended to be guaranteed is left out or left in blank, there is no

(*c*) *Fitzgerald* v. *Dressler*, 7 C.B. N.S. 374; 29 L.J. C.P. 113.

(*d*) *Mallet* v. *Bateman*, L.R. 1 C.P. 163; 35 L.J. C.P. 40.

(*dd*) See *Harburg India Rubber Comb Co.* v. *Martin*, (1902) 1 K.B. 778; 71 L.J. K.B. 529.

(*e*) *Holmes* v. *Mitchell*, 7 C.B. N.S. 361; 28 L.J. C.P. 301.

(*f*) *Ibid.*

sufficient memorandum of the contract (*g*). Parol evidence is, however, admissible to show whether the surety signed the guarantee, and in what capacity he signed it, if such evidence does not contradict the document itself (*h*). A statement in the will of the guarantor he had guaranteed and confirming the guarantee has been held to be a sufficient memorandum to satisfy the statute (*i*). The Statute of Frauds (see *ante*, p. 28) does not apply to the case where the party giving the guarantee is himself liable to the demand which he is purporting to guarantee. The debt must be exclusively the debt, default, or miscarriage of another to bring it within the statute (*k*).

Primary and secondary liabilities.—When money is advanced, or goods are supplied, to a principal debtor, on the security of a joint and several covenant, or a joint and several promissory note, executed by the principal debtor and his sureties for the repayment of the money or of the price, all the co-covenantors are primarily liable on the face of the instrument, and are bound to see that the money is paid on the day appointed for payment, so that, if default is made, they may be at once sued upon the instrument. Formerly, when two or more persons signed a joint and several promissory note as principals, it was not allowed, at common law, to modify the effect of the contract by showing that one of them signed only as surety for the other; but now the fact may be pleaded and given in evidence for the purpose of giving the party so signing the equitable rights of a surety, but not for the purpose of establishing a different contract from that evidenced by the writing, such as that a party who has contracted a primary obligation on the face of the contract was not intended to be primarily liable, but had agreed only to be secondarily liable after the default of another joint contractor (*l*).

Consideration when stated on the face of a guarantee.—We have already seen that a bygone transaction cannot be made a good consideration for a promise (*ante*, p. 7); but, if there is a valid consideration in point of fact, the mere statement of it in the past tense on the face of a guarantee will not invalidate the contract. The consideration, if disclosed, need not be expressed in words of form, or with technical accuracy (*m*). So where the defendant, for

(*g*) *Williams* v. *Lake*, 2 E. & E. 349; 29 L.J. Q.B. 1.

(*h*) *Young* v. *Schuler*, 11 Q.B.D. 651.

(*i*) *Hoyle, In re*, (1893) 1 Ch. 85; 62 L.J. Ch. 182.

(*k*) *Orrell* v. *Coppock*, 26 L.J. Ch. 269, *ante*, pp. 28—31.

(*l*) *Pooley* v. *Harradine*, 7 E. & B. 431; 26 L.J. Q.B. 156; *Greenough* v. *McClelland*, 2 E. & E. 424; 30 L.J. Q.B. 15; *Manley* v. *Boycot*, 2 E. & B. 46; 22 L.J. Q.B. 265; *Mut. Loan Fund, &c.* v. *Sudlow*, 5 C.B. N.S. 453; 28 L.J. C.P. 108; *Lawrence* v. *Walmsley*, 12 C.B. N.S. 809; 31 L.J. C.P. 143.

(*m*) *Pace* v. *Marsh*, 8 Moore, 59; 1 L.J. (O.S.) C.P. 69; *Boehm* v. *Campbell*, 3 Moore, 15; *Oldershaw* v. *King*, 2 H. & N. 519; 27 L.J. Ex. 120.

the purpose of inducing the plaintiff to give his father time for the payment of a debt, signed a promissory note making himself and his father jointly liable to the plaintiff for the amount, and the plaintiff forbore to sue the father for several years, it was held that there was good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing (*n*). The contract must be interpreted in connection with surrounding circumstances, in order to ascertain whether it was intended to apply to past or to future transactions; and, in case of doubt and ambiguity, it would seem that parol evidence is admissible to show that the parties meant, not a past, but a future transaction (*o*); and the courts will lean in favour of such a construction as will uphold the contract (*p*). Thus, where the defendant gave to the plaintiffs the following guarantee: "As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account," it was held that the expression "for goods supplied" did not necessarily import a past transaction, and ought to be read "for goods to be supplied" (*q*). If the consideration was a future valid consideration, and not a past transaction, the guarantee will be upheld as a valid instrument (*r*). But, if there are no future advances, and the instrument, construed in connection with surrounding circumstances, does not show a future consideration, but refers altogether to a past transaction, it is invalid (*s*). If there is any consideration for a guarantee, the court will not take notice of its inadequacy (*t*). An indorsement on a contract of a guarantee for the faithful performance of the contract by one of the contracting parties may be read in connection with the contract, in order to establish the consideration (*u*).

Proposals to guarantee not amounting to concluded contract.— Care must be taken in all cases to mark the distinction between a consummate guarantee, and a mere proposal, or offer, or tender of a guarantee which must be accepted, and the acceptance notified to the maker, and his final assent to the engagement be obtained, ere it can become a perfect contract. Where the defendant wrote a

(*n*) *Crears* v. *Hunter*, 19 Q.B.D. 341; 56 L.J. Q.B. 518.

(*o*) *Hoad* v. *Grace*, 7 H. & N. 494; 31 L.J. Ex. 98.

(*p*) *Broom* v. *Batchelor*, 1 H. & N. 263; 25 L.J. Ex. 299.

(*q*) *Hoad* v. *Grace*, *supra*.

(*r*) *Bainbridge* v. *Wade*, 16 Q.B. 99; 20 L.J. Q.B. 7; *Steele* v. *Hoe*, 19 L.J. Q.B. 89; *Edwards* v. *Jevons*, 19 L.J. C.P. 50; 8 C.B. 436; *Colbourn* v. *Dawson*, 20 L.J. C.P. 154; 10 C.B. 773; *Brooks* v. *Haigh*, 10 Ad. & E. 334.

(*s*) *Bell* v. *Welch*, 9 C.B. 168; 19 L.J. C.P. 184; *Allnutt* v. *Ashenden*, 5 M. & Gr. 392; 12 L.J. C.P. 124; *Westhead* v. *Sproson*, 30 L.J. Ex. 265; 6 H. & N. 728.

(*t*) *Dutchman* v. *Tooth*, 7 Sc. 710.

(*u*) *Coldham* v. *Showler*, 3 C.B. 312; 15 L.J. C.P. 261.

letter to the plaintiffs to the following effect:—"Gentlemen,—As I understand Messrs. Anderson and Co. have given you an order for rigging, &c., which will amount to about 4,000*l.*, I can assure you, that from what I know of their honour and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guarantee you against any loss from giving them this credit;" and this letter was given by the defendant to Anderson and Co., who handed it over to the plaintiffs, and the latter thereupon furnished the rigging and other articles, and, being unable to procure payment from Anderson and Co., brought an action against the defendant, it was held that the letter did not import a perfect guarantee, but only a proposition tending to a guarantee; that it was a mere overture or offer; and that, if the plaintiffs had accepted it, and intended to treat it as a guarantee, they ought to have given notice to the defendant (*x*).

If references are required from, and given by, an intended surety, and the creditor means to dispense with the references, and act upon the guarantee without them, he is bound to give notice to the surety of the intended renunciation before he acts upon the guarantee (*y*).

Conditions precedent.—When the liability of the surety attaches only on the happening of some precedent act or event, it must be fully established that the event has happened (*z*).

Bonds to secure faithful services.—If the surety has bound himself by a penal obligation under seal for the performance of some contract or duty by his principal, and the time for which the surety is to be bound is marked out in the recitals or condition, it cannot afterwards be extended by any general words. If the recital sets forth the appointment of the party, on whose behalf the surety consents to become bound, to some office or employment, and the condition of the bond is for the good conduct and faithful service of the party in such office or employment, the liability of the surety will be co-extensive with the duration of the office; if the office is an annual office, the liability will not extend beyond the current year of office (*a*); if it is a fixed and permanent employment for the life of such party, the liability of the surety will continue during the whole of the life of the latter; if, on the other hand, the duration is uncertain, as, for instance, if it is holden at the will of the employer, the liability will be as uncertain as the time of the employment (*b*). Moreover, if a bond is

(*x*) *M'Iver* v. *Richardson*, 1 M. & S. 557; *Mozley* v. *Tinkler*, 1 Cr. M. & R. 692; 4 L.J. Ex. 84.

(*y*) *Morten* v. *Marshall*, 2 H. & C. 305; 33 L.J. Ex. 54.

(*z*) *Moor* v. *Roberts*, 3 C.B. N.S. 841; 27 L.J. C.P. 161.

(*a*) *Cambridge (Mayor)* v. *Dennis*, 27 L.J. Q.B. 474; E. B. & E. 660.

(*b*) *Dartmouth (Mayor)* v. *Silly*, 7 E. & B. 97; 26 L.J. Q.B. 90.

given to secure the faithful services of the principal in one office at a specified salary, it will not extend to a different office at the same salary, or to the same office at a different and reduced salary (*c*); and a surety who becomes responsible for the good conduct of his principal as a clerk, will not be bound for him if he is afterwards employed as "a manager" (*d*). But there must be a substantial change in the office of employment, or the surety will not get rid of his liability (*e*). In an action upon a bond to secure the faithful service of a deputy-postmaster, it appeared by the recitals of the bond that the postmaster-general had deputed Jenkins to be deputy-postmaster "for the term of six months following," and the condition was, that Jenkins should, during all the time he continued deputy-postmaster, faithfully and diligently perform and execute the duties of the office; and it was held that the liability of the surety was restricted to the six months specified in the recitals (*f*). And, although the recital of a bond, setting forth the appointment of the principal to a certain office, does not state the nature or duration of the office, or in any way limit the period of the service for the performance of which the surety binds himself, yet, if the office is in point of fact an annual office, and there is a fresh appointment each year, the surety is only answerable for the execution of the duty for the current year (*g*).

Extent and duration of liability of surety.—If the surety by express words plainly manifests an intention to be bound for the faithful service of the party, not only for the current year of office, but for all succeeding years under any fresh appointment, the obligation will continue in force as long as the obligee may think fit to continue the employment (*h*). Thus, where a bond reciting the appointment of the principal to an office was conditioned for the due fulfilment by him of the duties thereof, "during such time as he shall continue in the said office, whether by virtue of his said appointment, or of any re-appointment thereto," it was held that the obligation was not confined to the current year of office, but extended to all subsequent years during which the party was continually re-appointed (*i*). And the surety may, by the terms

(*c*) *N. W. Ry.* v. *Whinray*, 10 Exch. 77; 23 L.J. Ex. 261; *Holland* v. *Lea*, 9 Exch. 430; 23 L.J. Ex. 122; *Frank* v. *Edwards*, 8 Exch. 214; 22 L.J. Ex. 42.

(*d*) *Anderson* v. *Thornton*, 3 Q.B. 271; 11 L.J. Q.B. 265; *Whitcher* v. *Hall*, 5 B. & C. 276; 4 L.J. (O.S.) K.B. 167.

(*e*) *Portsea Island Union* v. *Whillier*, 29 L.J. Q.B. 150; 2 E. & E. 755.

(*f*) *Arlington* (*Lord*) v. *Merricke*, 2 Wms. Saund. 411, a; *Stoughton* v. *Day*, Al. 10; Sty. 18; *Bamford* v. *Iles*, 3 Exch. 380; 18 L.J. M.C. 49; *Liverpool Water Co.* v. *Atkinson*, 6 East, 512.

(*g*) *Hassell* v. *Long*, 2 M. & S. 363; *Peppin* v. *Cooper*, 2 B. & Ald. 431; *Wardens of St. Saviour's* v. *Bostock*, 2 Bos. & P. N.R. 175; *Leadley* v. *Evans*, 9 Moore, 102; 2 L.J. (O.S.) C.P. 108; *Lond. Assur. Co.* v. *Bold*, 6 Q.B. 526; 14 L.J. Q.B. 50; *Cambridge* (*Mayor*) v. *Dennis*, 27 L.J. Q.B. 474; E. B. & E. 660.

(*h*) *Oswald* v. *Berwick* (*Mayor*), 5 H.L.C. 856; 25 L.J. Q.B. 383.

(*i*) *Augero* v. *Keen*, 1 M. & W. 390; 5 L.J. Ex. 233.

of an express contract under seal, render himself responsible for past, present, and future receipts and payments, and preceding debts and defaults, as well as those that are to come (*k*). And, if the duration of the employment is uncertain—if, for example, it is held or continues *durante bene placito*—and there is nothing in the language of the recital or of the condition directly or indirectly limiting the period of liability, the duration of the obligation of the surety is then as uncertain as the period of employment, and will continue as long as the employment lasts, though it should be for the whole life of the principal or party employed (*l*).

Release of surety.—The surety cannot, when no time is marked out by the contract for the termination of his liability, discharge himself from the liability he has voluntarily undertaken (*m*); and the courts, therefore, in all cases construe doubtful contracts of suretyship (when they are under seal and the surety has no power of revoking them) in favour of the surety, so as to narrow rather than enlarge his liability.

Discharge of surety by change in employment of principal.—In the case of a guarantee of the good conduct of the principal in any particular course of dealing with the plaintiffs, that course of dealing is part of the essence of the contract with the surety, so that, if it be altered, the surety is discharged (*n*); but, if the course of dealing is left to the option of the plaintiffs entirely, or within certain limits, the surety cannot then complain of a variation to which he has agreed (*o*). Where there is a bond of suretyship for the faithful execution of the duties of a public office, and, by the act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided (*p*). But, where a principal is appointed to two distinct employments, and his sureties guarantee by one bond his good conduct in both, they are not discharged from liability as to one of the employments by the fact of his duties being altered and enlarged in the other, or as to either by the fact that an additional and distinct office is undertaken (*q*). Where the condition of a bond was that a clerk should account for and pay over to the obligee, his executors or administrators, all moneys, bills, &c., which he should receive in the course of his employment as clerk to the obligee, it was held that the

(*k*) *Saunders* v. *Taylor*, 9 B. & C. 35, 41.

(*l*) *Curling* v. *Chalklen*, 3 M. & S. 509; *M'Gahey* v. *Alston*, 1 M. & W. 386.

(*m*) But see as to this *Burgess* v. *Eve*, L.R. 13 Eq. 450; 41 L.J. Ch. 515; *Phillips* v. *Foxhall*, L.R. 7 Q.B. 666; 41 L.J. Q.B. 293.

(*n*) *Arlington* (*Lord*) v. *Merricke*, 2 Wms. Saund. 403.

(*o*) *Stewart* v. *M'Kean*, 10 Exch. 689; 24 L.J. Ex. 145.

(*p*) *Pybus* v. *Gibb*, 6 E. & B. 911; 26 L.J. Q.B. 41.

(*q*) *Skillett* v. *Fletcher*, L.R. 2 C.P. 469; 36 L.J. C.P. 206.

liability of the surety ceased with the death of the obligee, and could not be extended to a new employment by the executors (*r*). And, where the condition of the bond was that a clerk should, during the time he continued in the service of the plaintiff, faithfully account for and pay over all moneys which he should receive belonging to the plaintiff, and the breach assigned was the non-payment by the clerk of money which he had received on account of the plaintiff and his partner, it was held that this was beyond the scope of the defendant's engagement (*s*).

Bonds and guarantees under seal to partnerships and associations.—If a bond be given to secure the faithful services of a clerk to a firm in partnership, or the repayment of advances made by the firm, and any change takes place in the constitution of the co-partnership, either by the death or retirement of existing partners, or the accession of new partners, the contract of suretyship is at an end, unless it appears to have been the intention of the contracting parties that the security should be a continuing security, and should remain in force throughout all changes in the co-partnership (*t*). This was held to be the case where a bond was given by a surety to the several partners of a banking house *nominatim* to secure the repayment to them, "or either of them," of advances to be made "by them" to the principal (*u*). This principle of construction, narrowing the liability of the surety, applies with still greater force in the case of bonds conditioned for the repayment of advances to be made *to* a firm, or to either of the partners. Where, therefore, a surety becomes bound for the repayment of advances made to two persons in partnership, or to either of them, and one dies, the liability of the surety will not extend to advances made to the survivor (*x*). If the liability of the surety is intended to continue after the retirement as well as the death of one of several persons in partnership, such intention must be manifested with a precision not to be mistaken (*y*). By sect. 18 of the Partnership Act, 1890 (*z*), "a continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the

(*r*) *Barker* v. *Parker*, 1 T.R. 287, 295.

(*s*) *Wright* v. *Russell*, 3 Wils. 530; 2 W. Bl. 934; *Napier* v. *Bruce*, 8 Cl. & Fin. 470; *Montefiore* v. *Lloyd*, 15 C.B. N.S. 203; 33 L.J. C.P. 49.

(*t*) *Bellairs* v. *Ebsworth*, 3 Campb. 53; *Chapman* v. *Beckington*, 3 Q.B. 703; 12 L.J. Q.B. 61; *Lond. Assur. Co.* v. *Bold*, 6 Q.B. 524; 14 L.J. Q.B. 50; *Mills* v. *Alderbury Guardians*, 18 L.J. Ex. 252; 3 Exch. 590; *Montefiore* v. *Lloyd*, 15 C.B. N.S. 203; 33 L.J. C.P. 49; *Barclay* v. *Lucas*, 3 Doug. 321.

(*u*) *Strange* v. *Lee*, 3 East, 489; *Weston* v. *Barton*, 4 Taunt. 673; *Dance* v. *Girdler*, 4 Bos. & P. 34.

(*x*) *Simson* v. *Cooke*, 8 Moore, 605; 2 L.J. (O.S.) C.P. 74.

(*y*) *Camb. University* v. *Baldwin*, 5 M. & W. 580; *Backhouse* v. *Hall*, 6 B. & S. 507; 34 L.J. Q.B. 141.

(*z*) 53 & 54 Vict. c. 39, s. 18.

constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given" (*a*).

Limitation of liability of surety.—If a bond or guarantee is given by a surety to secure the repayment of advances of money to the principal, provided such advances do not exceed in the whole, at any one time, a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but does not render the obligation void if the advances go beyond it (*b*), unless that clearly appears to have been the intention of the parties (*c*). A guarantee to secure moneys to be advanced to a third party on discount, "for the space of twelve calendar months," is countermandable within that time although some bills may have been discounted and repaid before notice (*d*). Where a surety gives a continuing guarantee limited in amount to secure the *floating balance* which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee limited in amount for a debt already ascertained which exceeds that limit is not *primâ facie* to be construed as a security for part of the debt only. It is a question of construction for the Court (*e*). Where the wife guaranteed as follows: "In consideration of your having at my request agreed to supply goods to my husband, I do hereby guarantee to you the sum of 500*l.*," it was held to guarantee the payment for goods supplied after the date of the guarantee only (*f*).

Continuing liabilities.—Where a bond, given by the defendant as surety, recited that the plaintiffs had agreed to advance to the principal "any sum of money not exceeding, at any one or more time or times, the sum of 200*l.* in the whole," and the bond was conditioned for the payment by the defendant, as surety, of "all and every such sum or sums of money, not exceeding the sum of 200*l.* as aforesaid," as the plaintiffs should advance, it was held that this bond was a continuing security, not confined to the first 200*l.* advanced, but extending to all future advances and payments that might at any time be made by the plaintiffs (*g*). The courts, however, in the case of contracts of suretyship under seal, lean in favour of a construction limiting the liability of the surety

(*a*) *Backhouse* v. *Hall*, 6 B. & S. 507; 34 L.J. Q.B. 141; *Myers* v. *Edge*, 7 T.R. 254; *Dry* v. *Davy*, 10 Ad. & E. 30; 8 L.J. Q.B. 209.

(*b*) *Seller* v. *Jones*, 16 M. & W. 112; 16 L.J. Ex. 20; *Gee* v. *Pack*, 33 L.J. Q.B. 49; *Backhouse* v. *Hall*, *supra*.

(*c*) *Parker* v. *Wise*, 6 M. & S. 246; *Gordon* v. *Rae*, 8 E. & B. 1605; 27 L.J. Q.B. 185.

(*d*) *Offord* v. *Davies*, 12 C.B. N.S. 748; 31 L.J. C.P. 319.

(*e*) *Ellis* v. *Emmanuel*, 1 Ex.D. 157; 46 L.J. Ex. 25.

(*f*) *Morrell* v. *Cowan*, 7 Ch. D. 151; 47 L.J. Ch. 73.

(*g*) *Batson* v. *Spearman*, 9 Ad. & E. 298.

to some particular advance, so as to confine it within an ascertained definite limit, rather than extending it to a continuous supply, creating an indefinite liability, from which the surety might have no means of relieving himself during the whole life of the principal (*h*). In the case of simple contracts, on the other hand, no such leaning is found. Thus, where the defendant gave to the plaintiff a guarantee for the payment of "any goods he hath or may supply W. P. to the amount of 100*l.*," it was held that the guarantee was a continuing guarantee, extending to all supplies of goods at any time furnished, so long as the parties continue to deal together (*i*). So, where the guarantee was, "In consideration of your supplying my nephew with earthenware and china, I hereby guarantee the payment of any bills you may draw upon him on account thereof to the amount of 200*l.*," it was held to be a continuing guarantee, remaining as a standing security to the amount specified, so long as the supply of earthenware lasted (*k*). From a continued liability under seal the surety has no means of escape at common law; he cannot recall the bond, covenant, or obligation, that he has entered into, and say that he will be no longer responsible for advances to the principal, unless in the contract of suretyship he has expressly reserved to himself such a power (*l*); and his liability may be prolonged indefinitely, and for the whole life of the principal. But, in the case of simple contracts, the surety (though liable for all advances that have been made on the faith of his promise) may at any time revoke such promise, and discharge himself from the continuing liability, by giving notice to that effect.

The following guarantees have been held to import a continuing liability: "I consider myself bound for any debt A. B. may contract with you in his business not to exceed 100*l.*" (*m*); "I undertake to be answerable to the extent of 100*l.* for any tallow supplied by you to A. B." (*n*); "I hereby agree to guaranty the payment of goods to be delivered . . . to S. & Co., according to the custom of their trading with you in the sum of 200*l.*" (*o*); "As an inducement to you to sell W. C. goods and continue your dealings with him, I hereby undertake to guarantee you in a sum of 100*l.* payable to you in default on the part of the said W. C. for two months" (*p*); "In consideration of your agreeing to supply

(*h*) *Kirby* v. *Marlborough* (*Duke*), 2 M. & S. 18.
(*i*) *Mason* v. *Pritchard*, 12 East, 227.
(*k*) *Mayer* v. *Isaac*, 6 M. & W. 605; 9 L.J. Ex. 225; *Hitchcock* v. *Humfrey*, 5 M. & Gr. 559; 12 L.J. C.P. 235; *Horlor* v. *Carpenter*, 27 L.J. C.P. 1; 3 C.B. N.S. 172.
(*l*) *Hassell* v. *Long*, 2 M. & S. 370; *Calvert* v. *Gordon*, 3 M. & R. 124; 7 L.J. (O.S.) K.B. 77.
(*m*) *Merle* v. *Wells*, 2 Campb. 413.
(*n*) *Bastow* v. *Bennett*, 3 Campb. 220.
(*o*) *Hargrave* v. *Smee*, 3 Moo. & P. 573; 8 L.J. (O.S.) C.P. 46.
(*p*) *Allan* v. *Kenning*, 2 M. & Sc. 768.

goods to K., we agree to guarantee any future debt with you to the amount of 600*l.*" (*q*); "In consideration of the credit given by the H. G. C. Co. to my son, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*; and, in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing, to an amount not exceeding the sum of 100*l.*" (*r*).

Guarantees not importing continuing liability.—The following guarantees have, on the other hand, been held to limit the liability of the surety to one solitary transaction, or to a particular course of dealing to a certain amount, and to be discharged or extinguished as soon as advances to the amount named have been made, and satisfied by the principal: "I engage to guarantee the payment of A. M. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of you" (*s*); "I agree to be answerable to K. for the amount of five sacks of flour, to be delivered to W. P., payable in one month" (*t*); "I agree to be answerable for the payment of 50*l.* for T. L., in case he does not pay for the gin he receives from you" (*u*). Where the guarantee was, "In consideration of your supplying Mr. S. with goods to the extent of 100*l.*, I undertake to pay you if he does not," it was held that the liability of the surety was dependent upon credit to the amount of 100*l.* being given if required, but that, if the debtor did not demand 100*l.* worth of goods, the surety would be liable for whatever was supplied (*x*). But, where the surety guarantees only the payment of one sum *in solido*, provided goods to the amount guaranteed are furnished, there is no cause of action against the surety until the full amount has been supplied (*y*).

Conditions precedent to liability of surety.—If the continued liability of the surety is made dependent upon the observance of certain conditions by the creditor, these terms must be strictly obeyed, or the surety will be discharged (*z*). Therefore, where the creditor took a warrant of attorney from the principal debtor with a stipulation for the benefit of the surety that, on notice from the latter, the creditor should enter up judgment and levy execution upon the warrant of attorney, and apply the proceeds in reduction

(*q*) *Martin* v. *Wright*, 6 Q.B. 917; 14 L.J. Q.B. 142.

(*r*) *Wood* v. *Priestner*, L.R. 2 Ex. 66, 282; 36 L.J. Ex. 42, 127. See for other cases of continuing guarantees, *Heffield* v. *Meadows*, L.R. 4 C.P. 595; *Laurie* v. *Scholefield*, L.R. 4 C.P. 622; 38 L.J. C.P. 290; *Coles* v. *Pack*, L.R. 5 C.P. 65; 39 L.J. C.P. 63; *Nottingham Hide, Skin, & Fat Market Co.* v. *Bottrill*, L.R. 8 C.P. 694; 42 L.J. C.P. 256.

(*s*) *Melville* v. *Hayden*, 3 B. & Ald. 593.

(*t*) *Kay* v. *Groves*, 6 Bing. 276; 7 L.J. (O.S.) C.P. 9.

(*u*) *Nicholson* v. *Paget*, 1 Cr. & M. 48; 2 L.J. Ex. 18.

(*x*) *Dimmock* v. *Sturla*, 14 M. & W. 758; 15 L.J. Ex. 65.

(*y*) *Johnson* v. *Gandy*, 26 L.T. 72.

(*z*) *Watts* v. *Shuttleworth*, 5 H. & N. 235; 29 L.J. Ex. 234; *Lawrence* v. *Walmsley*, 12 C.B. N.S. 808; 31 L.J. C.P. 143.

of the debt, and the creditor neglected to file the warrant of attorney, and to keep it up as an efficient security, it was held that the surety was discharged (*a*). Where a party has consented to be co-surety with another, he cannot be made responsible if the other party refuses or neglects to be bound. Where, therefore, one of two intended co-sureties executed a deed of covenant for the repayment of advances to be made to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety, and the deed never was executed by the other surety, it was held that the executing surety was entitled in equity to be discharged from every part of the debt (*b*). But a surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his (*c*). A surety for a contractor is not discharged from liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer (*d*).

Duty of person guaranteed.—Where the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged (*e*). Thus, in the cases of bonds and guarantees given to an employer to secure the faithful services of a servant in his employment, the surety has a right to expect from the employer that he will call upon such servant to account in the ordinary course of business, and that he will not trust him beyond the bounds of ordinary prudence (*f*). But the mere passive inactivity of the principal to whom a guarantee has been given, or his neglect to call the principal debtor to account, does not discharge the surety; there must be some positive act done to the prejudice of the surety, or such a degree of negligence as to imply connivance, and amount to fraud (*g*). The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer fails to use all the means in his

(*a*) *Watson* v. *Alcock*, 22 L.J. Ch. 858; 4 De G. M. & G. 242.

(*b*) *Evans* v. *Bremridge*, 8 De G. M. & G. 100; 25 L.J. Ch. 334; *Bonser* v. *Cox*, 4 Beav. 379; 10 L.J. Ch. 395.

(*c*) *Cooper* v. *Evans*, L.R. 4 Eq. 45; 36 L.J. Ch. 431.

(*d*) *Kingston-upon-Hull* (*Mayor*) v. *Harding*, (1892) 2 Q.B. 494; 62 L.J. Q.B. 55.

(*e*) *Watts* v. *Shuttleworth*, 29 L.J. Ex. 234; 5 H. & N. 235.

(*f*) *Smith* v. *Bank of Scotland*, 1 Dow, 292.

(*g*) *Durham* (*Mayor*) v. *Fowler*, 22 Q.B.D. 394; 58 L.J. Q.B. 246.

power to guard against the consequences of dishonesty (*h*). If, however, the master discovers that the person employed has been guilty of dishonesty, he must inform the surety, who has thereupon a right to withdraw from his guarantee (*i*); and, if he omits so to do, the surety will be discharged so far as subsequent acts of dishonesty are concerned (*j*), unless the surety must under the circumstances have known of the dishonest acts (*k*).

Alteration of principal obligation discharging surety.—If a new contract is substituted in the place of the original contract, or if the original contract is altered in any material point without the surety's consent, so as to constitute a new agreement varying substantially from the former, the surety is no longer bound (*l*). But, where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other (*m*). Where the defendant had as surety signed a joint and several promissory note with the principal debtor, having no reason to suppose that any one else was to sign it, and afterwards the payee, without the knowledge of the defendant, induced another person to sign it in order to strengthen the security, it was held that the defendant was discharged from liability (*n*). If the guarantee is a guarantee of the honesty of the principal in any particular course of dealing with the plaintiff, that course of dealing is part of the agreement of the plaintiff with the surety, and the plaintiff cannot alter it and keep the surety liable. But, when the course of dealing is left to the option of the plaintiff altogether, or within certain limits, and is allowed by the contract, the surety cannot complain of an alteration which he has himself permitted (*ante*, p. 1008).

Extension of time of payment.—If a man becomes surety for the payment of a debt secured by the bond of the debtor, payable at a given day, and the creditor, before the day of payment has arrived, by an indorsement under seal on the bond, extends the time of payment, this is a material variation, amounting to the

(*h*) *Black* v. *Ottoman Bank*, 15 Moo. P.C. 472; *Mansfield Union* v. *Wright*, 9 Q.B.D. 683.

(*i*) *Burgess* v. *Eve*, L.R. 13 Eq. 450; 41 L.J. Ch. 515.

(*j*) *Phillips* v. *Foxall*, L.R. 7 Q.B. 666; 41 L.J. Q.B. 293; *Sanderson* v. *Aston*, L.R. 8 Ex. 73; 42 L.J. Ex. 64.

(*k*) *Caxton Union* v. *Dew*, 68 L.J. Q.B. 380.

(*l*) *Whitcher* v. *Hall*, 5 B. & C. 276; 4 L.J. (O.S.) K.B. 167; *Bonar* v. *Macdonald*, 3 H.L.C. 239; *Gen. St. Nav. Co.* v. *Rolt*, 6 C.B. N.S. 550; *Polak* v. *Everett*, 1 Q.B.D. 669; 45 L.J. Q.B. 369; *Greenwood* v. *Francis*, (1899) 1 Q.B. 312; 68 L.J. Q.B. 228.

(*m*) *Harrison* v. *Seymour*, L.R. 1 C.P. 518; 35 L.J. C.P. 264.

(*n*) *Gardner* v. *Walsh*, 5 E. & B. 83; 24 L.J. Q.B. 284, overruling *Catton* v. *Simpson*, 8 Ad. & E. 136. See also *Holme* v. *Brunskill*, 3 Q.B.D. 495; 47 L.J. Q.B. 610; *Bolton* v. *Salmon*, (1891) 2 Ch. 48; 60 L.J. Ch. 239.

substitution of a new engagement in the place of the original contract, for the performance of which the surety is not bound (*o*). Any enlargement of the time of payment by a binding contract with the principal debtor which ties up the hands of the creditor, and prevents him from suing the principal debtor upon the original obligation, discharges the surety, if it has been made without his authority, inasmuch as the situation of the surety is varied and his liability prolonged beyond what was originally contemplated (*p*). As soon as the principal debtor has made default, the surety has a right to step in and pay the debt, and require the creditor to sue, or allow him to sue, the principal in his, the creditor's, name; and, if the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue the principal debtor, he thereby discharges the surety (*q*). But a contract with a stranger, or even with a co-surety (*r*), to give time to the principal debtor, which contract does not prevent the surety from discharging the debt and pursuing his remedy over against the principal debtor, will not discharge such surety from liability (*s*); and it must be proved that there was either a new security given to extend the time of payment, or a binding agreement upon sufficient consideration to suspend the remedy (*t*). If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal without the consent or knowledge of the surety, the surety is discharged (*u*). The mere giving of additional security by the principal to the creditor is not of itself a giving of time by the creditor to the principal (*x*).

There is no obligation of active diligence against the principal debtor on the part of the creditor. It is the business of the surety to see that the principal pays, not that of the creditor (*y*). A mere promise, therefore, without consideration, not to sue the principal debtor for a certain time will not discharge the surety (*z*), nor mere

(*o*) *Rees* v. *Berrington*, 2 Ves. 542.

(*p*) *Combe* v. *Woolf*, 8 Bing. 162; 1 L.J. C.P. 51; *Eyre* v. *Bartrop*, 3 Mad. 221; *Nisbet* v. *Smith*, 2 Br. C.C. 578. As to guarantees authorizing the giving time to the principal debtor, see *Cowper* v. *Smith*, 4 M. & W. 519; *Un. Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L.J. Ex. 133.

(*q*) Williams, J., *Strong* v. *Foster*, 17 C.B. 219; 25 L.J. C.P. 106; *Bailey* v. *Edwards*, 34 L.J. Q.B. 45; 4 B. & S. 761; *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, L.R. 7 Ch. 142; 41 L.J. Ch. 332.

(*r*) *Clarke* v. *Birley*, 41 Ch.D. 422; 58 L.J. Ch. 616.

(*s*) *Frazer* v. *Jordan*, 8 E. & B. 303; 26 L.J. Q.B. 288.

(*t*) Parke, B., *Moss* v. *Hall*, 5 Exch. 50; 19 L.J. Ex. 205; *Bingham* v. *Corbitt*, 34 L.J. Q.B. 37.

(*u*) *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L.R. 7 H.L. 348; *Rouse* v. *Bradford Banking Co.*, (1894) A.C. 586; 63 L.J. Ch. 890.

(*x*) *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, *supra*.

(*y*) *Wright* v. *Simpson*, 16 Ves. 734; Jervis, C.J., *Strong* v. *Foster*, 17 C.B. 216; 25 L.J. C.P. 106.

(*z*) *Tucker* v. *Laing*, 2 K. & J. 745, 749.

laches, or forbearance, on the part of the creditor, to press the debtor or party liable, and sue him for the money, without any suspension of the legal remedies (*a*). Nor will a parol agreement to enlarge the time of payment discharge the surety, when the principal obligation is under seal, inasmuch as such parol agreement cannot in any way affect the legal operation of the deed, or suspend the right of action thereon; neither will the acceptance by the creditor of a collateral security from the principal debtor operate as a discharge of the surety, if the position of the latter has in nowise been varied thereby (*b*); nor will the surety be discharged, if he himself has assented to the alteration of the principal obligation. In the case of an accommodation bill, known to be such to all the parties, the acceptor can only be considered a surety for the drawer, so that, if time be given to the drawer by a binding agreement, without the knowledge and concurrence of the acceptor, the acceptor is discharged (*c*). R. and H., being partners, consigned goods to China, and the money was remitted to the plaintiffs, and R. and H. drew bills on them whether sufficient money was remitted or not, and plaintiffs accepted fresh bills to enable them to take up their former acceptances, and so give time to R. and H.; R. and H. discontinued partnership, of which plaintiffs had notice; the plaintiffs renewed some bills by accepting new bills of H.; it was held that R. was not a surety, but remained a principal with H. and was not discharged by the giving of time to H. (*d*).

Suretyship where relation does not appear upon face of contract.—The doctrine of discharge by giving time is not confined to cases where the relation of suretyship appears on the face of the original contract between the creditor, the principal, and the alleged surety (*e*). The equity arises from the relation of the co-obligors, or co-promisors *inter se*, and on the knowledge by the creditor of the existence of that relation (*f*). It is held to be inequitable in the creditor knowingly to prejudice the rights of the surety, although he may know of the existence of the relation of suretyship only at the time of his dealing with the principal debtor so as to prejudice such rights (*g*). But extraneous evidence is not admissible for the

(*a*) *Orme* v. *Young*, Holt, 84; *Lond. Assur. Co.* v. *Buckle*, 4 Moore, 153; *Goring* v. *Edmonds*, 6 Bing. 91; 7 L.J. (O.S.) C.P. 235; *Dawson* v. *Lawes*, 23 L.J. Ch. 434; Kay, 280; *Durham (Mayor)* v. *Fowler*, 22 Q.B.D. 394; 58 L.J. Q.B. 246.

(*b*) *Twopenny* v. *Young*, 3 B. & C. 210; *Bell* v. *Banks*, 3 Sc. N.R. 497. But see *Bolton* v. *Buckenham*, (1891) 1 Q.B. 279; 60 L.J. Q.B. 261.

(*c*) *Laxton* v. *Peat*, 2 Campb. 185; *Bailey* v. *Edwards*, 4 B. & S. 761; 34 L.J. Q.B. 41.

(*d*) *Swire* v. *Redman*, 1 Q.B.D. 536. See this case discussed by the C. A. in *Rouse* v. *Bradford Banking Co.*, (1894) 2 Ch. 32; 63 L.J. Ch. 337.

(*e*) *Rayner* v. *Fussey*, 28 L.J. Ex. 132.

(*f*) *Davies* v. *Stainbank*, 6 De G. M. & G. 679, 696; *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, L.R. 7 Ch. 142; 41 L.J. Ch. 332. See same case in H. L., *ante*, p. 1015.

(*g*) *Pooley* v. *Harradine*, 7 E. & B. at p. 441; 26 L.J. Q.B. 156; *Greenhough*

purpose of showing that a party who, on the face of the contract, has incurred a primary liability, was only intended to be secondarily liable as a surety after the default of another principal contracting party (*h*).

Effect of giving time to principal debtor reserving remedies against surety.—If after the principal debtor has made default, and the surety has become liable to the payment of the debt, the creditor, by a binding contract, agrees to give his principal debtor time for payment, and in the same contract expressly stipulates for the reservation of all his remedies against the surety, the latter will still remain liable, notwithstanding the arrangement between the principal and the creditor (*i*). "The reserve of remedies," observes Parke, B., "has that effect upon this principle; first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the principal debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if, the instant afterwards, the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him" (*k*). And, if a security is taken which, by extending the time of payment would operate to release the surety, the creditor may prove by parol evidence that an agreement was come to between the creditor and the principal debtor that the transaction should not have that effect, and may thus keep alive the liability of the surety (*l*).

Release of principal debt—Discharge of surety.—If a debt secured by the collateral undertaking of a surety be unconditionally released or satisfied, the engagement of the surety is at an end, the extinguishment of the principal obligation necessarily involving in it the discharge of the surety (*m*). If, therefore, a creditor, by deed of composition, releases his debtor, and precludes himself from suing upon the original obligation for the original debt, the surety is discharged, unless the rights of the creditor against the surety have been expressly reserved on the face of the deed (*n*), or unless by the terms of the guarantee the surety is not discharged

v. *McClelland*, 2 E. & E. 424; 30 L.J. Q.B. 15, *ante*, p. 1004; *Bailey* v. *Edwards*, *ante*, p. 1016.

(*h*) *Hollier* v. *Eyre*, 9 Cl. & Fin. 45; *ante*, p. 1004.

(*i*) Ld. Eldon, *Glendenning*, *Ex parte*, Buck's B.C. 519.

(*k*) *Kearsley* v. *Cole*, 16 M. & W. 135; 16 L.J. Ex. 115; *Price* v. *Barker*, 4 E. & B. 779; 24 L.J. Q.B. 134.

(*l*) *Wyke* v. *Rogers*, 21 L.J. Ch. 613; 1 De G. M. & G. 408; *Boaler* v. *Mayor*, 19 C.B. N.S. 76; 34 L.J. C.P. 230.

(*m*) *Webb* v. *Hewitt*, 3 Kay & J. 438, 444; *Vorley* v. *Barrett*, 26 L.J. C.P. 1; 1 C.B. N.S. 225; *Commercial Bank of Tasmania* v. *Jones*, (1893) A.C. 313; 62 L.J. P.C. 104.

(*n*) *Lewis* v. *Jones*, 4 B. & C. 513, 515; 3 L.J. (O.S.) K.B. 270; *Green* v. *Wynn*, L.R. 4 Ch. 204; 38 L.J. Ch. 76, 220.

by the release of the principal debtor (*o*). Where a trustee in bankruptcy of a lessee for a term of years disclaims, a guarantor of the payment of such "rent as may be from time to time in arrear" under the lease is not liable under the guarantee for rent accruing due after the date of the disclaimer (*p*).

Release of principal obligation, reserving of remedies against surety.—But, if the principal debtor has made default, so that the liability of the surety has accrued, and the creditor has an immediate right of action against him, the creditor may compound with the principal debtor, receiving a portion only of the debt, and may release him from the payment of the residue, and at the same time reserve all his rights and remedies against the surety. A deed of release of this sort, with reserve of remedies against the surety, is construed as a covenant not to sue, in order that effect may be given to the intention of the parties, and the right of recourse against the surety be preserved (*q*). Where, therefore, upon the grant of an annuity, two co-sureties entered into a joint and several covenant for the payment by them of the annuity, in case of default made by the grantor, and default was made by him, and a deed was then entered into between the grantor and grantee of the annuity and one of the co-sureties, whereby, in consideration of all arrears of the annuity being paid up by such co-surety, the latter was released from the future payment of the annuity, and from all further liability upon his covenant, but it was provided that nothing therein contained should prejudice the rights of the grantee of the annuity as against the grantor and the other co-surety, it was held that this proviso prevented the release from operating as a discharge of the co-surety, as it did not in anywise prejudice the latter or increase his liability (*r*). But a release of a debt "in like manner as if the debtor had obtained a discharge in bankruptcy" is an absolute release, and, if given without the surety's consent, discharges him (*s*). It seems to be the result of the authorities that a release qualified by a reserve of the remedies against sureties allows the surety to retain all his rights over against the principal debtor, and operates only so far as the rights of the surety may not be affected (*t*); but it remains to be considered in every case, whether the arrangement between the principal debtor and the creditor does prejudicially affect the rights

(*o*) *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L.J. Ex. 133.

(*p*) *Stacey* v. *Hill*, (1901) 1 K.B. 660; 70 L.J. K.B. 435.

(*q*) *Nevill's case*, L.R. 6 Ch. 43; 40 L.J. Ch. 1; *Bateson* v. *Gosling*, L.R. 7 C.P. 9; 41 L.J. C.P. 53; *Duck* v. *Mayeu*, (1892) 2 Q.B. 511; 62 L.J. Q.B. 69.

(*r*) *Thompson* v. *Lack*, 3 C.B. 552; 16 L.J. C.P. 75; *Kearsley* v. *Cole*, 16 M. & W. 135; 16 L.J. Ex. 115.

(*s*) *Cragoe* v. *Jones*, L.R. 8 Ex. 81; 42 L.J. Ex. 68.

(*t*) *Price* v. *Barker*, 4 E. & B. 779; 24 L.J. Q.B. 134; *ante*, p. 1017.

or remedies of the surety (*u*); for, if it does, the surety is entitled to say that he is discharged (*x*).

Release of one of several co-sureties.—A release by the creditor of one of two or more co-sureties releases all (*y*). This is not so, however, if the sureties contract severally (*z*).

Payment by principal debtor operating as discharge of surety.—If a party becomes surety for the due payment of all money that comes to the hand of the principal, the surety is discharged, if the principal pays in such currency as the parties to whom the payment is to be made are willing to accept. If, therefore, they have the option of receiving cash, and choose, nevertheless, to take bills or notes from the principal, which are ultimately dishonoured, the surety is nevertheless discharged (*a*). A payment accepted by the creditor in good faith and without notice, but which is afterwards avoided as a fraudulent preference, does not operate as a satisfaction of the debt or discharge the surety (*b*). If the primary security proves worthless, whether it was so originally, or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor (*c*). If the principal debtor has a set-off against the creditor arising out of the same transaction, the surety may take advantage of it in an action against him by the creditor for the amount guaranteed (*d*).

Fraud on sureties.—A creditor is not bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, unless the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence (*e*). If a person abstains from inquiry because he sees that the result of inquiry will be to disclose fraud, his want of knowledge of the fraud affords no excuse. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge (*f*). If, when a person agrees to become surety, any material part of the contract between the debtor and creditor is misrepresented or concealed from the surety with the knowledge of the creditor, the misrepresentation or concealment amounts to a fraud upon the surety, and discharges him from his engagement (*g*);

(*u*) *Owen* v. *Homan*, 20 L.J. Ch. 323; aff. 4 H.L.C. 1037.

(*x*) *Wright* v. *Sandars*, 3 Jur. N.S. 507.

(*y*) *Cheetham* v. *Ward*, 1 B. & P. 633; *E. W. A., In re*, (1901) 2 K.B. 642; 70 L.J. K.B. 810; *Nicholson* v. *Revill*, 4 Ad. & E. 683; 5 L.J. K.B. 129; *Evans* v. *Bremridge*, 25 L.J. Ch. 104; 2 K. & J. 174; *Mercantile Bank of Sydney* v. *Taylor*, (1893) A.C. 317; as to release of one of several joint contractors, see *ante*, p. 160.

(*z*) *Ward* v. *National Bank of New Zealand*, 8 App.Cas. 755; 52 L.J. P.C. 65.

(*a*) *Lichfield Union* v. *Greene*, 1 H. & N. 880; 26 L.J. Ex. 140.

(*b*) *Petty* v. *Cooke*, L.R. 6 Q.B. 790; 40 L.J. Q.B. 285.

(*c*) *Hardwick* v. *Wright*, 35 Beav. 133.

(*d*) *Bechervaise* v. *Lewis*, L.R. 7 C.P. 372; 41 L.J. C.P. 161.

(*e*) *Hamilton* v. *Watson*, 12 Cl. & Fin. 119; *Wythes* v. *Labouchere*, 3 De G. & J. 595; 5 Jur. N.S. 499.

(*f*) *Owen* v. *Homan*, 4 H.L.C. 1035.

(*g*) *Stone* v. *Compton*, 6 Sc. 846; 5

but the principal is not bound to disclose to the surety every material circumstance known to him that may be calculated to affect or increase the responsibility of the surety (*h*). Where a surety had given a guarantee to the creditor to secure payment of iron of the value of 200*l*., to be supplied to the principal debtor, and it appeared that there had been a private agreement between the creditor and the principal debtor, that the latter should pay 10*s*. per ton beyond the market price, to be applied in liquidation of an old standing debt due to the former, it was held that the agreement was a fraud upon the surety, which discharged him from liability upon his contract (*i*). Where a surety was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, it was held that he was entitled to have the bond cancelled (*k*).

If a man finds that his agent has betrayed his trust, that he owes him a sum of money, or that it is likely he is in his debt, and, under such circumstances, requires sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he is not so, he cannot afterwards avail himself of a guarantee obtained from a party who was ignorant of what was known to, and ought to have been disclosed by, the employer (*l*). So, if a person whose honesty is guaranteed makes defalcations, which the employer condones without notice to the guarantor, the latter is not liable for subsequent defalcations (*m*). But, if a person having doubts as to the circumstances of his agent, and therefore requiring fresh sureties, states his doubts at the time to these sureties, they have no right to complain when they are called upon to fulfil their engagement (*m*).

Discharge of surety by death of principal.—Where the liability of the surety does not arise until after default has been made by the principal, and the latter dies before making default, the surety is discharged. Thus, where A. becomes bound for the appearance or surrender of B. by a particular day, and B. dies before the day, A. is discharged from his obligation (*n*).

Death of surety.—A. having guaranteed thus: "To C. I request you will credit B.; and, in consideration thereof, I guarantee the running balance;" it was held that the promise was not revoked

Bing. N.C. 142; *Railton* v. *Mathews*, 10 Cl. & Fin. 942; *Speight* v. *Cowne*, 1 H. & M. 359; *Lee* v. *Jones*, 17 C.B. N.S. 482; 34 L.J. C.P. 131; *Blest* v. *Brown*, 3 Giff. 450.

(*h*) *North Brit. Assur. Co.* v. *Lloyd*, 10 Exch. 523; 24 L.J. Ex. 14; *Jackson* v. *Duchaire*, 3 T.R. 552; *Seaton* v. *Burnand*, (1900) A.C. 135; 69 L.J. Q.B. 409.

(*i*) *Pidcock* v. *Bishop*, 3 B. & C. 605; 3 L.J. (O.S.) K.B. 109.

(*k*) *Blest* v. *Brown*, 3 Giff. 450; *Cooper* v. *Joel*, 1 De G. F. & J. 240.

(*l*) *Smith* v. *Bank of Scotland*, 1 Dow. 292.

(*m*) *Phillips* v. *Foxall*, L.R. 7 Q.B. 666; 41 L.J. Q.B. 293; *Caxton Union* v. *Dew*, 68 L.J. Q.B. 380.

(*n*) *Sparrow* v. *Sowgate*, W. Jones, 29.

by A.'s death without notice to C. from the executor (*o*). It seems that after notice of the death the guarantee is revoked except where the consideration is given once for all, and is not for future advances (*p*).

Indemnification of sureties.—When the engagement of the surety is made with the consent of the principal, there is in point of law an implied request from the latter to the surety to intervene on his, the principal's, behalf, if the latter makes default; and money paid by the surety for the purpose of discharging the claim against the principal is money paid for the use of the principal at his request, which may be recovered from the latter (*q*). The surety need not wait for the commencement of an action against the principal (*r*); but he cannot accelerate the liability of the latter; and, if he pays money voluntarily which he was not under any legal obligation to pay, he has no ground of action against the principal until the time of payment is past. A surety who has paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and, if made executor, to retain it out of the assets of the principal against all other creditors of equal degree (*s*). If A. has expressly agreed to indemnify B. against a particular claim or demand, and an action is brought on that demand against B., B. may then give notice to A. to come in and defend the action, and if A. refuses to come in, B. may compromise at once on the best terms he can get, and then bring an action on the contract of indemnity. On the other hand, if B. does not choose to trust A. with the defence to the action, he may if he pleases go on and defend it, and if the verdict is obtained against him and judgment signed on it, that judgment is conclusive because that is the meaning of the contract between the parties (*t*).

If the principal covenants with the surety that he will pay the creditor the debt by a day named, and makes default, the surety may sue him for the amount, although he has not himself, at the time he brings the action, paid any portion of the debt (*u*).

Contribution between co-sureties.—It has previously been stated that, if several persons together become surety for one principal in respect of the same debt, either jointly or severally, or by the same or different contracts (*x*), and one of such co-sureties, after the

(*o*) *Bradbury* v. *Morgan*, 1 H. & C. 249; 31 L.J. Ex. 462; and see *Harriss* v. *Fawcett*, L.R. 8 Ch. 866, 869; 42 L.J. Ch. 502.

(*p*) *Coulthart* v. *Clementson*, 5 Q.B.D. 42; 49 L.J. Q.B. 204; but see *Beckett* v. *Addyman*, 9 Q.B.D. 783; 51 L.J. Q.B. 597; *Lloyds* v. *Harper*, 16 Ch.D. 290; 50 L.J. Ch. 140; *Silvester, In re*, (1895) 1 Ch. 573; 64 L.J. Ch. 390; *Crace, In re*, (1902) 1 Ch. 733; 71 L.J. Ch. 358.

(*q*) *Kearsley* v. *Cole*, 16 M. & W. 128; 16 L.J. Ex. 115; *Boyd* v. *Brooks*, 34 L.J. Ch. 605; 34 Beav. 7.

(*r*) *Small* v. *Currie*, 5 De G. M. & G. 159; 23 L.J. Ch. 746.

(*s*) *Boyd* v. *Brooks*, *supra*.

(*t*) *Per* Mellish, L.J., *Parker* v. *Lewis*, L.R. 8 Ch. 1035, 1059; 43 L.J. Ch. 281.

(*u*) *Loosemore* v. *Rudford*, 9 M. & W. 657; 11 L.J. Ex. 284.

(*x*) And although they do not know

liability of the principal has arisen, pays the debt, or satisfies the whole, or more than his own proportion of it, he may have recourse to his co-sureties for contribution, and recover from them their several proportions (*y*), unless the plaintiff seeking contribution has promised to save the defendant harmless (*z*), or the defendant has become surety at the request of the plaintiff and for his accommodation (*a*). In equity, where one of three sureties had paid a sum of money, it was held that he was entitled to recover one moiety from another of the co-sureties, the third having become insolvent (*b*); but at law one of three co-sureties could only recover against any one of the others an aliquot proportion of the money paid, regard being had to the number of the sureties (*c*). A surety against whom judgment has been obtained by the principal creditor for the full amount of the debt, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment. The Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the claim of the principal creditor has been established against the surety (*d*).

If one of two co-sureties pays part of the debt only, and less than his moiety, he is not entitled to resort to his co-surety for contribution: for the latter might subsequently have to pay an equal or greater portion of the debt; in the former of which cases such co-surety would have no contribution to pay, and in the latter he would have one to receive; and it would tend to multiplicity of suits if each co-surety might sue all the others for a rateable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the co-sureties can ever be called upon to pay, then such part ought to be repaid by the others, and an action will lie for it (*e*). Where the plaintiff and defendant, together with the principal debtor, signed a joint and several promissory note, payable two months after date, as sureties for such principal debtor, and the latter paid only a portion of the amount of the note on its becoming due, and the plaintiff then paid

of each other's liability: *Dering* v. *Winchelsea* (*Earl*), 1 Cox, 318; *Whiting* v. *Burke*, L.R. 6 Ch. 342.

(*y*) *Kemp* v. *Finden*, 12 M. & W. 421; 13 L.J. Ex. 137.

(*z*) *Thomas* v. *Cooke*, 8 B. & C. 728; 7 L.J. (O.S.) K.B. 49.

(*a*) *Turner* v. *Davies*, 2 Esp. 478.

(*b*) *Peter* v. *Rich*, 1 Ch. C. 34; *Hitchman* v. *Stewart*, 3 Drew. 271; 24 L.J. Ch. 690.

(*c*) *Browne* v. *Lee*, 6 B. & C. 697; 5 L.J. (O.S.) K.B. 276; *Kemp* v. *Finden*, *supra*.

(*d*) *Wolmershausen* v. *Gullick*, (1893) 2 Ch. 514; 62 L.J. Ch. 773.

(*e*) Parke, B., *Davies* v. *Humphreys*, 6 M. & W. 169; 9 L.J. Ex. 263; *Snowdon*, *Ex parte*, 17 Ch.D. 44; 50 L.J. Ch. 540.

the residue, although no demand had been made upon him by the creditor for payment, and subsequently brought his action against the defendant, his co-surety, for contribution, it was held that he was entitled to recover a moiety of the amount he had paid (*f*). All persons who by common consent put their names to an accommodation bill, whether as drawers, acceptors, or indorsers, in order that one of them may get the bill discounted for his own benefit, are co-sureties for the due payment of the bill; and, if the bill is dishonoured at maturity, and one of them is compelled to pay the amount of the bill, and thus releases all the other parties from their common liability upon the instrument, the one so paying is entitled to contribution from the others (*g*). The principal creditor is not entitled to the benefit of collateral securities given by the principal debtor to the surety (*h*). A surety is bound to bring into hotchpot for the benefit of his co-sureties a security given to him by the principal debtor, although he only consented to be surety upon having such security given him, and although the other sureties were not even aware of his having taken such security (*i*). Where the same default of the principal renders all the co-sureties responsible, all are to contribute, and all should contribute equally if each is surety to an equal amount, and if not equally then proportionably to the amount for which each is surety (*k*).

Death of co-sureties.—The death of one of the co-sureties does not determine the liability of the surviving co-surety (*l*).

Assignments of judgments and securities to enable surety to obtain indemnification.—Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, is entitled (19 & 20 Vict. c. 97, s. 5) to have assigned to him, or to a trustee for him, every judgment, specialty, or other security, held by the creditor in respect of the debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty; and such person is entitled to stand in the place of the creditor, and use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, indemnification for the

(*f*) *Pitt* v. *Purssord*, 8 M. & W. 539; 10 L.J. Ex. 174.

(*g*) *Reynolds* v. *Wheeler*, 10 C.B. N.S. 561; 50 L.J. C.P. 350.

(*h*) *Walker, In re*, (1892) 1 Ch. 621; 61 L.J. Ch. 234.

(*i*) *Steel* v. *Dixon*, 17 Ch.D. 825; 51 L.J. Ch. 690; *Arcedeckne, In re*, 24 Ch.D. 709; 53 L.J. Ch. 102; *Berridge* v. *Berridge*, 44 Ch.D. 168; 59 L.J. Ch. 533.

(*k*) *Ellesmere Brewery Co.* v. *Cooper*, (1896) 1 Q.B. 75; 65 L.J. Q.B. 173.

(*l*) *Beckett* v. *Addyman*, 9 Q.B.D. 783; 51 L.J. Q.B. 597.

advances made, and loss sustained, by the person who has paid the debt or performed the duty; and the payment or performance by the surety is not pleadable in bar of any such action or other proceeding by him; but no co-surety, co-contractor, or co-debtor is entitled to recover from any other co-surety, co-contractor, or co-debtor more than the just proportion to which, as between these parties themselves, the latter is justly liable (*m*). This section includes Crown debts, and therefore a surety to the Crown who has paid the debt of his deceased principal is entitled to the Crown's priority in the administration of the principal's estate (*n*). Where one of two co-sureties has paid the whole of the debt to the creditor, he is entitled to sue his co-surety under this section for the full amount of the debt; although he can only actually recover the proportion which as between the sureties the co-surety is liable to pay (*o*).

The creditor is bound to give to the surety the benefit of every security which he holds at the time of the contract, and is not in equity allowed in any way to vary the position of the surety with reference to those securities (*p*); and every security of which the creditor has the benefit at the time the contract of suretyship is made is supposed to be discovered to the surety at the time he is entering into the obligation; and if, through any neglect on the part of the creditor, he is deprived of the benefit of them, or is put into a different position from that which he was in at the time the contract was entered into, he is discharged (*q*). But the surety is not entitled to have an assignment of the principal security, unless he pays the debt in full (*r*). The indorser of a bill is a surety to the holder for the payment, and having paid the bill, he is entitled to the benefit of any securities deposited with the holder by the acceptor, even although he was ignorant of such deposit (*s*).

Judgment against principal not binding sureties.—A judgment recovered against a principal does not bind a surety, who is entitled to have the case proved *de novo* (*t*).

Breach of contracts of indemnity—Bankruptcy of principal debtor.—If the principal debtor becomes bankrupt, or is discharged by a

(*m*) *Batchellor* v. *Lawrence*, 9 C.B. N.S. 543; 30 L.J. C.P. 42; *Drew* v. *Lockett*, 32 Beav. 499; *Strange* v. *Fooks*, 4 Giff. 408.

(*n*) *Churchill, In re*, 39 Ch.D. 174; 58 L.J. Ch. 136.

(*o*) *Parker, In re*, (1894) 3 Ch. 400; 64 L.J. Ch. 6.

(*p*) *Pearl* v. *Deacon*, 24 Beav. 186; 26 L.J. Ch. 761.

(*q*) *Newton* v. *Chorlton*, 10 Hare, 650; *Strange* v. *Fooks*, *supra*; *Forbes* v. *Jackson*, 19 Ch.D. 615; 51 L.J. Ch. 690; *Wulff* v. *Jay*, L.R. 7 Q.B. 756; 41 L.J. Q.B. 322. See also *Rainbow* v. *Juggins*, 5 Q.B.D. 422; 49 L.J. Q.B. 718; *Taylor* v. *Bank of N. S. W.*, 11 App.Cas. 596; 55 L.J. P.C. 47; *Dixon* v. *Steel*, (1901) 2 Ch. 602; 70 L.J. Ch. 794.

(*r*) *Ewart* v. *Latta*, 4 Macq. 983.

(*s*) *Duncan & Co.* v. *N. & S. Wales Bank*, 6 App.Cas. 1; 50 L.J. Ch. 355.

(*t*) *Young, Ex parte*, 17 Ch.D. 668; 50 L.J. Ch. 824.

resolution under sect. 28 of the Bankruptcy Act, 1883, the surety remains liable (*u*), but if he has paid the debt, he has a right to stand in the place of the original creditor against the estate of the principal debtor; and, if the creditor has received a dividend out of that estate, the surety has a right to be paid that dividend, or to have it deducted from the amount for which he is liable (*x*), and to have all future dividends secured to him (*y*), unless he has agreed to waive this right for the benefit of the creditor (*z*). Where a surety guaranteed the payment of any debt which the principal debtor might contract from time to time with the plaintiffs, as a running balance of account, to any amount not exceeding 400*l.*, and the plaintiffs, on the faith of this guarantee, allowed the principal to get into their debt to the extent of 825*l.*, and the principal then became insolvent, and assigned his effects to trustees for the benefit of his creditors, and the plaintiffs proved their debt of 825*l.* against his estate, and received from the trustees a dividend thereon of 8*s.* 9*d.* in the pound, and then brought an action against the surety on the guarantee, it was held that the dividend was to be deducted rateably from the whole debt, as well the part covered by the guarantee as the part which was left uncovered; and that the plaintiffs were trustees for the surety of the dividend of that portion of the debt which was covered by the guarantee, and could only recover from the surety the balance remaining of the 400*l.* after deducting the dividend (*a*). So, where two persons separately guaranteed the payment of all goods supplied to A. B., so that their liability should not exceed 250*l.* each, and goods were supplied to A. B. to the amount of 657*l.*, and he then became bankrupt, and the creditor proved for the whole amount, and, having obtained 250*l.* from each of the guarantors, afterwards received 2*s.* 1*d.* in the pound on the 657*l.*, it was held that each of the guarantors was entitled to a part of this dividend bearing to the whole the same proportion as 250*l.* to 657*l.* (*b*).

Recovery of interest on money paid by sureties.—In cases of contracts of suretyship, where a surety has been compelled to pay money which the principal debtor ought to have paid, and has, consequently, been damnified by the loss of the use of his money, he is entitled, in an action on the implied contract of indemnity against the principal, to recover interest on the money he has been

(*u*) *Ellis* v. *Wilmot*, L.R. 10 Ex. 10; 44 L.J. Ex. 10; 46 & 47 Vict. c. 52, s. 30 (4).

(*x*) *Gee* v. *Pack*, 33 L.J. Q.B. 49; *Hobson* v. *Bass*, L.R. 6 Ch. 792.

(*y*) *Thornton* v. *M'Kewan*, 1 Hem. & M. 525; 32 L. J. Ch. 69.

(*z*) *Midland Banking Co.* v. *Chambers*, L.R. 4 Ch. 398; 38 L.J. Ch. 478.

(*a*) *Bardwell* v. *Lydall*, 5 Moo. & P. 335; 9 L.J. (O.S.) C.P. 148; *Gee* v. *Pack*, *supra*.

(*b*) *Hobson* v. *Bass*, L.R. 6 Ch. 792; *Midland Bank. Co.* v. *Chambers*, L.R. 4 Ch. 398; 38 L.J. Ch. 478.

compelled to pay (*c*); for in every contract of indemnity the party damnified is entitled to recover all such damages, costs, and charges as reasonably result from the fulfilment by him of the obligation he has contracted on behalf of the principal debtor (*d*).

Guarantees by one of several partners in name of co-partnership.—By sect. 7 of the Partnership Act, 1890 (*e*), where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorized by the other partners; but this section does not affect any personal liability incurred by an individual partner. Where one of several partners gave a guarantee in the trading name of the firm to secure the payment of a debt of a third party, it was held by Lord Ellenborough that there was no implied authority resulting from the mere existence of the co-partnership to any one or more of the partners to pledge the partnership name for such a purpose (*f*). And, where one of two solicitors in partnership together, in order to obtain the discharge of a client from custody, signed the partnership name to an undertaking to pay the debt and costs, it was held that the other partner, who had given no express authority to his colleague to give such an undertaking, could not be sued thereon, as the giving of undertakings of such a description was not within the usual course of business of solicitors; and the law, therefore, would raise no inference of any authority from the one partner to bind the other (*g*). But, if the guarantee, when it has been given, is notified to the firm, and they do not dissent from it, or if it refers to a partnership transaction, and is given to secure the payment of goods supplied, or money advanced to the firm, and added to the joint stock, or if it has been given to secure the performance of something within the ordinary scope and business of the firm, and which one partner generally has power to undertake for or on behalf of the firm, it binds all the partners, and all are liable to be sued thereon (*h*). The effect of a change in the firm upon a continuing guarantee is explained by sect. 18 of the Partnership Act, 1890 (*ante*, p. 1009).

(*c*) *Petre* v. *Duncombe*, 20 L.J. Q.B. 242; *Bishop, Ex parte*, 15 Ch.D. 400; 50 L.J. Ch. 18.

(*d*) *Smith* v. *Howell*, 6 Exch. 737; 20 L.J. Ex. 377.

(*e*) 53 & 54 Vict. c. 39, s. 7.

(*f*) *Duncan* v. *Lowndes*, 3 Campb. 478.

(*g*) *Hasleham* v. *Young*, 5 Q.B. 833; 13 L.J. Q.B. 265; *Brettel* v. *Williams*, 4 Exch. 629; 19 L.J. Ex. 121.

(*h*) *Notte, Ex parte*, 2 Glyn & J. 306; *Sandilands* v. *Marsh*, 2 B. & Ald. 679; *Gardom, Ex parte*, 15 Ves. 286; *West of England Bank, In re*, 14 Ch.D. 317; 49 L.J. Ch. 400.

SECTION II.

OF MARINE INSURANCE.

Contracts of insurance.—The contract of insurance is a contract whereby one of the contracting parties agrees to take upon himself, and protect the other from, the risks and accidents to which any particular property or any particular individual may be exposed, and covenants or promises, in consideration of a sum of money which the other contracting party pays or binds himself to pay to him as the price of the risk run, to indemnify the latter against these risks and accidents. The party who takes the risks upon himself, or undertakes to indemnify, is called the assurer or insurer, and commonly in our law the underwriter, from his subscribing his name at the bottom of the contract; the party protected by the contract, the assured or insured; and the money paid as the price of the indemnity, the premium for the risk; whilst the contract itself, or rather the written instrument evidencing or constituting it, is called a policy of insurance.

Mutual insurance consists in the association of different proprietors of property exposed to the same risk, with a view of indemnifying at the common expense those members who suffer loss. The members of such an association are at the same time insurers and insured; and the engagement which each of them contracts with the association at large as an insurer is the consideration or price of the indemnity which the society guarantees to him in return (*a*).

Policies of insurance.—The owner of the property insured generally pays to the insurer a premium at a certain rate per cent.; and the latter then subscribes the ordinary written or printed instrument, called a policy of insurance, whereby he expresses that he "doth make assurance" and cause the party "to be insured" in a certain sum, on certain specified property, for a certain voyage or for a certain time, against certain risks and perils which are set forth in the policy. The policy is frequently preceded by a "SLIP," which is a short memorandum of the terms of the insurance, to which the underwriters subscribe their initials, with the sums for which they are willing to engage. But the slip is often nothing

(*a*) See *Montgomerie* v. *U. K. Mutual Steamship Assn.*, (1891) 1 Q.B. 370; 60 L.J. Q.B. 429; *U. K. Mutual Steamship Assn.* v. *Nevill*, 19 Q.B.D. 110; 56 L.J. Q.B. 522; *Gt. Britain Steamship Assn.* v. *Wyllie*, 22 Q.B.D. 710; 58 L.J. Q.B. 614; *British Marine Mutual Ins. Assoc.* v. *Jenkins*, (1900) 1 Q.B. 299; 69 L.J. Q.B. 177.

more than an offer or proposal of terms preliminary to the contract (*b*).

Voyage and time policies—Valued and open policies.—When the insurance is on a voyage from one port to another, without reference to time, the policy is called a voyage policy: but, when it is from one fixed period to another, such as "from the 1st of March, 1875, to the 1st of January, 1876," or for three, six, or twelve months, &c., the policy is a time policy. Sometimes a policy is so made as to be partly a voyage policy and partly a time policy (*c*). When the value of the property insured, as between the insured and the underwriter, is expressed on the face of the policy, the policy is called a valued policy (*d*). When it is not so expressed, but is left to be estimated in case of loss, the policy is called an open policy. In the one case the declared value establishes the pecuniary interest and loss of the insured as between himself and the underwriter; and in the other the value has to be proved. "The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial;" and this must be fairly done, with a view of obtaining a fair indemnity; for, if the policy be enormously overvalued, that will be evidence of fraud (*e*). In the absence, however, of fraud or wagering, the value stated in the policy is conclusive, however largely in excess of the true value (*f*), unless it appears that there is some mistake as to the thing insured (*g*), or some question outside of the contract has arisen (*h*). If the value declared is the value of a full cargo, and, at the time of the loss, there was not a full cargo on board, the insurers are not liable for the full amount of the declared value, but only for the real loss, and the policy in such case must be treated as an open policy (*i*); for, as the contract is strictly a contract of indemnity for a real loss, the law will not permit it to be made a means of profit and gain to one of the parties at the expense of the other (*post*, p. 1078).

When the insurance is on goods, to be thereafter declared and valued, the insured has the power, by duly declaring and valuing before knowledge of the loss, to make the policy a valued policy;

(*b*) *Rogers* v. *Macarthey*, Park. Ins. 39; *Parry* v. *Great Ship Co.*, 4 B. & S. 556; 33 L.J. Q.B. 41; *post*, p. 1031; *Mildred* v. *Maspons*, 8 App.Cas. 874; 53 L.J. Q.B. 33.

(*c*) *Gambles* v. *Ocean Marine Ins. Co.*, 1 Ex.D. 141; 45 L.J. Ex. 366.

(*d*) *Wilson* v. *Nelson*, 5 B. & S. 354; 33 L.J. Q.B. 220.

(*e*) *Lewis* v. *Rucker*, 2 Burr. 1171.

(*f*) *Irving* v. *Manning*, 1 H.L.C. 287; *Barker* v. *Janson*, L.R. 3 C.P. 307; 37 L.J. C.P. 105; as to liability of insurer where ship has been undervalued, see *S.S. Balmoral* v. *Marten*, 71 L.J. K.B. 819; (1902) A.C. 511; 71 L.J. K.B. 857.

(*g*) *Williams* v. *North China Ins. Co.*, 1 C.P.D. 757; see *post*, p. 1078.

(*h*) *Burnand* v. *Rhodocanachi*, 7 App. Cas. 333; 51 L.J. Q.B. 548.

(*i*) *Tobin* v. *Harford*, 17 C.B. N.S. 528; 34 L.J. C.P. 37; the same rule prevails in the case of a valued policy on freight: *Denoon* v. *Home & Colonial Ass. Co.*, L.R. 7 C.P. 341; 41 L.J. C.P. 162.

but if the insured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial. The declaration, when made, does not require the assent of the underwriters. It is generally put upon the policy for convenience; but this is not necessary, nor is there any necessity for its being in writing. The making of the declaration is not a condition precedent which must be fulfilled by the insured before the liability of the underwriters attaches; yet, in order to be available, it must be made and communicated to the underwriters, or some one on their behalf, before intelligence has been received of the loss of the subject-matter of insurance. If it is not so made and communicated, the policy becomes, as we have already seen, an open policy (*k*). Where goods are insured at a value very greatly in excess of their real value, the non-disclosure of this circumstance to the underwriter may avoid the policy (*l*). All facts material to enable an underwriter to judge whether he shall accept the risk must be disclosed (*m*). Where the loss of the ship is not the risk insured against, but the risk depends upon some other contingency not known to have happened, the fact of the loss of the ship being known to both parties at the time the insurance is effected will not invalidate the policy; for the knowledge that will vitiate a policy must be a knowledge of the loss of the subject-matter of the contract (*n*). When the premium is paid down at the time of the making of the contract, the policy is not usually signed by both parties, but only by the insurer; and in these cases, therefore, it partakes of the nature of a guarantee, the insurer warranting the safe arrival of the ship, cargo, or merchandise, at the place of destination.

Insurable interests—Wagering and gaming policies of insurance.—By sect. 1 of 19 Geo. 2, c. 37, no assurance shall be made by any person on any ship, or on any goods or merchandise laden on board thereof, interest or no interest, or without further proof of interest than the policy, by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such insurance shall be void (*o*). The fact of a person being named both shipper and consignee in a bill of lading is *primâ facie*, but not conclusive, evidence of an insurable interest in him. If he is a mere agent without lien on the goods, or possession of them as a bailee, or liability to

(*k*) *Harman* v. *Kingston*, 3 Campb. 150; *Robinson* v. *Touray*, *ib.* 158.

(*l*) *Ionides* v. *Pender*, L.R. 9 Q.B. 531; 43 L.J. Q.B. 227.

(*m*) *Rivaz* v. *Gerussi*, 6 Q.B.D. 222; 50 L.J. Q.B. 176; see *post*, p. 1040.

(*n*) *Gledstanes* v. *Roy. Ex. Assur. Co.*, 5 B. & S. 797; 34 L.J. Q.B. 30; *Mead* v. *Davison*, 3 Ad. & E. 303; 4 L.J. K.B. 193.

(*o*) *Lowry* v. *Bourdieu*, 2 Doug. 468; *Kent* v. *Bird*, Cowp. 583; *Gedge* v. *Roy. Exch. Assur.*, (1900) 2 Q.B. 214; 69 L.J. Q.B. 506; *Roddick* v. *Indemnity Mut. Mar. Ins. Co.*, (1895) 2 Q.B. 380; 64 L.J. Q.B. 733.

account for their loss by the perils insured against, he has no insurable interest (*p*). An assurance on profits of goods laden on board a vessel is an assurance on goods within the meaning of this statute (*q*), and so it seems is an insurance upon commission (*r*). Freight, or the profit derivable from the carriage of goods or the hire of a vessel, constitutes a good insurable interest; and so does the profit which the shipowner ordinarily makes from carrying his own goods in his own vessel to a distant market, or any profits fairly expected to be made in the due course of trade (*s*); also the special property which a carrier has in the goods entrusted to him to carry (*t*), or the interest which an executor has in the property of his testator before probate of the will has been granted, or the interest which captors have in time of war in the prizes taken by them (*u*), or which the crown has in prizes before condemnation, or the freight which the freighter of a vessel has paid in advance, or the legal and equitable interest which mortgagors and mortgagees have in the mortgaged property, or the interest which a party has in the security of property the safety of which he has guaranteed for some determinable period (*x*), or the interest which a purchaser has in specific, ascertained chattels bought by him, but which remain in the hands of the vendor, covered by the lien of the latter for the unpaid purchase-money (*y*), or which the charterer of a vessel, or the hirer or lessee of personalty or realty, has in the property entrusted to him to be used for hire. It has been decided, but after the greatest possible difference of opinion, that the purchaser of a "cargo" at so much per cwt. cost and freight, which is to be loaded when a ship which is expected arrives, has no insurable interest (*z*). A defeasible or inchoate interest may be insured as well as an absolute and perfect interest, but not a mere expectancy (*a*). The wages of labour cannot be insured; for it would take away the stimulus to exertion to secure to the workman the payment of his wages at all events, and would be contrary to

(*p*) *Seagrave* v. *Union Mar. Ins. Co.*, L.R. 1 C.P. 305; 35 L.J. C.P. 172.

(*q*) *Smith* v. *Reynolds*, 1 H. & N. 223; 25 L.J. Ex. 337; *De Mattos* v. *North*, L.R. 3 Ex. 185; 37 L.J. Ex. 116; *Allkins* v. *Jupe*, 2 C.P.D. 375; 46 L.J. C.P. 824; *Berridge* v. *Man On Ins. Co.*, 18 Q.B.D. 346; 56 L.J. Q.B. 223.

(*r*) *Allkins* v. *Jupe*, *supra*.

(*s*) *M'Swiney* v. *Roy. Ex. Assur. Co.*, 14 Q.B. 634; 18 L.J. Q.B. 193; *Chope* v. *Reynolds*, 5 C.B. N.S. 642; 28 L.J. C.P. 194.

(*t*) *Crowley* v. *Cohen*, 3 B. & Ad. 478; 1 L.J. K.B. 158.

(*u*) *Le Cras* v. *Hughes*, Park. Ins. 568; *Boehm* v. *Bell*, 8 T.R. 154; *Irving* v. *Richardson*, 2 B. & Ad. 193; 9 L.J. (O.S.) K.B. 225.

(*x*) *Waters* v. *Monarch Life Assur. Co.*, 5 E. & B. 870; 25 L.J. Q.B. 102.

(*y*) *Sparkes* v. *Marshall*, 3 Sc. 172; 5 L.J. C.P. 286.

(*z*) *Anderson* v. *Morice*, 1 App.Cas. 713; 46 L.J. C.P. 11; see *Inglis* v. *Stock*, 10 App.Cas. 263; 54 L.J. Q.B. 582; *Colonial Ins. Co.* v. *Adelaide Mar. Ins. Co.*, 12 App.Cas. 128; 56 L.J. P.C. 19; *Ajum Goolam Hossen & Co.* v. *Union Mar. Ins. Co.*, (1901) A.C. 362; 70 L.J. P.C. 34.

(*a*) *Devaux* v. *Steele*, 6 Bing. N.C. 371; *Stockdale* v. *Dunlop*, 6 M. & W. 224; 9 L.J. Ex. 83.

public policy (*b*). Where the insurance does not exclude British ships they must be taken to be included (*c*). Formerly the interest which the underwriter himself acquires in the safety of the property he has insured could not have been re-insured (*d*); but by sect. 1 of 27 & 28 Vict. c. 56, re-insurance may now be effected upon any ship or vessel, or upon any goods.

Whenever the policy is effected on property valued at a certain sum, and it is expressly provided that the policy shall be deemed sufficient proof of interest, the insurance is in principle an insurance, "interest or no interest," and void within the statute (*e*). As no person can sue upon a policy who is not really interested therein, it follows that, if the insured assigns away his interest after the making of the policy, he cannot maintain an action upon it for his own benefit. He can sue upon it only in one way, *i.e.*, as a trustee for the assignee in a case where the policy is handed over to him upon the assignment (*f*). But, wherever he sustains a *bonâ fide* loss by the destruction of the subject-matter of the insurance, he is entitled to be indemnified, and may sue upon the contract; and the court will not allow underwriters to get rid of their liability merely because the name of the party they have agreed to indemnify is not on the register (*g*). If the policy is on goods lost or not lost, the indemnity extends to past as well as future losses; and it is no answer, therefore, to an action on such a policy to say that the interest was not acquired until after the loss (*h*). As the fact of the ship being lost at the time the policy is effected does not prevent such policy from attaching, so also the fact, unknown to the parties, that the ship has arrived safely does not prevent a policy from attaching, and the premium is payable thereon (*i*).

Requisites of contract.—Contracts of insurance must be expressed in a policy which must specify the particular risk or adventure, the names of the subscribers, and the sums insured (*k*). If any of these particulars are omitted, or if the policy is for any time exceeding twelve months, it is void (*l*). And no policy can be pleaded or given in evidence unless it is duly stamped, except in the case of mutual insurances or formerly of policies made abroad (*m*).

(*b*) *Webster* v. *Du Tastet*, 7 T.R. 157.
(*c*) *Allkins* v. *Jupe*, 2 C.P.D. 375; 46 L.J. C.P. 824.
(*d*) 19 Geo. 2, c. 37.
(*e*) *Murphy* v. *Bell*, 4 Bing. 567; 6 L.J. (O.S.) C.P. 118.
(*f*) *Powles* v. *Innes*, 11 M. & W. 10; 12 L.J. Ex. 163.
(*g*) *Hutchinson* v. *Wright*, 27 L.J. Ch. 834; 25 Beav. 444.
(*h*) *Sutherland* v. *Pratt*, 11 M. & W. 312; 12 L.J. Ex. 235.
(*i*) *Bradford* v. *Symondson*, 7 Q.B.D. 456; 50 L.J. Q.B. 582.
(*k*) 30 Vict. c. 23, s. 7; *Reid* v. *Allan*, 4 Exch. 326; 19 L.J. Ex. 39; *Fisher* v. *Liverpool Mar. Insur. Co.*, L.R. 8 Q.B. 469; 42 L.J. Q.B. 224; *Hargrove, Ex parte*, L.R. 10 Ch. 542; 44 L.J. Ch. 569; *Edwards* v. *Aberayron Ship Ins. Soc.*, 1 Q.B.D. 563.
(*l*) 30 Vict. c. 23, ss. 7, 8.
(*m*) 30 Vict. c. 23. s. 9. The exception as to policies made abroad is repealed:

But the slip may be given in evidence to show the intention of the parties (*n*). By 27 & 28 Geo. 3, c. 56, it is enacted that it shall not be lawful for any person to effect a policy of insurance upon any ship, or upon any goods, merchandise, or property whatever, without first inserting in such policy the name or the usual style and firm of one or more of the persons interested in such insurance, or of the consignor or consignee, or of the person in Great Britain receiving the order to insure and effecting the insurance, or of the person who shall give the order to the agent immediately employed to negotiate the policy (*o*). If the policy is effected by the policy broker or agent "for the benefit of all parties interested," these last may become privy to the contract by adopting it (*p*); and any person who acquires an interest in the subject-matter of the insurance, whilst it is covered and protected by such a policy, may sue thereon for an indemnity against loss (*q*). The subject-matter of the insurance must be correctly and clearly described, so that the things insured may be ascertained and identified, and so that it may be known to what articles the risk attaches, whether it be to the ship, the freight, or the whole or part of the cargo (*r*). The policy need not be expressed to be a re-insurance where such is the fact, though it would seem that if such a fact were intentionally concealed and were material, the policy might be rendered void by the fraud (*s*). But wherever the peculiar nature of the interest alters the risk such interest is the subject-matter of the insurance, and must be stated in the policy (*t*).

Matters and things covered by policy.—If a person insures a cargo to be laden on board on the Brazilian coast, the policy will not cover and protect a cargo taken on board on the coast of Africa (*u*). If the ship only is insured, the policy will not, of course, cover and protect the merchandise laden on board (*x*); and if the insurance is merely on "the ship's tackle and furniture," it will not cover stores, harpoons, lines, and fishing-tackle, put on board to be used in the whale fishery (*y*), unless the vessel is described in the policy as a whaling vessel, and the insurance is declared to be made on a whaling adventure. The provisions of

see St. L. R. Act, 1875. As to the making of alterations in the policy, see 30 Vict. c. 23, s. 10. By sect. 12, insurances by carriers by sea are to be deemed to be contracts for sea insurance.

(*n*) *Ionides* v. *Pacific Insurance Co.*, L.R. 7 Q.B. 517; 41 L.J. Q.B. 190. See *Thompson* v. *Adams*, 23 Q.B.D. 361; *Bhugwandass* v. *Netherlands India Co.*, 14 App.Cas. 83.

(*o*) *Wolff* v. *Horncastle*, 1 Bos. & P. 316; *Mellish* v. *Bell*, 15 East, 6; *Hibbert* v. *Martin*, 1 Campb. 538.

(*p*) *Hagedorn* v. *Oliverson*, 2 M. & S. 490; *Barlow* v. *Leckie*, 4 Moore, 8; *Stirling* v. *Vaughan*, 11 East, 619.

(*q*) *Sutherland* v. *Pratt*, 11 M. & W. 296; 12 L.J. Ex. 235.

(*r*) *Crowley* v. *Cohen*, 3 B. & Ad. 478; 1 L.J. K.B. 158.

(*s*) *Mackenzie* v. *Whitworth*, 1 Ex.D. 36; 45 L.J. Ex. 233.

(*t*) *Mackenzie* v. *Whitworth*, *supra*.

(*u*) *Robertson* v. *French*, 4 East, 130.

(*x*) Molloy, b. 2, c. 7, s. 8.

(*y*) *Hoskins* v. *Pickersgill*, Park, Ins. 126.

the crew are covered by a policy on "the furniture of the ship" (*z*). But, if a ship is disabled and puts into port to refit, or is detained by an embargo, the extraordinary wages and provisions for the crew during the detention cannot be charged against the underwriter of a policy on the ship, cargo, and furniture (*a*). A mere mistake in the name of the ship will not avoid the policy and discharge the underwriters, if the identity of the vessel with the vessel named in the policy is clearly established, and the underwriters have in nowise been prejudiced by the mistake (*b*). Whatever is considered, by the custom and usage of trade, to be comprehended under the term "goods, specie, and effects," will be covered by a policy upon such property. Money expended by the captain in the course of the voyage for the use of the ship, and for which *respondentia* interest was charged, is in some trades included by custom under these words (*c*). A general policy of insurance on goods laden on board a particular vessel extends to all goods which form part of the cargo, and will cover and protect goods laden on deck, provided it is customary for goods to be so laden, and the risk of the insurer is not thereby increased beyond what must be presumed to have been contemplated at the time the insurance was effected (*d*). If the insurance is upon all goods that may be laden on board a particular vessel on an outward and homeward voyage, the policy will attach on any goods that may be carried out or brought back on board such vessel (*e*). If the insurance is on goods from "any port or ports in the East Indies" to "any port or ports" in this country, the insurance will cover any goods that may be shipped from the East Indies for England, whatever vessel may be selected for their conveyance (*f*). And, if an insurance is effected on goods on board "any ship or ships" that may sail during a particular period from one port to another, or from one part of the world to another, and goods of the assured are laden on board different vessels, some of which arrive safe and others are lost, the insured will have a right to apply the policy to the ships that are lost, and the underwriters cannot discharge themselves from liability by showing that ships answering the description in the policy have arrived safe (*g*). The words "war-

(*z*) *Brough* v. *Whitmore*, 4 T.R. 206. As to meaning of "hull and machinery" in policy, see *Roddick* v. *Indemnity Mut. Mar. Ins. Soc.*, (1895) 2 Q.B. 380; 64 L.J. Q.B. 733; as to "dunnage mats" in grain ships, see *Hoggarth* v. *Walker*, (1900) 2 Q.B. 283; 69 L.J. Q.B. 634.

(*a*) *Robertson* v. *Ewer*, 1 T.R. 132; *De Vaux* v. *Salvador*, 4 Ad. & E. 420; 5 L.J. K.B. 134; *Field S.S. Co.* v. *Burr*, (1899) 1 Q.B. 579; 68 L.J. Q.B. 426.

(*b*) *Le Mesurier* v. *Vaughan*, 6 East, 385; *Ionides* v. *Pacific Ins. Co.*, L.R. 7 Q.B. 517; 41 L.J. Q.B. 190.

(*c*) *Glover* v. *Black*, 1 Park, Ins. 10; see *Mackenzie* v. *Whitworth*, *ante*, p. 1032.

(*d*) *Da Costa* v. *Edmunds*, 4 Campb. 142.

(*e*) *Grant* v. *Paxton*, 1 Taunt. 463.

(*f*) *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L.J. (O.S.) K.B. 274.

(*g*) *Kewley* v. *Ryan*, 2 H.Bl. 343.

ranted no iron" have been held to include "steel," because steel is wrought iron, and the object with which the words are inserted must be regarded (*h*). In construing an open policy in order to ascertain what risks are covered by the policy, the voyage insured must first be ascertained, and if the goods lost were never upon that voyage, the policy never attached (*i*).

Oral evidence is admissible to explain the customary meaning of terms used in a particular trade, but not to add a new term to the contract, or to show that more things were intended to be insured than are ordinarily or customarily included under the express terms of the contract (*k*).

Implied warranties—Seaworthiness of vessel—Time policies and voyage policies.—There is an implied warranty in voyage policies on the part of the insured that the ship insured is seaworthy, "tight, staunch, and strong," at the time of the commencement of the voyage (*l*); but in the case of time policies there is no such warranty, although the time policy be effected upon an outward-bound ship, lying in a British port, where the insuring owner resides, or on a new vessel about to undertake her first voyage (*m*). Before the insured, however, can recover against the underwriter upon a voyage policy, he is bound to prove, not only that the ship was tight, staunch, and strong, but that she was properly equipped with sails and stores, and that she was manned with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the policy attaching; and, if they are not complied with, so that the perils are enhanced, from whatever cause this may arise, and though no fraud was intended by the insured, the underwriters have a right to say they are not liable (*n*); but the insured is not obliged to keep the ship seaworthy throughout the voyage, or during the period of the risk (*o*). The insured warrants that the ship is seaworthy for the purposes of the particular subject-matter of the insurance. Therefore in the case of a policy of insurance on deck cargo, it is not a compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary rough weather with safety to herself, because the deck cargo is such

(*h*) *Hart* v. *Standard Mar. Ins. Co.*, 22 Q.B.D. 499; 58 L.J. Q.B. 284.

(*i*) *Simon* v. *Sedgwick*, (1893) 1 Q.B. 303; 62 L.J. Q.B. 163.

(*k*) *Ante*, p. 65.

(*l*) *Cohn* v. *Davidson*, 2 Q.B.D. 455; 46 L.J. Q.B. 305; this implied warranty is not excluded by a provision in the policy that the ship's fittings should be approved by a surveyor, *Sleigh* v. *Tyser*, (1900) 2 Q.B. 333; 69 L.J. Q.B. 626.

(*m*) *Fawcus* v. *Sarsfield*, 6 E. & B. 200; 25 L.J. Q.B. 249; *Thompson* v. *Hopper*, 6 E. & B. 172; 25 L.J. Q.B. 240; *Gibson* v. *Small*, 4 H.L.C. 353; *Michael* v. *Tredwin*, 17 C.B. 551; 25 L.J. C.P. 83; see also *Dudgeon* v. *Pembroke*, 2 App.Cas. 284; 46 L.J. Q.B. 409.

(*n*) Ld. Ellenborough, *Wedderburn* v. *Bell*, 1 Campb. 1; *Douglas* v. *Scougall*, 4 Dow, 269.

(*o*) *Jenkins* v. *Heycock*, 8 Moo. P.C. 361; *Biccard* v. *Shepherd*, 14 Moo. P.C. 471; *Thin* v. *Richards*, (1892) 2 Q.B. 141; 62 L.J. Q.B. 39.

as may be readily jettisoned in such weather (*p*). The insurer is entitled to expect that the shipowner will do all that can reasonably be expected to be done, to limit the risk covered by the insurance to those perils incidental to navigation which the care and skill of man cannot provide against. But, where the nature of the adventure, and the size and class of vessel to be employed, are known to both parties, the implied warranty of the shipowner cannot be carried further than that he shall do his utmost to make the particular vessel as fit for the voyage as she can possibly be made. Therefore, in sending a river steamer across the ocean, the warranty of seaworthiness is complied with, if the nature of the adventure is disclosed to the underwriter, and the owner does as much as can reasonably be done to make her fit for the voyage, though she may not be considered seaworthy in the ordinary sense of the term as applied to ordinary sea-going vessels (*q*).

Non-compliance with the requirements of the statutes respecting the engagement of the crew does not render a vessel unseaworthy; it must be shown that the crew was actually insufficient in number, or that there was a want of capacity in the master or other officers (*r*). If a ship becomes leaky or founders without any adequate cause as soon as she leaves the port, the presumption is that the vessel was unseaworthy at the time she put to sea (*s*). If the vessel is not properly found with cables, anchors, and ground tackling, she is unseaworthy (*t*); and so she is, if she has an insufficient crew, or an incompetent captain, or has no pilot on board at those parts of the voyage where a pilot is required (*u*); but, if a competent master, and crew and pilot have been provided in the first instance, the insurer is not discharged by their negligence or want of skill; "for there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew" or pilot "during the whole course of the voyage" (*x*). If the master is unable, from stress of weather or other causes, to procure a pilot, this is a risk covered by the policy, and the insurer remains liable (*y*). And, if by accident or mistake a vessel sails out of port in an unseaworthy state, and the defect is remedied before any loss occurs, and she then sails again in a seaworthy state, the insurer will be liable on the policy for a subsequent loss (*z*). The parties may

(*p*) *Daniels* v. *Harris*, L.R. 10 C.P. 1; 44 L.J. C.P. 1.

(*q*) *Burges* v. *Wickham*, 3 B. & S. 669; 33 L.J. Q.B. 17; *Clapham* v. *Langton*, 34 L.J. Q.B. 46; 5 B. & S. 729.

(*r*) *Redmond* v. *Smith*, 7 M. & Gr. 457; 13 L.J. C.P. 159.

(*s*) *Davidson* v. *Burnand*, L.R. 4 C.P. 117; 38 L.J. C.P. 73.

(*t*) *Watson* v. *Clark*, 1 Dow, 336; *Parker* v. *Potts*, 3 *ib.* 23; *Wilkie* v. *Geddes*, *ib.* 57.

(*u*) *Tait* v. *Levi*, 14 East. 481.

(*x*) *Sadler* v. *Dixon*, 8 M. & W. 895; 11 L.J. Ex. 435.

(*y*) *Phillips* v. *Headlam*, 2 B. & Ad. 383; 9 L.J. (O.S.) K.B. 238.

(*z*) *Weir* v. *Aberdeen*, 2 B. & Ald. 320;

make any stipulations they think fit in the policy respecting the seaworthiness of the vessel; and the insurer may consent to take her as seaworthy, or insure conditionally, on certain repairs being done. The insured also impliedly warrants that a loss shall not happen through his own personal default, and that he will himself do nothing to enhance the risk. If he neglects to have the ship properly documented according to her national character, or if he furnishes her with simulated papers without the knowledge of the underwriters, these last will be released from all liability upon the policy in respect of losses occasioned by the neglect, as such increased risk is not the risk they intended to take upon themselves (*a*).

If the insurance attaches before the voyage commences, it is enough if the state of the ship is commensurate with the then risk; and if the voyage is such as to require a different complement of men or state of equipment in different parts of it, as if it be a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at the time when she enters upon each stage of the navigation properly manned and equipped for it (*b*). In the case of an insurance on goods there is no implied warranty that the goods are fit to encounter the ordinary risks or vicissitudes of the voyage; and it is no answer to the claim of the insurer to say that the goods were in an unfit condition to be shipped, unless it can be shown that the loss arose from that unfitness (*c*). In the case of an insurance on goods on board an English ship, there is no implied warranty that the ship shall continue English (*d*).

In a voyage policy of insurance "at and from a port," there is an implied warranty that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there is delay beyond such time, the policy does not attach (*e*). It is a question for the jury whether the fact of the ship proving unseaworthy shortly after starting shows that it was so before starting. The burden of proof is upon the underwriters to show that the ship was unseaworthy at starting (*f*).

but see *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada*, L.R. 3 P.C. 234; 39 L.J. P.C. 53.

(*a*) *Oswell* v. *Vigne*, 15 East, 70; *Pipon* v. *Cope*, 1 Campb. 434; but if the master violates the 57 & 58 Vict. c. 60, s. 451, *post*, p. 1043, by stowing a portion of the cargo on deck, and sails without a certificate of clearance, the absence of that document does not create a statutory unseaworthiness so as to discharge the underwriter: *Wilson* v. *Rankin*, L.R. 1 Q.B. 162; 35 L.J. Q.B. 87.

(*b*) *Sadler* v. *Dixon*, *ante*, p. 1035; *Bouillon* v. *Lupton*, 15 C.B. N.S. 138; 33 L.J. C.P. 37; *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada*, *supra*; *Hedley* v. *Pinkney & Sons' S.S. Co.*, (1894) A.C. 222; 63 L.J. Q.B. 419.

(*c*) *Koebel* v. *Saunders*, 17 C.B. N.S. 78; 33 L.J. C.P. 310; *Boyd* v. *Dubois*, 3 Campb. 133.

(*d*) *Dent* v. *Smith*, L.R. 4 Q.B. 414; 38 L.J. Q.B. 144.

(*e*) *De Wolf* v. *Archangel, &c. Ins. Co.*, L.R. 9 Q.B. 451; 43 L.J. Q.B. 147.

(*f*) *Pickup* v. *Thames Ins. Co.*, 3 Q.B.D.

Express warranties.—Every positive averment on the face of a policy of insurance of facts material to the risk, forming the basis of the contract, "amounts to a warranty; and, if such allegation be not strictly true, the insured cannot recover on the policy, to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty or wholly independent of it; for it is a condition on which the contract is to take effect, which failing, the contract fails" (*g*). But every representation inserted in a contract does not, as we have seen (*ante*, p. 505), amount to a warranty. A written memorandum or representation does not become part of the policy from being folded up in it, or pinned thereto (*h*); but, if the policy refers to it or to any separate writing, the two documents may then be placed in juxtaposition and read together (*i*). When there is a warranty that the vessel "is well" on the day the insurance is effected, the warranty is complied with if the vessel was safe at any time on the day named, so that, if the vessel should have been lost in the morning of that day, and the insurance be effected in the afternoon, the underwriters will be liable (*k*). The warranties most frequently met with in maritime policies are warranties of the time of sailing, of departure with convoy, and warranties of neutrality.

Time of sailing.—When the vessel is warranted to sail by a particular day, the underwriter will be discharged if she does not sail at the time appointed; and the circumstance of her being prevented by inevitable accident, or detention of princes, does in nowise exonerate the insured from the consequences of his breach of contract (*l*). When the vessel has left her loading port with all her cargo and clearances on board, with no other object in view than to get in the safest way she can to the port of delivery, this is a sailing within the meaning of the warranty, although she does not proceed straight to sea, but sails to some general place of rendezvous to wait for convoy (*m*). But she must be actually out of port or be sailing down a river towards the sea, and have made a *bonâ fide* commencement of the voyage, in order to satisfy a warranty to sail (*n*). If the warranty be to sail after a specific day, and the ship sails before, or if it be not to sail during a

594; 47 L.J. Q.B. 749; *Ajum Goolam & Co.* v. *Union Mar. Ins. Co.*, (1901) A.C. 362; 70 L.J. P.C. 34.

(*g*) Le Blanc, J., *Lothian* v. *Henderson*, 3 Bos. & P. 515; *De Hahn* v. *Hartley*, 1 T.R. 343; *Ollive* v. *Booker*, 1 Exch. 416; 17 L.J. Ex. 21.

(*h*) *Pawson* v. *Ewer*, 1 Doug. 11, n.

(*i*) *Routledge* v. *Burrell*, 1 H. Bl. 254; *Worsley* v. *Wood*, 6 T.R. 710.

(*k*) *Blackhurst* v. *Cockell*, 3 T.R. 360.

(*l*) *Hore* v. *Whitmore*, Cowp. 784.

(*m*) *Bond* v. *Nutt*, Cowp. 601; *Wright* v. *Shiffner*, 11 East, 515; *Thellusson* v. *Fergusson*, 1 Doug. 361; *Cockrane* v. *Fisher*, 1 Cr. M. & R. 809; 4 L.J. Ex. 328; *Lang* v. *Anderdon*, 3 B. & C. 495; 3 L.J. (O.S.) K.B. 62; *Sea Ins. Co.* v. *Blogg*, (1898) 2 Q.B. 398; 67 L.J. Q.B. 757.

(*n*) *Moir* v. *Royal Exch. Assur. Co.*, 4 Campb. 84; *Ridsdale* v. *Newnham*, 3 M. & S. 456; *Graham* v. *Barras*, 5 B. & Ad. 1011.

particular period of the year, and the ship sails during the prohibited period, the liability on the policy does not attach, as the risk is a different risk from the one agreed to be run by the underwriter (*o*).

Warranties—Sailing with convoy.—If a vessel warranted "to depart with convoy" is proceeding from her loading port to the nearest place of rendezvous for convoy and is captured, the underwriters are nevertheless responsible, as the vessel was fulfilling the warranty at the time of the capture in the only mode in which it could be fulfilled, and was proceeding to secure convoy and departing with convoy, in the mercantile sense of the term, and according to the usage of trade (*p*). A warranty that the vessel shall "depart with convoy" does not mean merely that she is to sail out of port or from the place of general rendezvous with convoy, but that she is to have convoy for the whole voyage insured, unless prevented by stress of weather (*q*), or unless it is the usage for ships to be convoyed only part of the distance, and convoy beyond a certain point is not deemed necessary and is not provided by the government (*r*). The mode of the convoy is regulated by mercantile usage; and it is never considered necessary for the ship to be convoyed throughout by the same vessels, there being in general relays of convoy from stage to stage (*s*).

Neutrality.—Whenever property is insured as neutral property which is not neutral property, there is no contract, and no action can be maintained on the policy. But, if the property is neutral at the time the insurance is effected and the risk attaches on the policy, the circumstance of its ceasing to be so at a subsequent period does not affect the underwriter's liability (*t*). "If a war break out the next day, the underwriter is liable" (*u*). It is no answer to an action on a policy of insurance that the goods were contraband of war, and were shipped for the purpose of being sent to a belligerent port, unless facts establishing a fraudulent concealment (*infra*) are set forth (*x*). The sentence of a foreign court of admiralty, or prize court, falsifying the warranty of neutrality, will be conclusive evidence of the breach thereof (*y*), unless it appears on the face of such sentence that the grounds of the adjudication are erroneous, or the adjudication itself is involved in

(*o*) *Vezian* v. *Grant*, 2 Park, Ins. 670; *Colledge* v. *Harty*, 6 Exch. 205; 20 L.J. Ex. 146.

(*p*) *Anderson* v. *Pitcher*, 2 Bos. & P. 164.

(*q*) *Jefferyes* v. *Legendra*, 1 Show. 297; *Lilly* v. *Ewer*, 1 Doug. 72.

(*r*) *D'Eguino* v. *Bewicke*, 2 H. Bl. 551.

(*s*) *De Garey* v. *Clagget*, 2 Park, Ins. 708.

(*t*) *Eden* v. *Parkinson*, 2 Doug. 732; and see *Dent* v. *Smith*, L.R. 4 Q.B. 414; 38 L.J. Q.B. 144.

(*u*) *Salucci* v. *Johnson*, 2 Park, Ins. 716.

(*x*) *Hobbs* v. *Henning*, 34 L.J. C.P. 117; 17 C.B. N.S. 791; and see *Chavasse, Ex parte*, 34 L.J. Bk. 17.

(*y*) *Bolton* v. *Gladstone*, 5 East, 155; *Baring* v. *Clagett*, 3 Bos. & P. 201; *Garrels* v. *Kensington*, 8 T.R. 230.

doubt (*z*). It has been held that an American by birth, who has resided for some years with his family in England, going occasionally to America, is so far to be considered a British subject that, if a ship of his be warranted American property, it is not to be deemed so, though the vessel was built in America and registered there (*a*).

Fraudulent misrepresentation.—Oral evidence of representations made at the time the policy was effected is inadmissible to control the liability upon the policy, unless such representations are fraudulent representations (*b*). All material representations which are false to the knowledge of the party making them are fraudulent, and may be proved by oral testimony in order to deprive the plaintiff of his right of action upon the contract (*c*). A misrepresentation will be of a material fact, and will avoid the policy, if it be an assertion in time of war that the ship will sail with convoy or in company with other vessels, and carry a certain force (*d*). If the representation is true in substance, the policy will not be avoided, although it may be incorrect in minor details; nor will the policy be avoided if it is merely a representation of the parties' own opinion and belief; or if it is immaterial and does not affect the risk; or if the insurer has not been deceived; or if it is made concerning facts which lie as much within the knowledge of the insurer as the insured, and the party making the representation believes it to be true at the time it is made (*e*). But if the underwriter has been thrown off his guard and prevented from making those inquiries which he would otherwise have made, the insured will be precluded from suing upon the policy, although the means of information may be within reach of the underwriter (*f*). A fraudulent misrepresentation, made to the first underwriter on a material point affecting the risk, is considered as a misrepresentation to every underwriter who underwrites the policy after him; because the obtaining of the signature of the first underwriter weighs with the others, and induces a misplaced confidence; but a misrepresentation to an intermediate underwriter has been held not to extend to the others (*g*).

Concealment of circumstances materially affecting the risk to be incurred by the insurer avoids all policies of assurance, and prevents

(*z*) *Dalgleish* v. *Hodgson*, 7 Bing. 495; 9 L.J. (O.S.) C.P. 138; *Hobbs* v. *Henning*, *ante*, p. 1038.

(*a*) *Tabbs* v. *Bendelack*, 3 Bos. & P. 207, n.

(*b*) *Weston* v. *Emes*, 1 Taunt. 115.

(*c*) *Ante*, pp. 113, 114; *Macdowall* v. *Fraser*, 1 Doug. 260.

(*d*) *Edwards* v. *Footner*, 1 Campb. 530.

(*e*) *Driscol* v. *Passmore*, 1 Bos. & P. 200; *Hubbard* v. *Glover*, 3 Campb. 313; *Bowden* v. *Vaughan*, 10 East, 415; *Flinn* v. *Headlam*, 9 B. & C. 693; 7 L.J. (O.S.) K.B. 307.

(*f*) *Mackintosh* v. *Marshall*, 11 M. & W. 116; 12 L.J. Ex. 337.

(*g*) *Barber* v. *Fletcher*, 1 Doug. 306; *Sibbald* v. *Hill*, 2 Dow, 266; *Forrester* v. *Pigou*, 1 M. & S. 9; *Bell* v. *Carstairs*, 2 Campb. 543.

the insured from recovering even in respect of a loss wholly unconnected with the circumstance concealed (*h*). The rule is that *all facts* should be disclosed which are material to enable the underwriter to judge whether he shall accept the risk, and at what rate, not that merely facts should be disclosed which are material to the risk (*i*). Thus the non-disclosure of the fact that goods are insured greatly in excess of their value will avoid the policy (*k*). The keeping back of any such circumstance avoids the policy, although the suppression may have occurred through mistake, "because the underwriter is deceived, and the risk run is really different from the risk understood and intended to be run at the time of the agreement" (*l*). A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material, though if a particular fact be actually known to the underwriter at the time, he cannot afterwards set up as a defence to an action on the policy that that fact was not communicated; but, if a material fact be not communicated, which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the insured to show that the particulars supplied by him, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated (*m*). In the case of a time policy, if the insured wilfully permits the ship to sail, or knows that it has sailed, on the voyage of which the time policy covers part, in an unseaworthy state, the insurance will be void on the ground of the concealment of a material circumstance (*n*). If the insured has received a doubtful account of the loss of his ship such as "that a ship similar to his has been captured," and neglects to disclose the intelligence to the underwriter, the policy will be void (*o*); and so it will, if the assured keeps back any fact which, if disclosed, would in all probability have caused the underwriter to charge a higher premium (*p*); such as that the captain's judgment in the navigation of the vessel has been restricted by some unusual private instructions (*q*), or that the ship is a missing ship

(*h*) *Seaman* v. *Fonerau*, 2 Str. 1183; *Fitzherbert* v. *Mather*, 1 T.R. 12; *Hodgson* v. *Richardson*, 1 W. Bl. 463; *Traill* v. *Baring*, 33 L.J. Ch. 521; 4 Giff. 485.

(*i*) *Rivaz* v. *Gerussi*, 6 Q.B.D. 222; 50 L.J. Q.B. 176; *Tate* v. *Hyslop*, 15 Q.B.D. 369; 54 L.J. Q.B. 592.

(*k*) *Ionides* v. *Pender*, L.R. 9 Q.B. 531; 43 L.J. Q.B. 227.

(*l*) *Carter* v. *Boehm*, 3 Burr. 1910; *Mercantile Steamship Co.* v. *Tyser*, 7 Q.B.D. 73.

(*m*) *Bates* v. *Hewitt*, L.R. 2 Q.B. 595; 36 L.J. Q.B. 282.

(*n*) Parke, B., *Gibson* v. *Small*, 4 H. L.C. 408.

(*o*) *Da Costa* v. *Scandret*, 2 P. Wms. 169.

(*p*) *Willes* v. *Glover*, 1 Bos. & P. N.R. 16.

(*q*) *Middlewood* v. *Blakes*, 7 T.R. 162.

out of her time (*r*), or that she had encountered tempestuous weather, and that another ship, that sailed long before her, had arrived (*s*), or that she had taken the ground or struck on a rock, at an antecedent period, and had not since been surveyed or repaired (*t*), or that she had been met at sea in a leaky state (*u*), or had missed joining convoy and been driven out to sea (*x*), or that hostile privateers had been seen in pursuit of her (*y*), or that she was intended to be employed in a foreign smuggling transaction, or to carry simulated papers. But the insured, or the party effecting the policy, is not bound to disclose "loose rumours gathered together no one knows how" (*z*), nor matters which lie as much within the knowledge of the underwriter as of the party effecting the insurance, nor such things as it is the business of the underwriter to know or find out for himself; such as the ordinary risks attendant upon particular adventures, the usages of trade, the dangers of particular seas and rivers, the probability of hostilities between different foreign states; nor the build, age, history, or capabilities of the ship, although, if questions are put to him upon any of these points, he is bound to answer to the best of his information and belief, and, if he knowingly states that which is false, he is guilty of a fraudulent misrepresentation which avoids the policy (*a*). The insured is not bound to disclose to the underwriter the time of the ship's sailing, or to say whether she has sailed or not, unless the ship is a missing ship. "If the underwriter wants to know he ought to inquire" (*b*). If the insured, at the time he effects the insurance, knows that the loss insured against has taken place, this is obviously a downright fraud, which avoids the policy; but, if he does not know of the loss, the validity of the insurance will depend upon the terms of the particular policy. If the insurance is on goods alleged to be on board a particular vessel, and no such goods or vessel exist at the time the policy is effected, the contract is nugatory, and the risk upon it never attaches. But, if the policy is on goods "lost or not lost," the indemnity extends, as we have before seen (*bb*), to all past as well as future losses. If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship or cargo, purposely omits to discharge this

(*r*) *M'Andrew* v. *Bell*, 1 Esp. 373.
(*s*) *Kirby* v. *Smith*, 1 B. & Ald. 672; *Elton* v. *Larkins*, 8 Bing. 198; *Bridges* v. *Hunter*, 1 M. & S. 20.
(*t*) *Gladstone* v. *King*, 1 M. & S. 35; *Russell* v. *Thornton*, 6 H. & N. 140; 30 L.J. Ex. 69; *Holland* v. *Russell*, 4 B. & S. 14; 32 L.J. Q.B. 297.
(*u*) *Lynch* v. *Hamilton*, 3 Taunt. 37; *Lynch* v. *Dunsford*, 14 East, 494.
(*x*) *Sawtell* v. *Loudon*, 5 Taunt. 359.
(*y*) *Beckwaite* v. *Nalgrove*, cited 3 Taunt. 41.
(*z*) *Durrell* v. *Bederley*, Holt, N.P. 285.
(*a*) *Carter* v. *Boehm*, 3 Burr. 1915; *Haywood* v. *Rodgers*, 4 East, 597; *Freeland* v. *Glover*, 7 East, 464; *Harrower* v. *Hutchinson*, L.R. 5 Q.B. 584; 39 L.J. Q.B. 229.
(*b*) *Fort* v. *Lee*, 3 Taunt. 381.
(*bb*) *Ante*, p. 1031.

duty, and the principal, being thus left in ignorance of a fact material to be communicated to the underwriter, effects an insurance by means of that agent, the insurance is void on the ground of concealment (*c*). But where the insurance is effected through another agent, and both he and the principal are ignorant of the material fact in question, the policy is not void, although a former agent who had endeavoured to effect the policy knew of the fact and concealed it from his principal (*d*); but the two transactions must be separate (*e*). The agent ought to communicate with the principal by electric telegraph, where that means of communication is in general use (*f*). Where the agent innocently omits to communicate with his principal, the policy is not void (*g*). But, when the slip has been initialed, the insured need not communicate to the underwriters facts which come to his knowledge afterwards, but before the policy is completed (*h*). Although it is fraud in an insured to insure a vessel which he knows to be lost, yet if an insurance has been effected before the loss but without his authority, he may ratify such insurance although he knows of the loss (*i*).

Risks covered by policy—Custom and usage.—Everything done in the usual course of navigation and trade is presumed to have been in contemplation by the parties to every contract of insurance at the time they entered into the engagement (*k*). If the policy is effected on the ship, tackle, boats, and furniture, and it is the custom to sling boats over the quarter outside the ship, the underwriter will be responsible for a boat lost by being so slung; for every underwriter is presumed to be acquainted with the practice of the trade he insures, and, "if he does not know, he ought to inform himself" (*l*). If liberty of "unloading and re-shipping" is expressly given by the policy, that must be taken to mean an unloading and re-shipping according to the usage of the trade; and therefore, if it is the custom to put goods on board a store-ship to await the arrival of a vessel into which they can be re-shipped,

(*c*) *Fitzherbert* v. *Mather*, 1 T.R. 12, 16; *Gladstone* v. *King*, 1 M. & S. 35. These decisions have been dissented from by Mr. Justice Story, *Ruggles* v. *General Interest Insurance Co.* (4 Mason's Rep. 74), but have been upheld in *Proudfoot* v. *Montefiore*, L.R. 2 Q.B. 511; 36 L.J. Q.B. 225. See, however, *Blackburn, Low & Co.* v. *Vigors*, 12 App.Cas. 531; 57 L.J. Q.B. 114.

(*d*) *Blackburn, Low & Co.* v. *Vigors*, *supra*.

(*e*) *Blackburn, Low & Co.* v. *Haslam*, 21 Q.B.D. 144; 57 L.J. Q.B. 479.

(*f*) *Proudfoot* v. *Montefiore*, *supra*.

(*g*) *Stribley* v. *Imperial Marine Insurance Co.*, 1 Q.B.D. 507; 45 L.J. Q.B. 396. See, however, remarks of Lord Watson in *Blackburn, Low & Co.* v. *Vigors*, 12 App.Cas. 531, at p. 540.

(*h*) *Cory* v. *Patton*, L.R. 7 Q.B. 304; 41 L.J. Q.B. 195, n.; *Lishman* v. *Northern Maritime Insurance Co.*, L.R. 8 C.P. 216; 42 L.J. C.P. 108.

(*i*) *Williams* v. *North China Ins. Co.*, 1 C.P.D. 757.

(*k*) *Pelly* v. *Roy. Ex. Assur. Co.*, 1 Burr. 341.

(*l*) *Blackett* v. *Royal Ex. Assur. Co.*, 2 Cr. & J. 249; 1 L.J. Ex. 101; *Noble* v. *Kennoway*, 2 Doug. 513.

and the goods are lost in such store-ship, the underwriters will be responsible (*m*). If it is the custom, for vessels insured "to depart with convoy," to sail from the loading port without convoy to the general place of rendezvous for ships wanting convoy, and a vessel is captured whilst proceeding thither unaccompanied to obtain convoy in the customary mode, the underwriters will be responsible for the loss (*n*).

Deck cargoes.—If it is the known custom of the captains and masters in any particular trade to carry deck cargoes, and such a cargo is insured and washed overboard, the underwriters will be bound to make good the loss; but, as goods thus carried are exposed to greater hazard than goods carried in the ordinary way, they will be discharged from liability, unless the custom is clearly established, or the underwriters have express notice of the increased risk (*o*). But as a rule deck cargoes jettisoned are not entitled to general average contribution (*p*). By the Merchant Shipping Act, 1894 (*q*), deck cargoes are prohibited at certain periods of the year. A policy of insurance, therefore, entered into for the express purpose of protecting what the law has prohibited will be invalid (*r*); but the statute does not make the voyage absolutely illegal so as to affect innocent persons. It must be shown that the policy was effected with full knowledge by the insured that the goods were to be placed on deck, and that the vessel was to sail during the prohibited period; and the knowledge of the ship-master is not the knowledge of the shipowner (*s*). A custom that underwriters are not liable under the ordinary form of policy for general average in respect of the jettison of goods stowed on deck is a valid custom and does not contradict the terms of the policy (*t*).

Intermediate voyages—Custom and usage.—On fishing voyages to the American seas, it is customary for vessels, after the termination of the outward voyage, to be employed in banking or fishing off the coasts of Newfoundland before they return; and, if a vessel is insured for the outward and homeward voyage, the insurance will cover the vessel during the intervening period occupied by fishing, if she is not detained longer than is customary and usual (*u*). If it is the custom, when several empty vessels arrive together at the port of lading and cannot all find cargoes, to

(*m*) *Tiernay* v. *Etherington*, cited 1 Burr. 346.

(*n*) *Gordon* v. *Morley*, 2 Str. 1265; *Warwick* v. *Scott*, 4 Campb. 62.

(*o*) *Milward* v. *Hibbert*, 3 Q.B. 120; 11 L.J. Q.B. 137; *Miller* v. *Titherington*, 31 L.J. Ex. 363; 7 H. & N. 954.

(*p*) *Wright* v. *Marwood*, 7 Q.B.D. 62; 50 L.J. Q.B. 643; see *ante*, p. 933.

(*q*) 57 & 58 Vict. c. 60, s. 451.

(*r*) *Cunard* v. *Hyde*, 29 L.J. Q.B. 6; 2 E. & E. 1.

(*s*) *Cunard* v. *Hyde*, E. B. & E. 670; 27 L.J. Q.B. 408; *Wilson* v. *Rankin*, 35 L.J. Q.B. 87; L.R. 1 Q.B. 162; *Dudgeon* v. *Pembroke*, L.R. 9 Q.B. 581; 43 L.J. Q.B. 220.

(*t*) *Miller* v. *Titherington*, 7 H. & N. 954; 31 L.J. Ex. 363.

(*u*) *Vallance* v. *Dewar*, 1 Campb. 503.

employ some of them on a short intermediate voyage, and a vessel insured for the outward and homeward voyage is so employed, and then takes on board her return cargo and is lost on the homeward voyage, the liability of the underwriters in respect of the loss will not be discharged; but a usage for the employment of the vessel for an unreasonable space of time will not be sanctioned (*x*). The usages established amongst the underwriters at Lloyd's cannot affect their liability upon the policy, unless it be shown that the insured was cognizant of them, or was in the habit of transacting business at Lloyd's (*y*).

Loss by sea perils—Negligence and misconduct of master or mariners.—The risks that the underwriters generally take upon themselves by the common form of policy are perils of the sea, fire, pirates, letters of mart and countermart, takings at sea, restraint of princes and people, barratry of the masters and mariners, &c. As between the carrier of goods by sea and the owner of such goods, losses which, though caused immediately by the violence of the winds and waves, are imputable to the ignorance or negligence of the master or mariners, are not losses by perils of the sea (*ante*, p. 913); but a different rule prevails in cases of insurance, where the immediate and not the remote cause of loss is regarded, so that if a vessel is stranded and wrecked through the incompetency or misconduct or barratry of the captain and crew, the loss is nevertheless, as between the insurer and the insured, a loss by perils of the sea, and is covered by the policy, provided the insured, if the insurance is on the vessel itself, had appointed a sufficient crew, and a captain who appeared to have competent skill at the commencement of the voyage (*z*). And generally a loss caused immediately by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy (*a*). If, by reason of the wilful extinguishment of a particular light by a hostile force, the captain miscalculates his position and the ship goes ashore, the loss is a loss by perils of the sea, although it might never have occurred if hostilities had not broken out (*b*). And if a ship is wrecked on a foreign coast, and the cargo gets into the hands of the authorities there, and the owners, in order to recover it, are compelled to pay a sum of money to such authorities, the loss of that sum, being an immediate conse-

(*x*) *Ougier* v. *Jennings*, 1 Campb. 505, n. (*a*); *Phillips* v. *Irving*, 7 M. & Gr. 325; 13 L.J. C.P. 145; *Salvador* v. *Hopkins*, 3 Burr. 1707.

(*y*) *Scott* v. *Irving*, 1 B. & Ad. 605; 9 L.J. (O.S.) K.B. 89; *Gabay* v. *Lloyd*, 3 B. & C. 793; 3 L.J. (O.S.) K.B. 116; *ante*, p. 66.

(*z*) *Redman* v. *Wilson*, 14 M. & W. 483; 14 L.J. Ex. 333.

(*a*) *Dudgeon* v. *Pembroke*, 2 App.Cas. 284; 46 L.J. Q.B. 409.

(*b*) *Ionides* v. *Univ. Marine Ins. Co.*, 14 C.B. N.S. 259; 32 L.J. C.P. 170.

quence of the wreck, is a loss by perils of the sea (*c*). A loss occasioned by another vessel's running down the ship insured is a loss by perils of the sea (*d*), although there has been negligence and want of skill on the part of the master and crew of the ship insured (*e*). If, in the collision, both vessels are injured, and the owners are compelled by the rules of the Court of Admiralty to divide the loss, and the ship insured has done more damage than she has received, and the owners are obliged to pay the balance, this is not then a loss by perils of the sea, as the sea is not the proximate cause thereof: "it grows out of an arbitrary provision in the law of nations from views of general expediency, and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against" (*f*). If a ship takes the ground on entering or leaving port, the loss is a loss by perils of the sea; but if she is hove down on a beach within the tideway, or placed in a graving dock to be repaired or cleaned, and rolls over, or is blown over by the wind, and is bilged or damaged, the loss is not a loss from perils of the sea; for the sea is not in such a case the proximate cause of the mischief (*g*). The collision clause now frequently inserted in policies to secure the shipowner against damage, which he may be compelled to pay for injury done to others by his vessel coming into collision with another, does not extend to damages paid by the insured in respect of loss of life or personal injury (*h*). Nor does it cover the extra costs which the insured may be put to when he is sued for damages for a collision but gets a verdict, nor can these costs be recovered under the suing and labouring clause (*i*). But where goods were carried on the terms of an ordinary bill of lading, excepting perils of the sea but not excepting negligence, and the loss apparently fell within the exception of perils of the sea, the burden of showing that the shipowners were not entitled to the benefit of the exception by reason of negligence fell upon the shippers (*k*).

Sea risks covered by policy.—Loss or damage resulting from

(*c*) *Dent* v. *Smith*, L.R. 4 Q.B. 414; 38 L.J. Q.B. 144.

(*d*) *Sailing Ship Garston Co.* v. *Hickie, Borman & Co.*, 18 Q.B.D. 17; 56 L.J. Q.B. 38; *The Xantho*, 12 App.Cas. 503; 56 L.J. P. 96.

(*e*) *Smith* v. *Scott*, 4 Taunt. 126. See, however, *The Xantho*, *supra*.

(*f*) *De Vaux* v. *Salvador*, 4 Ad. & E. 420; 5 L.J. K.B. 134.

(*g*) *Thompson* v. *Whitmore*, 3 Taunt. 227; *Phillips* v. *Barber*, 5 B. & Ald. 161. See *Davidson* v. *Burnand*, L.R. 4 C.P. 117; 38 L.J. C.P. 73; *Reischer* v. *Borwick*, (1894) 2 Q.B. 548; 63 L.J. Q.B. 753.

(*h*) *Taylor* v. *Dewar*, 5 B. & S. 58; 33 L.J. Q.B. 141. As to the meaning of the word "collision," see *Union Mar. Ins. Co.* v. *Borwick*, (1895) 2 Q.B. 179; 64 L.J. Q.B. 679; *The Zeta*, (1893) A.C. 468; 63 L.J. P. 17; *Chandler* v. *Blogg*, (1898) 1 Q.B. 32; 67 L.J. Q.B. 336; *The Munroe*, (1893) P. 248; *Burger* v. *Indemnity Mut. Mar. Assur. Co.*, (1900) 2 Q.B. 348; 69 L.J. Q.B. 838.

(*i*) *Xenos* v. *Fox*, L.R. 4 C.P. 665; 38 L.J. C.P. 351.

(*k*) *The Glendarroch*, (1894) P. 226; 63 L.J. P. 89.

ordinary wear and tear, or from some inherent vice or defect (*l*), is not covered by the policy. There must be something fortuitous or accidental in the nature of the damage (*m*). Therefore, where a vessel moored in a river waiting her turn to discharge her cargo floated when the tide was in and took the ground when the tide was out, and so remained for several days, when she became hogged or strained, and the cabin doors would not shut, and she was obliged to go into dock to be thoroughly repaired, it was held that there was nothing in the disaster which could be referred to the perils insured against. The tide rose and fell as the tide always does; there was no *casus fortuitus;* and the underwriters were not answerable (*n*). If a vessel founders at sea in consequence of her hull having been eaten into by worms during the voyage, the loss is a loss by perils of the sea, as the sea is the proximate cause of the mischief. But if the vessel gets safe to some intermediate port at which she was authorised to touch, and is then unable to put to sea again in consequence of the ravages made in her hull by the worms, or in consequence of her bottom having been eaten into by rats while she was lying in port, the loss is not a loss from perils of the sea, but a loss from the ravages of worms and rats, as the worms and the rats are then the proximate, and not the remote cause of the mischief (*o*). Where a cargo was damaged by heat in consequence of the ventilators having to be closed during a storm of exceptional severity, it was held that the loss was occasioned by "accidents of the seas" (*p*).

Losses from old age and decay and other causes—Sea perils.—If a vessel is old, and her timbers decay during the voyage, and the bolts and fastenings become loosened, and she founders in a gale of wind which a younger and stouter vessel would in all probability have ridden out in safety, the loss is a loss by perils of the sea (*q*); but, if she gets safe into port and there drops to pieces, or is found to be unfit to go to sea again from age and decay, the loss is not a loss from perils of the sea, but from old age.

Where a policy was effected on merchandise laden on board a vessel, and the ship was disabled in a storm and obliged to put into port to refit, and the master, in order to defray the expense, sold part of the goods, and applied the proceeds in payment of such expense, it was held that, as it was want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods,

(*l*) Byles, J., *Koebel* v. *Saunders*, 17 C.B. N.S. 79; 33 L.J. C.P. 312.
(*m*) *Paterson* v. *Harris*, 1 B. & S. 336; 30 L.J. Q.B. 354.
(*n*) *Magnus* v. *Buttemer*, 11 C.B. 876; 21 L.J. C.P. 119; *Corcoran* v. *Gurney*, 1 E. & B. 456; 22 L.J. Q.B. 113.
(*o*) *Hunter* v. *Potts*, 4 Campb. 203.
(*p*) *The Thrunscoe*, (1897) P. 301; 66 L.J. P. 172.
(*q*) *Phillips* v. *Nairne*, 4 C.B. 358; 16 L.J. C.P. 194.

the loss was not a loss from a peril of the sea (*r*). Where a vessel went ashore and was wrecked in consequence of two of the crew being seized and carried off by a pressgang whilst they were making fast a line to the quay, it was held that, as the immediate cause of the loss was the stranding of the vessel, it was a loss by perils of the sea within the meaning of the policy of insurance, although it had been brought about and occasioned by the press-gang (*s*). If a cargo of living animals is insured "free from mortality and jettison," and the beasts are killed by the rolling of the ship in a storm, the underwriter is nevertheless liable, as the exception extends only to death from natural causes, and the death in such a case arises immediately from a peril of the sea (*t*). If a cargo of hides has been insured, and the upper portion of the cargo has been injured from putrefying exhalations arising from the decomposition of the lower hides occasioned by the action of sea water, the injury to the upper hides is a loss occasioned by perils of the sea; and, if the cargo consists partly of corn or tobacco and partly of hides, and the sea water renders the hides putrid, and the putridity of the hides injures the corn or the tobacco, such injury constitutes a loss by perils of the sea (*u*). But the insurer is not responsible for loss arising from damage to the reputation of goods from suspicion of injury by salt water where they have not in fact been so injured (*x*). If a cargo of hemp or cotton is put on board in a damp and dangerous state, and it ferments and catches fire or becomes damaged, this is not a loss by perils of the sea, but from an inherent defect in the article itself (*y*); nor is it a loss by perils of the sea where meat is spoiled by reason of mere delay occasioned by stormy weather (*z*). A loss from capture or robbery by pirates is a loss by "perils of the sea" (*a*). If a ship is captured and taken in tow by a man-of-war, and is thereby exposed to a tempestuous sea which injures goods on board, the loss may be treated either as a loss by perils of the sea or a loss by capture (*b*). If a vessel has sailed out of port on her intended voyage, and does not arrive at her port of destination within a reasonable period, and no intelligence can be obtained respecting her, this is evidence

(*r*) *Powell* v. *Gudgeon*, 5 M. & S. 437; *Sarquy* v. *Hobson*, 2 B. & C. 7; 1 L.J. (O.S.) K.B. 222. In such a case the owner of the goods must resort to the shipowner for an indemnity against the loss; *ante*, p. 909.

(*s*) *Hodgson* v. *Malcolm*, 2 Bos. & P. N.R. 336.

(*t*) *Lawrence* v. *Aberdein*, 5 B. & Ald. 107.

(*u*) *Montoya* v. *Lond. Assur. Co.*, 6 Exch. 451; 20 L.J. Ex. 254.

(*x*) *Cator* v. *G. W. Ins. Co. of New York*, L.R. 8 C.P. 552; 42 L.J. C.P. 266; *Lysaght* v. *Coleman*, (1895) 1 Q.B. 49; 64 L.J. Q.B. 175.

(*y*) *Boyd* v. *Dubois*, 3 Campb. 133; Byles, J., *Koebel* v. *Saunders*, 17 C.B. N.S. 79; 33 L.J. C.P. 312.

(*z*) *Taylor* v. *Dunbar*, L.R. 4 C.P. 206; 38 L.J. C.P. 178; *Pink* v. *Fleming*, 25 Q.B.D. 396; 59 L.J. Q.B. 559.

(*a*) 2 Roll. Abr. 248, fol. 10.

(*b*) *Hagedorn* v. *Whitmore*, 1 Stark. 157.

of the loss of the vessel from perils of the sea (*c*). Where one of the risks insured against was "all risks incident to steam navigation," and by failure of machinery the ship was detained so long that the charterers cancelled their charter-party under the terms contained in it, it was held that the loss was occasioned by such cancelling and not by the breaking down of the machinery (*d*).

Perils of fire and jettison.—When fire is one of the perils insured against, and "the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state," to prevent the vessel from falling into the hands of the enemy (*e*), or by the gross negligence of the captain or crew (*f*). "Fire is still the *causa causans;* and the loss is covered by the policy." Where a vessel insured against fire was described in the policy as "lying in the Victoria Dock, with liberty to go into a dry dock," it was held that the ship was not covered by the policy whilst she was lying in the Thames not *in transitu* to the dry dock (*g*). When jettison is one of the risks insured against, the policy will cover a loss occasioned by the throwing of the goods overboard to prevent their falling into the hands of the enemy (*h*). It is not an implied condition that the insured on goods must claim contribution of the other parties for a jettison before he can demand indemnity from his underwriters. He may demand it of them in the first instance; and, when the underwriters have paid him, they will be entitled to stand in his place with respect to the general average contribution (*i*).

Loss by capture and seizure.—Where an insurance was effected against capture only, and the vessel was driven on the enemies' coast in a stiff gale of wind, but received no damage, and, whilst she remained stranded on the shore, she was seized and confiscated, it was held that this was a loss by capture (*k*). But, if the vessel had been disabled or totally wrecked, it would have been a loss from perils of the sea (*l*). The circumstance that the capture has been occasioned by the barratry of the master, or that it is an illegal capture, does not render the capture less a capture (*m*). As

(*c*) *Green* v. *Brown*, 2 Str. 1199; *Koster* v. *Reed*, 6 B. & C. 19.

(*d*) *Mere. Steamship Co.* v. *Tyser*, 7 Q.B.D. 73. As to meaning of term "cancellation," see *Jamieson* v. *Newcastle S.S. Freight Ins. Assoc.*, (1895) 2 Q.B. 90; 64 L.J. Q.B. 560.

(*e*) *Gordon* v. *Rimmington*, 1 Campb. 123.

(*f*) *Busk* v. *Royal Exch. Assur. Co.*, 2 B. & Ald. 73.

(*g*) *Pearson* v. *Commercial Un. Assur. Co.*, 33 L.J. C.P. 85; 15 C.B. N.S. 304; L.R. 8 C.P. 548; 42 L.J. C.P. 548; 1 App.Cas. 498; 45 L.J. Ex. 761.

(*h*) *Butler* v. *Wildman*, 3 B. & Ald. 398.

(*i*) *Dickenson* v. *Jardine*, L.R. 3 C.P. 639; 37 L.J. C.P. 321.

(*k*) *Green* v. *Elmslie*, Peake, 278.

(*l*) *Hahn* v. *Corbett*, 2 Bing. 205; 2 L.J. (O.S.) C.P. 253; *Ionides* v. *Universal Marine Ins. Co.*, 14 C.B. N.S. 259; 32 L.J. C.P. 170, *ante*, p. 1044.

(*m*) *Arcangelo* v. *Thompson*, 2 Campb. 620; *Powell* v. *Hyde*, 5 E. & B. 611; 25

insurances on voyages to ports blockaded by a British squadron are illegal, no action can be maintained for indemnity in respect of losses resulting from an attempt to break such a blockade, if it appears that the party bringing the action knew of the blockade and intended to break it at the time he effected the insurance. If he had no knowledge of the blockade or no intention to break it, or had fair ground to think that the blockade would be raised by the time the vessel reached her destination, the insurance will be valid (*n*). Insurances by British subjects of foreign vessels and cargoes from capture do not extend to captures made by order of the government of this country; for all insurances of enemies' property against *British* capture are null and void, as being contrary to the public policy of the law (*o*). This principle does not apply to insurance against seizure by a belligerent government of the property of its own subjects (*p*). In every policy of insurance there is an implied term, that the insurance shall not extend to cover any loss from capture of enemies' property by the British government on the breaking out of hostilities (*q*). But the property of neutrals will be covered by the policy (*r*); and so will the property of all persons who have received a licence to trade from the crown (*s*). If a foreigner consigns goods to merchants in this country on his own account and risk, and the consignees make advances to such foreign consignor in respect of the consignment, and insure the goods on his account, and a war breaks out which prevents the consignor from suing upon the policy in the courts of this country, the consignees cannot avail themselves of the policy for the purpose of recovering the amount of their advances from the underwriters, although it was made in their names as interest might appear. They should have insured their interest in the first instance (*t*). When a capture has been made, whether legal or not, the underwriters are liable for the expenses of a compromise made *bonâ fide* to prevent the ship's being condemned as a prize (*u*). If the capture does not take place until after the goods have been landed, the underwriters are not liable,

L.J. Q.B. 65; *Palmer* v. *Naylor*, 10 Exch. 382; 23 L.J. Ex. 323; *Cory* v. *Burr*, 8 App.Cas. 393; 52 L.J. Q.B. 657.

(*n*) *Harratt* v. *Wise*, 9 B. & C. 712; 7 L.J. (O.S.) K.B. 309; *Naylor* v. *Taylor*, 9 B. & C. 718.

(*o*) *Furtado* v. *Rogers*, 3 B. & P. 191; *Esposito* v. *Bowden*, 7 E. & B. 763; 27 L.J. Q.B. 17.

(*p*) *Driefontein Gold Mines* v. *Janson*, (1901) 2 K.B. 419; 70 L.J. K.B. 881; aff. H.L., 71 L.J. K.B. 857; (1902) A.C. 484; *Nigel Gold Mining Co.* v. *Hoade*, (1901) 2 K.B. 849; 70 L.J. K.B. 1006. As to meaning of "seizure," see *Robinson Gold Mining Co.* v. *Alliance Mar. & Gen. Assur. Co.*, (1902) 2 K.B. 489; 71 L.J. K.B. 942.

(*q*) *Brandon* v. *Curling*, 4 East, 417; *Kellner* v. *Le Mesurier*, *ib.* 396.

(*r*) *Visger* v. *Prescott*, 5 Esp. 186.

(*s*) *Usparicha* v. *Noble*, 13 East, 332.

(*t*) *Conway* v. *Gray*, 10 East, 536; but see *Aubert* v. *Gray*, 32 L.J. Q.B. 50; 3 B. & S. 163.

(*u*) *Berens* v. *Rucker*, 1 W. Bl. 313.

as the voyage is terminated, although the goods may never have come to the possession of the consignees (*x*).

Restraints and detainments of kings, princes and people.—The word "people" comprehends nations in their collective capacity, and not bodies of insurgents acting in opposition to their rulers. "It means the supreme power of the country, whatever it may be;" and, therefore, if a corn vessel is seized and detained by a hungry mob or a party of rebels, the loss resulting therefrom is not covered by the policy; for it is not a detention by "the people" (*y*). But, if it be made by order of the executive officers of a foreign government, or by any foreign prince, potentate, or power, it is otherwise (*z*). It is not necessary in order to render the underwriters liable that there should be an intention to keep the ship; but where a ship was seized and the cargo plundered by natives, it was held to be within the policy (*a*). The clause does not extend to losses by detention by the British government, or by officers acting under its authority, unless the detention be unlawful. A foreigner, therefore, cannot sue any British subject in the courts of this country for such losses (*b*), unless he can show that it was an erroneous or unlawful detention (*c*). The insurance against the risk of detention by princes will not extend to cover any loss happening in the course of any contraband adventure in which the goods become liable to seizure as forfeited by the laws of this country (*d*), or by the laws of any foreign country, unless the underwriter has notice of the intention of the insured to engage in a foreign smuggling transaction, and accepts the increased risk, in which case he will be liable upon the policy, as our courts do not take notice of the revenue laws of foreign governments (*e*). If the detention arises from the captain's having carried simulated papers, or from his having neglected to provide proper national documents for his vessel, the underwriters will be discharged (*f*), unless they have received notice of the intention so to trade, and have accepted the increased risk, and the trading with simulated or defective papers is not unlawful by the laws of this country, but is resorted to in the furtherance of British commerce (*g*). If, by reason of a hostile embargo suddenly laid on the destined port, the further prosecution of the voyage becomes impracticable, and the ship returns, and the voyage is lost, the loss is not a loss by deten-

(*x*) *Brown* v. *Carstairs*, 3 Campb. 161.
(*y*) *Nesbitt* v. *Lushington*, 4 T.R. 783.
(*z*) *Rotch* v. *Edie*, 6 T.R. 413.
(*a*) *Johnston* v. *Hogg*, 10 Q.B.D. 432; 52 L.J. Q.B. 343.
(*b*) *Touteng* v. *Hubbard*, 3 Bos. & P. 291.
(*c*) *Mullett* v. *Shedden*, 13 East, 304; *Lozano* v. *Janson*, 28 L.J. Q.B. 337; 2 E. & E. 60.
(*d*) *Brandon* v. *Curling*, 4 East, 416.
(*e*) *Planché* v. *Fletcher*, 1 Doug. 251; *Holman* v. *Johnson*, Cowp. 343.
(*f*) *Bell* v. *Carstairs*, 14 East, 374.
(*g*) *Bazett* v. *Meyer*, 5 Taunt. 824.

tion (*h*). Goods are detained where they are by the application of a hostile force prevented from being carried to their destination, as where they are in a blockaded port or a besieged town. Thus, where goods insured from Shanghai to London *viâ* Marseilles arrived at Paris, but that city was immediately afterwards so completely surrounded and invested by the German armies who were then besieging it that it was impossible to remove the goods from it, it was held that there was a loss by "restraint of princes," and that the insured was justified in abandoning the goods (*i*). The meaning of the term "restraint of princes" is not confined to an actual physical restraint, but includes a restraint arising from a reasonable apprehension of danger; if such a restraint is likely to continue, the shipowner is entitled to discharge the cargo before reaching the port of destination (*k*). Every foreigner is deemed to be a party to the public authoritative acts of his own government; and a detention by order of such government is as much his act as if it proceeded immediately from himself. He cannot, therefore, make a loss resulting from such a detention the foundation of a claim for indemnity against any British subjects in the courts of this country (*l*), unless the insurance is expressly directed against such a contingency, and the insurer has expressly agreed to take upon himself such a risk (*m*). If the detention of goods takes place whilst they are on board the vessel at the port of destination, before the risk in the policy ceases, the underwriters are responsible; but, if the goods have been safely landed and are then seized, they are discharged from liability (*n*). The underwriters are sometimes exempted, by the express terms of the policy, from responsibility in case of confiscation, seizure, and capture in port. In these cases, whether the vessel was or was not at her port of discharge is a question of fact for a jury, to be determined by reference to custom and usage, as defining the limits of the port (*o*).

Peril of barratry of master and crew.—Barratry may be defined to be any species of fraud by which the owners or insurers are injured (*p*), such as running away with the ship; or fraudulently carrying her out of her course; or sinking or deserting her; or fraudulently defeating or delaying the voyage; embezzling the cargo; smuggling (*q*); cruising for and taking prizes without the

(*h*) *Forster* v. *Christie*, 11 East, 205.

(*i*) *Rodocanachi* v. *Elliott*, L.R. 9 C.P. 518; 43 L.J. C.P. 255. See *Miller* v. *Law Accident Ins. Soc.*, 71 L.J. K.B. 551.

(*k*) *Nobel's Explosives Co.* v. *Jenkins*, (1896) 2 Q.B. 326; 65 L.J. Q.B. 638.

(*l*) *Campbell* v. *Innes*, 4 B. & Ald. 423; but see *Aubert* v. *Gray*, 32 L.J. Q.B. 50; 3 B. & S. 163.

(*m*) *Simeon* v. *Bazett*, 2 M. & S. 98.

(*n*) *Brown* v. *Carstairs*, 3 Campb. 160.

(*o*) *Reyner* v. *Pearson*, 4 Taunt. 662; *Levy* v. *Vaughan*, *ib.* 387; *Levin* v. *Newnham*, *ib.* 722; *Mellish* v. *Staniforth*, 3 Taunt. 499.

(*p*) *Vallejo* v. *Wheeler*, Cowp. 154; *Earle* v. *Rowcroft*, 8 East, 126.

(*q*) *Dixon* v. *Reid*, 5 B. & Ald. 597; *Hucks* v. *Thornton*, Holt, N.P. 30;

authority of the owner (*r*); sailing out of port without paying port dues, or in breach of an embargo, whereby the vessel or cargo is confiscated or lost; trading with alien enemies; or wilfully and knowingly sailing to a blockaded port, whereby the ship is seized by a British cruiser (*s*); and the act may be barratry, although it was done by the captain with no view of benefiting himself, but of securing some advantage for the shipowners. But barratry does not in our own law include simple negligence, unaccompanied by culpable misconduct, nor any act done in obedience to the commands of the shipowner, or from ignorance, or a mere error of judgment, or a mistake by the captain of the tenor of his instructions (*t*). "Barratry," it has been observed, "is an act of fraud, not directed against the owner of the goods which are lost, but against the owner of the ship; and, if the owner of the ship (he being sole owner) concurs in the act which causes the loss, it takes from it the character of barratry." But, if the owner of the goods is the freighter or charterer of the vessel, and the ship is under his orders and control, he is *pro hâc vice* the owner of the vessel, and the fraudulent conduct of the master and crew amounts to barratry as between him and them, although the shipowner may be a party to the fraud. A master who is a sole owner cannot commit barratry, because he cannot commit a fraud against himself; but, if a master, being also part owner, makes away with the ship in fraud of the other owners, that is barratry (*u*). Where barratry of the master was insured against, and the ship was warranted "free from capture and seizure," and the ship was seized in consequence of barratry, it was held that the loss was due to the seizure not the barratry (*x*).

Perils, losses, and misfortunes generally.—The clause generally inserted in policies extending the insurance to "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship, &c.," covers all losses happening on the sea and in port, whilst the ship is in the customary prosecution of the voyage insured, and whilst the risk on the policy continues. If, therefore, a vessel is fired into and sunk by mistake the loss is within this "sweeping clause" of the policy. If a vessel is lost or injured in port, whilst the policy

Roscow v. *Corson*, 8 Taunt. 684; *Ross* v. *Hunter*, 4 T.R. 33; *Havelock* v. *Hancil*, 3 T.R. 277.

(*r*) *Moss* v. *Byrom*, 6 T.R. 379.

(*s*) *Goldschmidt* v. *Whitmore*, 3 Taunt. 508.

(*t*) *Todd* v. *Ritchie*, 1 Stark. 240; *Stamma* v. *Brown*, 2 Str. 1173; *Phyn* v. *Royal Exchange*, 7 T.R. 505; *Grill* v. *Gen. Iron Screw Collier Co.*, L.R. 3 C.P. 476; 37 L.J. C.P. 205.

(*u*) *Jones* v. *Nicholson*, 10 Exch. 28; 23 L.J. Ex. 330. As to negligence of master who is also part owner, see *Trinder, Anderson & Co.* v. *Thames and Mersey Mar. Ins. Co.*, (1898) 2 Q.B. 114; 67 L.J. Q.B. 666; *Westport Coal Co.* v. *McPhail*, (1898) 2 Q.B. 130; 67 L.J. Q.B. 674.

(*x*) *Cory* v. *Burr*, 8 App.Cas. 393; 52 L.J. Q.B. 657, *ante*, p. 1049.

continues in force, the loss will be covered by this clause; but the general words thereof are restrained in construction to perils of the same kind as those more particularly enumerated in the policy (*y*). And, where meat becomes putrid by reason of delay caused by tempestuous weather, it is not a loss within this clause (*z*). Nor will these general words include damage by the explosion of a boiler (*a*).

Commencement of risk.—If the policy is on a ship or goods "lost or not lost," the indemnity extends to all past as well as all future losses. It is the same as if, the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that, if the goods at the time of the purchase had sustained any damage by the perils of the sea, he would make it good (*b*). Sometimes the risk is expressly appointed to commence from "the time of the vessel's being ready to sail," or "from the time of clearing," or "of her being ready for sea." When it is to commence "at and from" a particular place, it will attach immediately on her first arrival at the port in such a seaworthy condition as to be enabled to lie there in safety, although she is not safely moored, and will continue whilst she is lying at anchor preparing for the voyage for which she is insured (*c*). But, if there is any voluntary and unreasonable delay, the underwriter will be discharged; for his liability upon the policy is not to be subjected to the caprice of a shipowner who may choose to let his ship lie and rot at her anchors (*d*). If there has been a delay in the ship's arrival at the place, it is a question for a jury whether the delay materially varied the risk (*e*); and, if it did, the policy did not attach (*f*). But the vessel must arrive "and have once been *at* the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches." The safety required is a physical safety from the perils insured against, and not a freedom from political danger (*g*). There is, in general, an express stipulation in all policies of insurance on goods, to the effect that the risk upon the policy shall commence from the loading of the goods on board the ship. In this case, and when-

(*y*) *Cullen* v. *Butler*, 5 M. & S. 461; *Phillips* v. *Barber*, 5 B. & Ald. 161; *Naylor* v. *Palmer*, 8 Exch. 739; 22 L.J. Ex. 329; *Davidson* v. *Burnand*, L.R. 4 C.P. 117; 38 L.J. C.P. 73.

(*z*) *Taylor* v. *Dunbar*, L.R. 4 C.P. 206; 38 L.J. C.P. 178; *Pink* v. *Fleming*, 25 Q.B.D. 396; 59 L.J. Q.B. 559.

(*a*) *Thames and Mersey Mar. Ins. Co.* v. *Hamilton, Fraser & Co.*, 12 App.Cas. 484; 56 L.J. Q.B. 626, disapproving *West India Teleg. Co.* v. *Home Ins. Co.*, 6 Q.B.D. 51; 50 L.J. Q.B. 41.

(*b*) *Sutherland* v. *Pratt*, 11 M. & W. 312; 12 L.J. Ex. 235.

(*c*) *Houghton* v. *Empire Mar. Ins. Co.*, L.R. 1 Ex. 206; 35 L.J. Ex. 117.

(*d*) *Chitty* v. *Selwyn*, 2 Atk. 359; *Palmer* v. *Marshall*, 8 Bing. 79; 1 L.J. C.P. 19; *Smith* v. *Surridge*, 4 Esp. 25.

(*e*) *Hull* v. *Cooper*, 14 East, 479.

(*f*) *De Wolf* v. *Archangel Ins. Co.*, L.R. 9 Q.B. 451; 43 L.J. Q.B. 147; *Maritime Ins. Co.* v. *Stearns*, (1901) 2 K.B. 912; 71 L.J. K.B. 86.

(*g*) *Parmeter* v. *Cousins*, 2 Campb. 235; *Bell* v. *Bell*, ib. 478.

ever an insurance is effected on goods laden on board a particular vessel, the risk on the policy does not commence until the goods are safely shipped on board. If they are lost by the upsetting of boats or lighters whilst they are being conveyed from the shore to the ship preparatory to the voyage, the underwriters will not be responsible for the loss. As to risk in landing from lighters after the voyage, see *post*, pp. 1056, 1057.

Whenever, by the express terms of the policy, the adventure is to begin from the loading of goods on board at a particular place, the risk on the policy will not attach if no goods are taken on board at the place specified (*h*), or if the vessel is lost before she arrives at the port of loading (*i*); and the policy will not cover and protect goods previously taken on board, as the adventure had not commenced when those goods were received; but this, being a strict construction, has been relaxed when there is anything on the face of the instrument to satisfy the court that the policy was intended to cover goods previously on board (*k*); and, therefore, if the policy is expressed to be made in continuation of a former policy, which former policy covered the antecedent cargo, the goods previously laden on board, as well as those received on board at the subsequent place of loading designated in the subsequent policy, will be protected (*l*). And, if the adventure is to commence on the goods "wheresoever loaded," the courts will give the words the largest signification, so as to cover all antecedent shipments (*m*). Where part of an antecedent shipment was taken out at the loading port mentioned in the policy as the port from whence the adventure was to commence, and the whole cargo was inspected by custom-house officers for adjusting duties which were paid on it at that port, and was then put on board again with the knowledge of the underwriter, this was held to be in substance a re-loading of the whole cargo, so as to make it a cargo laden on board at the loading port mentioned in the charter-party (*n*).

Duration and termination of risk.—It is generally expressly provided in the policy that the risk shall continue, as regards the ship, until she has arrived at her port of destination or port of discharge, and has been moored at anchor in safety twenty-four hours, and, as regards the goods, until they have been safely discharged and landed. Where a ship was insured "at and from" Jamaica, and was lost in coasting from one port of the island to another, it was

(*h*) *Royal Ex. Assur. Co.* v. *McSwiney*, 19 L.J. Q.B. 222; 14 Q.B. 661.

(*i*) *Halhead* v. *Young*, 6 E. & B. 312; 25 L.J. Q.B. 290.

(*k*) *Mellish* v. *Allnutt*, 2 M. & S. 106; *Rickman* v. *Carstairs*, 5 B. & Ad. 663; 3 L.J. K.B. 28.

(*l*) *Bell* v. *Hobson*, 16 East, 240; *Joyce* v. *Realm Ins. Co.*, L.R. 7 Q.B. 580; 41 L.J. Q.B. 356.

(*m*) *Gladstone* v. *Clay*, 1 M. & S. 418.

(*n*) *Nonnen* v. *Kettlewell*, 16 East, 188; *Carr* v. *Montefiore*, 33 L.J. Q.B. 57, 257; 5 B. & S. 408.

held that she was protected by the policy in moving from port to port in the discharge of her cargo, and in taking fresh cargo, in the prosecution of the outward and homeward voyage in the ordinary and usual manner (*o*). But a vessel is not protected in going about from port to port, or cruising round the whole island, in order to dispose of her cargo, in a manner that is not warranted by the ordinary usage and custom of trade, as the risk is thereby increased to the detriment of the underwriter to an extent not contemplated at the time the insurance was effected. If the policy is on the ship until her arrival at the last port of discharge, and several ports are named in the policy, some of which are blockaded, the risk on the policy will cease on the arrival of the vessel at the last unblockaded port (*p*). But, if the vessel deviates from the voyage insured, and enters upon a fresh adventure, or goes to ports not named in the policy, through fear of the breaking out of hostilities, and of the ports of destination becoming hostile ports, the underwriters will be discharged (*q*). Where a ship was insured for the outward voyage "to all or any of the ports or places in the East Indies, China, or elsewhere, until arrival at the last place of discharge on the outward voyage," it was held that the outward voyage terminated as soon as the outward cargo had been discharged, and that the risk could not be prolonged so as to cover goods taken on board at intermediate places, to be carried onwards to the more distant ports or places named in the policy (*r*). A policy on goods which includes "all risk of craft until the goods are discharged and *safely landed*," does not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel, and not to be landed (*s*).

Where, in a policy of insurance on a vessel for the outward voyage, there is a clause giving her liberty to "touch, stay, &c., at any ports whatsoever to take on board and land goods," the clause will protect the vessel while she is stopping for the *bonâ fide* discharge of the outward cargo, and is at the same time availing herself of the opportunity of taking in merchandise, being at the time in the due prosecution of the outward voyage; but "the captain has no right to mix up together the two objects of disposing of the remnant of the outward cargo and procuring a homeward cargo at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceases to be the sole reason for his stay at 'a particular port,' these underwriters are

(*o*) *Cruikshank* v. *Janson*, 2 Taunt. 301; *Warre* v. *Miller*, 4 B. & C. 538; 4 L.J. (O.S.) K.B. 8.

(*p*) *Doyle* v. *Powell*, 4 B. & Ad. 267.

(*q*) *Oliverson* v. *Brightman*, 8 Q.B. 781; 15 L.J. Q.B. 274.

(*r*) *Richardson* v. *Lond. Assur. Co.*, 4 Campb. 94.

(*s*) *Houlder Bros.* v. *Merchants' Marine Ins. Co.*, 17 Q.B.D. 354; 55 L.J. Q.B. 420; and see *post*, p. 1058, as to lighters.

discharged" (*t*). If the party effecting the insurance is ignorant of the particular port at which the goods will be shipped, as well as of the name of the ship and of the species of the goods, he may protect himself against loss by a general insurance of goods of a certain value to be sent to him by sea whatever may be the ship they are sent in, or the place at which they are put on board (*u*).

Arrival at port of destination—Mooring in safety (*x*).—The limits of the "port of discharge" are regulated by usage; and the term as used in policies of insurance includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel. Where a ship's place of destination was "her Majesty's Dockyard at Deptford," and the vessel got to the dock gates, but could not get into the dock by reason of ice which blocked up the entrance, and she was accordingly moored in the river alongside the dock gates, and was there driven on shore and totally lost, it was held that the underwriters continued liable, as she had never been moored in safety at her place of destination within the terms of the policy (*y*). But, where a vessel was chartered for a voyage from Quebec to Wallasey Port, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo, and the vessel arrived in the Mersey and was towed abreast of Wallasey Port, but could get no further by reason of her great draught of water, and the captain then began to discharge the cargo in lumpers, and also discharged his crew, and after several days, when a considerable portion of the cargo had been discharged, the ship fell over on her side and was injured, it was held that the vessel had arrived at her place of destination, and that the risk on the policy ceased after she had been moored twenty-four hours in safety, although it appeared that the captain intended ultimately to carry the vessel into Wallasey Port with as much of the cargo as he could carry over the shallow part of the river intervening between his original anchorage and that port (*z*). If a vessel has sprung a leak or received her "death wound at sea," but comes into port and casts anchor in apparent safety for twenty-four hours, and the mischief is not discovered until after the expiration of the time limited for the continuance of the risk on the policy, the underwriter will nevertheless continue liable, as it is obvious that the

(*t*) Ld. Ellenborough, *Inglis* v. *Vaux*, 3 Campb. 437; *Moore* v. *Taylor*, 1 Ad. & E. 25; 3 L.J. K.B. 132.

(*u*) *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L.J. (O.S.) K.B. 274; affirmed, 1 Cr. & J. 423; 9 L.J. (O.S.) Ex. 118.

(*x*) *Lindsay* v. *Janson*, 4 H. & N. 704; 28 L.J. Ex. 315.

(*y*) *Samuel* v. *Royal Ex. Assur. Co.*, 8 B. & C. 123; 6 L.J. (O.S.) K.B. 315; *Stone* v. *Marine Ins. Co.*, 1 Ex.D. 81; 45 L.J. Ex. 361.

(*z*) *Whitwell* v. *Harrison*, 2 Exch. 127; 18 L.J. Ex. 465.

vessel never was in reality moored in safety at all (*a*). But, although a ship is damaged, yet if she is not a mere wreck or in a sinking state at the time of her arrival, and is moored as a ship in the possession and control of her owners, she is "moored in safety" (*b*). If an embargo is laid on all English vessels at a foreign port, and the vessel enters in ignorance thereof, and remains at anchor twenty-four hours, and is subsequently seized, the underwriters are liable; "for she is in the power of the enemy the very moment she enters the port, and is not for one minute moored in safety" (*c*). And if, by reason of quarantine regulations or other laws of the port, the vessel is not lawfully moored, but is liable to be sent out of port to perform quarantine, or to be examined or fumigated, the risk continues on the policy, although the vessel may have remained at anchor more than twenty-four hours before any actual removal takes place, and before the port regulations against her mooring are enforced (*d*). But, where a vessel, after being moored, remained in actual safety as a ship for twenty-four hours, and so that during those twenty-four hours her owners had complete and undisturbed possession of her, but was afterwards seized in consequence of the master having smuggled before her arrival, it was held that the terms of the policy were satisfied, and that the loss by the seizure was a loss after the termination of the risk (*e*).

Risks in landing goods.—When the insurance is on goods, it is generally expressly provided in the policy that the risk shall continue until the goods have been safely discharged and landed; but whether there is such a provision or not, the risk upon the policy will continue from the time of the loading of the goods on board to the time of their being actually landed at the port of destination (*f*). Any loss or damage, therefore, sustained in the transhipment of the goods from the vessel to the shore by the upsetting or stranding of boats or lighters, will have to be made good by the underwriters, provided the transhipment is made in the ordinary course, and according to the usage of the port and trade (*g*), and is not made in the boats and lighters of the owner of the goods. If the latter sends his own lighters and servants for the goods and receives them, the underwriters will be discharged, as the voyage is terminated, and the risk on the policy ceases, as soon as the consignee has got the goods into his own possession

(*a*) *Meretony* v. *Dunlope*, cited 1 T.R. 260, where it is stated that the verdict was given for the insured, whereas the court, in *Knight* v. *Faith*, 19 L.J. Q.B. 517; 15 Q.B. 649, treat the case as if the verdict had been for the insurer.

(*b*) *Lidgett* v. *Secretan*, L.R. 5 C.P. 190; 39 L.J. C.P. 196.

(*c*) *Minett* v. *Anderson*, Peake, 277.

(*d*) *Waples* v. *Eames*, 2 Str. 1243; *Horneyer* v. *Lushington*, 15 East, 46.

(*e*) *Lockyer* v. *Offley*, 1 T.R. 252.

(*f*) *Anon.*, Skinner, 243.

(*g*) *Stewart* v. *Bell*, 5 B. & Ald. 238.

and under his own care (*h*). If the goods are conveyed in public lighters, or in the boats or lighters of third parties, in accordance with the usage of the port, the underwriters will continue liable until the goods are landed, unless such lighters or boats are in the possession and under the control of the consignee or owner of the goods, in which case the voyage will be just as much terminated as if they were his own lighters and boats, the goods being then actually delivered to him and in his possession (*i*). On an insurance of goods on a voyage policy, until the same are safely landed at the port of discharge, "including all risks to and from the ship," there is no implied warranty that the lighter used at the end of the voyage to convey the goods from the ship to the shore shall be seaworthy for that purpose (*k*). If a vessel is disabled and obliged to put into port before the voyage is completed, and is not worth repairing, and is consequently abandoned, and the master tranships the goods, and after such transhipment the goods are lost, the underwriters will be liable upon the policy (*l*).

Insurance on profits.—When profits expected to be realised from the carriage of merchandise are insured from the ordinary perils of the sea, and the ship is lost by a peril insured against, but the merchandise is brought safe to the port of destination by another vessel, there is no loss of profit within the meaning of the policy, and the underwriters are not responsible (*m*).

Freight policies.—The freight to be earned by the vessel on the performance of the voyage may be insured as well as the vessel itself, and the cargo laden on board (*n*). The object of the contract is to protect the insured from being deprived by any of the perils insured against of the profit he would otherwise earn from the carriage of the goods. It is incumbent, therefore, on the insured to prove that, unless some of the perils insured against had intervened, some freight would have been earned, and evidence must be given, either that goods were put on board from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by perils insured against, would have been entitled to demand freight (*o*). Prepaid freight cannot be recovered back (*p*). When an express contract of affreightment, under which the

(*h*) *Sparrow* v. *Caruthers*, 2 Str. 1236.

(*i*) *Hurry* v. *R. Ex. Assur. Co.*, 2 B. & P. 430; *Strong* v. *Natally*, 1 B. & P. N.R. 16.

(*k*) *Lane* v. *Nixon*, L.R. 1 C.P. 412; 35 L.J. C.P. 243.

(*l*) *Plantamour* v. *Staples*, 3 Doug. 1; 1 T.R. 611, n.; *Shipton* v. *Thornton*, 9 Ad. & E. 337; 8 L.J. Q.B. 73.

(*m*) *Chope* v. *Reynolds*, 5 C.B. N.S. 651; 28 L.J. C.P. 194.

(*n*) As to insuring advances on freight, see *Price* v. *Maritime Ins. Co.*, (1901) 2 K.B. 412; 70 L.J. K.B. 780.

(*o*) Ld. Ellenborough, *Forbes* v. *Aspinall*, 13 East, 325; *Patrick* v. *Eames*, 3 Campb. 441.

(*p*) *Allison* v. *Bristol Ins. Co.*, 1 App. Cas. 209.

shipowner is entitled to the freight insured, can be proved, the risk on the policy will commence from the time that the shipowner has put himself into a condition to earn the freight, by making the vessel ready for sea and placing her at the disposal of the charterer, whether any goods have or have not been actually shipped on board under the contract (*q*). Thus, if a vessel is chartered for a voyage from A. to B., the interest in the freight commences on the vessel's sailing for A., either in ballast or with a small quantity only of goods for B., so long as she is starting solely with a view to the chartered freight (*r*). But, if no express contract of affreightment can be proved, the risk will not attach on the policy until goods have been actually shipped on board under circumstances giving the shipowner a right to freight (*s*).

When the insurance is on the freight to be earned on the outward and homeward voyage, and there is an express contract of charter-party for the outward and homeward voyage, the liability of the insurer will continue all through the outward and homeward voyage, whether any of the homeward cargo had or had not been taken on board at the time of the loss (*t*); but, if the insurance is on freight to be earned out and home, and the insured has only made a contract of affreightment for the outward voyage, the liability of the insurer, as respects the homeward voyage, will not commence until an express contract of affreightment for the homeward voyage has been entered into, or until a return cargo or return merchandise has been shipped on board, giving the shipowner a right to homeward freight (*u*). Freight may be insured for a portion of the voyage as well as a cargo of goods; and, if an insurance on freight is effected on a voyage from A. to B., the risk is not varied, and the underwriters are not discharged, because the vessel is in reality sailing from A. to C., touching at B., and the insured has neglected to disclose that fact to the underwriters (*x*). But, if the voyage is altogether a different voyage from the one insured, as, for instance, if the insurance is on the freight to be earned under a contract of affreightment for a particular voyage, and the voyage is subsequently altered, the underwriter will be discharged (*y*). As regards the meaning of the term "freight," it has been held that, if the master, in order to make up a full cargo, buys merchandise on behalf of the shipowner and brings it home,

(*q*) *Thompson* v. *Taylor*, 6 T.R. 478; *Truscott* v. *Christie*, 2 B. & B. 320; *Devaux* v. *J'Anson*, 5 Bing. N.C. 519; 8 L.J. C.P. 284.

(*r*) *Barber* v. *Fleming*, L.R. 5 Q.B. 59; 39 L.J. Q.B. 25; *Foley* v. *United Fire Assur. Co.*, L.R. 5 C.P. 155; 39 L.J. C.P. 206; *Mercantile Steam Co.* v. *Tyser*, 7 Q.B.D. 73.

(*s*) *Tonge* v. *Watts*, 2 Str. 1251.

(*t*) *Davidson* v. *Willasey*, 1 M. & S. 313; *Atty* v. *Lindo*, 1 B. & P. N.R. 236.

(*u*) *Williamson* v. *Innes*, 8 Bing. 81, n.

(*x*) *Taylor* v. *Wilson*, 15 East, 330.

(*y*) *Sellar* v. *M'Vicar*, 1 B. & P. N.R. 23.

the fair value of the conveyance of such goods may be included under the term "freight" in the policy (*z*). But, although "freight" includes the interest of the owner in the carriage of his own goods, yet in an ordinary policy it does not extend to passage money (*a*).

Loss of freight.—To recover for loss of freight, a total loss by perils of the sea must be proved. If the master has the means of repairing a vessel which has sustained sea damage, and of shipping and bringing home the cargo, and neglects to avail himself of the opportunities within his reach, the insured cannot recover for loss of freight (*b*). Where the insurance was on freight, and the ship was injured by perils of the sea, and obliged to put into port and land the cargo to re-fit, and part of the cargo was so wetted by sea-water that it could not be re-laden on board without imminent danger of ignition, unless it went through a process which would have detained the vessel six weeks, at an expense equal to the freight, and the master sold the goods, and, finding he could not obtain others, sailed on his voyage, it was held that the underwriters were not liable to make good the loss of the freight on these goods (*c*). Where the plaintiff having entered into a charter-party by which the ship was to proceed to Newport and there load a cargo, insured the chartered freight, and the ship on the way to Newport was delayed by the perils insured against for so long a time that the freighter refused and was justified in refusing to load a cargo, it was held that there was a total loss of the freight (*d*).

Insurance on passage money.—When the insurance has been effected on passage-money, and the ship is disabled and obliged to put into port for repairs, and great expenses are incurred in maintaining the passengers, there is no loss for which the underwriters are liable, if the vessel ultimately completes the voyage and earns the money (*e*).

Deviation from voyage insured.—Every policy of insurance is effected upon the implied understanding that the vessel will proceed straightway and without unnecessary delay to her place of destination. If, therefore, she voluntarily deviates from her course to put into port, and is afterwards lost, the underwriters will be discharged (*f*), unless it be shown that she went there under the

(*z*) *Flint* v. *Flemyng*, 1 B. & Ad. 45; 8 L.J. (O.S.) K.B. 350; *Devaux* v. *J'Anson*, 7 Sc. 507; 5 Bing. N.C. 519; 8 L.J. C.P. 284.

(*a*) *Denoon* or *Dinoon* v. *Home & Colonial Assur. Co.*, L.R. 7 C.P. 341; 41 L.J. C.P. 162.

(*b*) *Philpot* v. *Swan*, 5 L.T. 183.

(*c*) *Mordy* v. *Jones*, 4 B. & C. 400; 3 L.J. (O.S.) K.B. 250.

(*d*) *Jackson* v. *Union Ins. Co.*, L.R. 8 C.P. 572; 10 C.P. 125; see *Inman Steam Co.* v. *Bischoff*, 7 App.Cas. 670; 52 L.J. Q.B. 169; *Brankelow S.S. Co.* v. *Canton Ins. Office*, (1901) A.C. 462; 70 L.J. K.B. 962; *The Alps*, (1893) P. 109; 62 L.J. P. 59; *The Bedouin*, (1894) P. 1; 63 L.J. P. 30.

(*e*) *Willis* v. *Cooke*, 5 E. & B. 647; 25 L.J. Q.B. 16; as to insurances against the charges and liabilities which may be incurred under the Passengers Act, 1852, see *Gibson* v. *Bradford*, 4 E. & B. 586; 24 L.J. Q.B. 159.

(*f*) *Elliot* v. *Wilson*, 4 Bro. P.C. 470

pressure of necessity (*g*), or for necessary repairs or purposes essential to the safe prosecution of the voyage (*h*), or to avoid pirates, or icebergs, or other dangers of navigation (*i*), or that she went out of her way for the purpose of succouring a ship in distress (*k*), or of procuring convoy (*l*), or had liberty by the charter-party to make deviations or to call at different ports for trading purposes. A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property (*m*). It is not necessary to a deviation or change of risk whereby the underwriters are discharged that the degree or period of the risk should be thereby increased (*n*). If the voyage insured has been actually abandoned, and it has been determined to alter the ship's destination, the underwriters will be discharged; but a mere meditated change of destination, not carried into effect by an actual abandonment of the voyage, will not have that effect (*o*). If a ship insured for one voyage sails upon another, and the same track for part of the distance leads towards both places of destination, and the vessel is taken before she arrives at the dividing point for the two voyages, the underwriters are nevertheless discharged, because the voyage was other than the particular voyage insured (*p*). But, if there is an actual inception of the voyage insured, and there exists only an intention to deviate, and no deviation had in fact taken place at the time of the loss, the underwriters will remain liable (*q*). And, if a loss occurs before any actual deviation has taken place, and the vessel afterwards deviates, the loss will fall upon the underwriters (*r*). But a vessel, or goods, or freight, may be insured for part of a voyage as well as the whole distance; and, if a vessel is chartered from A. to C., touching at B., and the vessel is insured from A. to B., there is no pretence for saying that the underwriters are discharged merely because the vessel is going on to an ulterior place of destination which is not disclosed at the time they accept the risk (*s*). And, if a ship is compelled by adverse circumstances in the course of her voyage to enter a port to victual, or repair, or re-fit, or if she is

Leduc v. *Ward*, 20 Q.B.D. 475; 57 L.J. Q.B. 379.

(*g*) *Scott* v. *Thompson*, 1 B. & P. N.R. 181; see *Phelps* v. *Hill*, (1891) 1 Q.B. 605; 60 L.J. Q.B. 382.

(*h*) *Weir* v. *Aberdeen*, 2 B. & Ald. 320; *Delancy* v. *Stoddart*, 1 T.R. 22.

(*i*) *The Teutonia*, L.R. 4 P.C. 171, 179.

(*k*) Arnould, Ins. 405; *The Jane*, 2 Hag. Adm. 345.

(*l*) *Bond* v. *Nutt*, Cowp. 601.

(*m*) *Scaramanga* v. *Stamp*, 5 C.P.D. 295; 49 L.J. C.P. 674.

(*n*) Phillips on Insurance, 983; *Hartley* v. *Buggin*, 3 Dougl. 39; *Company of American Merchants* v. *British & Foreign Ins. Co.*, L.R. 8 Ex. 154; 42 L.J. Ex. 60.

(*o*) *Tasker* v. *Cunninghame*, 1 Bligh, 87; *Driscol* v. *Bovil*, 1 Bos. & P. 313.

(*p*) *Way* v. *Modigliani*, 2 T.R. 32.

(*q*) *Foster* v. *Wilmer*, 2 Str. 1249; *Heselton* v. *Allnutt*, 1 M. & S. 46.

(*r*) *Green* v. *Young*, 2 Ld. Raym. 840; 2 Salk. 444; *Hare* v. *Travis*, 7 B. & C. 14; 5 L.J. (O.S.) K.B. 343.

(*s*) *Taylor* v. *Wilson*, 15 East, 330,

compelled to cast anchor, to pay toll, or to await a fair wind, she may avail herself of the opportunity to take in some additional cargo, provided no additional delay is thereby created (*t*). But, if the circumstances rendering it necessary to go into port or to cast anchor have been designedly brought about by the insured, this is a fraud upon the underwriters which discharges them from liability.

If a ship with goods on board insured on a voyage to a foreign port, learns in the course of the voyage thither that an embargo has been laid on all ships of her nation at that port, but there is a prospect of the speedy removal of the embargo, and she accordingly goes into port as near as she can safely get to the port of destination, and there waits a short time for the removal of the embargo with the intention of continuing the voyage, she will be protected by the policy in so doing. But, if she abandons the voyage and sails back to her port of outfit and is lost on the homeward voyage (*u*), or if, through reasonable fear of an embargo, or of the ports of destination becoming hostile ports, she sails to a port not named in the policy, and so embarks on a new voyage or adventure, the underwriters will be discharged, as the new risk then run is not the risk they insured against (*x*). If the vessel goes out of her course in order to avoid a peril not insured against and is lost, the underwriters will be discharged, but not if the peril sought to be avoided was covered by the policy. Thus, where loss from capture in a particular port was excepted from the policy, and the vessel ran out to sea and out of her course to avoid capture, and sailed to an adjoining port, and was lost from peril of the sea, it was held that the underwriters were not liable (*y*); but, where the vessel was insured against capture in port, and put to sea, and deviated from her course to avoid capture, it was held that they were liable (*z*). Where there is a deviation clause in a charter-party which is contained in general words on a printed form, it is allowable to look at the main object of the charter-party, and the general words used may be limited so as not to defeat that main object (*a*).

Unreasonable delay at any place at which the vessel is authorized to touch is equivalent to a deviation; for it is an implied term of every contract of insurance that the voyage shall be performed without delay, unless liberty is given to the vessel to halt in her course; and consequently, if there are unnecessary stoppages, the

(*t*) *Laroche* v. *Oswin*, 12 East, 131.
(*u*) *Blackenhagen* v. *Lond. Assurance*, 1 Campb. 454.
(*x*) *Oliverson* v. *Brightman*, 8 Q.B. 781; 15 L.J. Q.B. 274.
(*y*) *O'Reilly* v. *Royal Exch. Assur.*, 4 Campb. 246.
(*z*) *O'Reilly* v. *Gonne*, 4 Campb. 249.
(*a*) *Glynn* v. *Margetson*, (1893) A.C. 351; 62 L.J. Q.B. 466.

adventure becomes a different adventure from that which the underwriters agreed to insure (*b*). But, if the delay is necessary and reasonable, the risk on the policy will continue, and the underwriters remain chargeable (*c*).

Insurances on voyages to several ports and places.—When the insurance is on a voyage to several ports and places named in successive order, and the final port of discharge is fixed, the general rule is that the vessel must go to them in the order in which they are named in the policy, unless a different intention is manifested by the policy, or unless a usage to the contrary be established; but, if they are not named in successive order, they must be taken in the order in which they occur in the usual and most practicable course of the voyage, without reference to the shortest geographical distance; and, if the ship's final port of discharge is not fixed, but the vessel is at liberty to select any port that may be found most suitable as a discharging port, she may take any ports she is authorized to touch at in any order she may think fit (*d*). Where a policy was "at and from Martinique and all or any of the West India Islands" to London, and the vessel sailed from Martinique to St. Domingo to take in her cargo, which was far away from the direct course from Martinique to London, it was held that there was no deviation (*e*).

Licences to touch at different ports and places.—When, by the express terms of the policy, the vessel is to be "at liberty, in the outward or homeward bound voyage, to proceed, sail to, touch, and stay at, any ports or places whatsoever, without the same being deemed a deviation," the liberty extends only to such places as are in the usual course of the voyage, and customarily resorted to by traders making such voyages (*f*). A licence of this kind will not enable the captain to alter the regular course of the voyage, or touch at any place or port for purposes unconnected with the main adventure (*g*), or to stay an unreasonable time at places he is authorized to touch at (*h*); and, if he sails with convoy, it will not authorize him voluntarily to stay at places, when by so doing he will part company with the convoy (*i*). Whenever a vessel is on a seeking voyage, and is to look about for some safe port of discharge, and has consequently "liberty to touch at any port or ports" in a particular sea "for orders, or any other purpose," the insured will

(*b*) *Mount* v. *Larkins*, 8 Bing. 122; 1 L.J. C.P. 20.

(*c*) *Phillips* v. *Irving*, 7 M. & Gr. 325; 13 L.J. C.P. 145.

(*d*) *Andrews* v. *Mellish*, 5 Taunt. 502.

(*e*) *Bragg* v. *Anderson*, 4 Taunt. 229; *Lambert* v. *Liddard*, 5 Taunt. 480; *Ashley* v. *Pratt*, 16 M. & W. 471; 17 L.J. Ex. 135; *Pratt* v. *Ashley*, 1 Exch. 257.

(*f*) *Lavabre* v. *Wilson*, 1 Doug. 284.

(*g*) *Bottomley* v. *Bovill*, 5 B. & C. 210; 4 L.J. (O.S.) K.B. 237.

(*h*) *Urquhart* v. *Barnard*, 1 Taunt. 450.

(*i*) *Williams* v. *Shee*, 3 Campb. 469.

be entitled to make every call, stay, or delay which may be necessary for safety and for the due accomplishment of the object of the voyage (*k*). Where the name of the place to which the vessel is to sail comprehends a particular town and harbour, and also an extensive district of coast, the policy will cover and protect only a voyage from the particular town and harbour, unless it appears that by maritime custom and usage the whole line of coast is considered, for insurance purposes, to be included under the name used in the policy (*l*). An open roadstead is a port within the meaning of the term "port" in a policy, if it is used as such by seafaring persons, and is resorted to by shipping for the discharge and loading of cargoes (*m*). Sometimes vessels are expressly insured for a general voyage to any ports or places whatsoever, in port and at sea, in all places, at all times, and in all services, to the intent that the risk may be covered by the policy, whatever may be the employment of the vessel, and however long the duration of the voyage.

Total loss and abandonment—Notice of abandonment.—If a ship insured for a particular voyage grounds on a sandbank and cannot be got off, the loss is a total loss, although the ship still exists *in specie*. If she is disabled by stress of weather, and is so strained as not to be worth repairing, the loss is a total loss, although she still exists as a ship in the dockyard. And, when a vessel has been wrecked, the cargo is totally lost if no part of it can be recovered for the benefit of the insured. If a cargo is so much injured as to be unfit for conveyance to the port of destination, and has consequently been landed at an intermediate port to prevent its entire destruction, the loss is in contemplation of law, as between the underwriter and insured, a total loss, and the latter is entitled to recover the full amount of the insurance (*n*). But in these cases, when the subject-matter of the insurance is not totally destroyed, the insured must, in order to recover the full amount of the insurance as for a total loss, ABANDON what remains, *i.e.*, he must make a cession of all his proprietary rights thereto to the underwriters, and give them notice of abandonment. The notice of abandonment is required in all cases to give the insurers the means of inquiry and of guarding against fraud, to enable them to repair the ship if they should deem such a proceeding for their advantage, and to secure all the benefit that can be derived from the wreck. It must

(*k*) *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L.J. (O.S.) K.B. 274; affirmed, 1 Cr. & J. 423; 9 L.J. (O.S.) Ex. 118.

(*l*) *Constable* v. *Noble*, 2 Taunt. 403.

(*m*) *Sea Ins. Co.* v. *Gavin*, 4 Bligh, N.S. 578; *Brown* v. *Tayleur*, 4 Ad. & E. 241; 5 L.J. K.B. 57; *Cockey* v. *Atkinson*, 2 B. & Ald. 460; *Harrower* v. *Hutchinson*, L.R. 5 Q.B. 584; 39 L.J. Q.B. 229.

(*n*) *Ionides* v. *Universal Ins. Co.*, 14 C.B. N.S. 292; 32 L.J. C.P. 176.

be given "within a reasonable time after the insured receives intelligence of the accident, that the underwriter may be entitled to the benefit of what may still be of value" (*o*). Notice of abandonment need not, however, be given to the underwriters of a policy of re-insurance (*p*). Where the insured receives information that the subject of insurance is in *imminent* danger of becoming a total loss he must immediately give notice of abandonment, and it is immaterial that the subject of insurance is afterwards justifiably sold (*q*). The abandonment must be an unconditional abandonment of the whole of the subject-matter of the insurance to the insurers or underwriters, unless the latter think proper to accept of a conditional abandonment. When the subject-matter of the insurance totally perishes, no notice of abandonment is necessary; for there is nothing to abandon (*r*). And, when it is so far annihilated that it no longer exists *in specie*, a formal abandonment of the comparatively valueless remnants of what was once a ship or a cargo is not necessary to enable the insured to recover as for a total loss (*s*), although, if these remnants are worth anything at all, or have been sold, the underwriters will be entitled to them, or to the value of them, or to the price they have fetched; for it is contrary to the principle of every contract of indemnity to permit the insured to recover more than the amount of the loss sustained (*t*). If the insurance is on freight, and the voyage is lost by a peril insured against, so that the freight cannot be earned by the insured, the loss is a total loss, and there is no need of an abandonment of freight; "for there is nothing to abandon" (*u*). If the adventure is brought to an end by a peril insured against, and the things are taken out of the power of the insured, as, for instance, if they are totally lost to him by reason of capture or seizure in a foreign port, or by political laws working detention and sale by a court, or by circumstances of distress and danger creating a mercantile necessity for a sale, there is no necessity for any notice of abandonment (*x*). And, where the sale was not

(*o*) *Mitchell* v. *Edie*, 1 T.R. 613; *Knight* v. *Faith*, 15 Q.B. 649; 19 L.J. Q.B. 509; *Gernon* v. *Royal Exch. Assur. Co.*, 6 Taunt. 383; *King* v. *Walker*, 33 L.J. Ex. 325; 3 H. & C. 209; *Stringer* v. *English Ins. Co.*, L.R. 4 Q.B. 676; 38 L.J. Q.B. 321; aff. 5 Q.B. 599; 39 L.J. Q.B. 214.

(*p*) *Uzielli* v. *Boston Marine Ins. Co.*, 15 Q.B.D. 11; 54 L.J. Q.B. 142.

(*q*) *Kaltenbach* v. *Mackenzie*, 3 C.P.D. 467; 48 L.J. C.P. 9.

(*r*) *Rankin* v. *Potter*, L.R. 6 H.L. 83; 42 L.J. C.P. 169.

(*s*) *Cambridge* v. *Anderton*, 2 B. & C. 691; 2 L.J. (O.S.) K.B. 141; *Allen* v. *Sugrue*, 8 B. & C. 561; 7 L.J. (O.S.) K.B. 53.

(*t*) *Roux* v. *Salvador*, 4 Sc. 34; 7 L.J. Ex. 328; *Trinder, Anderson & Co.* v. *Thames & Mersey Mar. Ins. Co.*, (1898) 2 Q.B. 114; 67 L.J. Q.B. 666.

(*u*) *Idle* v. *Roy. Ex. Assur. Co.*, 8 Taunt. 755; 3 Moore, 142; *Mount* v. *Harrison*, 4 Bing. 388; 6 L.J. (O.S.) C.P. 6; *Rankin* v. *Potter*, *supra*.

(*x*) *Farnworth* v. *Hyde*, 34 L.J. C.P. 207; 18 C.B. N.S. 835; *Mullett* v. *Shedden*, 13 East, 304; *Mellish* v. *Andrews*, 15 *ib.* 13; *Cossman* v. *West*, 13 App.Cas. 160; 57 L.J. P.C. 17.

under a condemnation of any court, but took place because the insured declined to give security to prevent the sale, it was held that such sale was a total loss occasioned by the seizure, the giving of the security under the circumstances not being the course which a prudent uninsured owner would have adopted (*y*). But it is otherwise where the sale is not a necessary or natural consequence of any of the perils insured against (*z*). A constructive total loss is a total loss within the meaning of a policy against "total loss only" (*a*).

Party to give notice of abandonment.—The party giving notice of abandonment must be the party in whom the property in the ship is at the time vested. Where, therefore, a policy of insurance has been deposited as security for an advance of money, the pledgee of the policy has no implied authority to give notice of abandonment; but it is otherwise with a person who has a mortgage on the ship (*b*).

Form of notice of abandonment.—The word "abandon" need not be used; any words showing an intention to give up the property insured upon the ground of its having been totally lost will be sufficient (*c*).

Effect of notice of abandonment.—The effect of a notice of abandonment, therefore, is to put the insured into a condition to claim from the underwriters as for a total loss, provided the facts as they are subsequently established warrant an abandonment. If they do not warrant an abandonment, or the insured neglects to give prompt notice of abandonment, he must proceed against the underwriters for the loss he has actually sustained. The insured then makes the best of what he can save, and resorts to the underwriter for the actual loss, after deducting the value of the remnants. On the other hand, when there is a constructive total loss and an abandonment, the risk of saving what remains to be saved is thrown upon the underwriter. After the abandonment the insurer stands in the place of the insured, and is clothed with the ownership of the property saved, and is entitled to all the profits and advantages that may accrue therefrom; and, if the insured recovers and retains possession of any portion of the property, the underwriters may maintain an action against him for the recovery of the value of it (*d*). The abandonment is retrospective in its operation, so that the title of the abandonees relates back to the time of the loss (*e*).

(*y*) *Stringer* v. *English Insurance Co.*, L.R. 5 Q.B. 599; 39 L.J. Q.B. 214.

(*z*) *De Mattos* v. *Saunders*, L.R. 7 C.P. 570.

(*a*) *Adams* v. *Mackenzie*, 13 C.B. N.S. 442; 32 L.J. C.P. 92.

(*b*) *Jardine* v. *Leathley*, 3 B. & S. 700; 32 L.J. Q.B. 132.

(*c*) *Currie* v. *Bombay Native Ins. Co.*, L.R. 3 P.C. 72; 39 L.J. P.C. 1.

(*d*) *Leatham* v. *Terry*, 3 Bos. & P. 479.

(*e*) *Cammell* v. *Sewell*, 3 H. & N. 644; 27 L.J. Ex. 447.

Insurance on freight.—Where a ship and the freight to be earned on the voyage were insured by separate sets of underwriters, and the ship was captured, and the ship and freight were abandoned to the respective underwriters, who each paid as for a total loss, and after that the ship was recaptured, and then performed her voyage and earned freight, it was held that the underwriters on the *ship* were entitled to the freight so earned, to the exclusion of the underwriters on the freight (*f*). The insured ship is by the abandonment vested in the underwriters from the time of the loss; and, as their ship earns the freight, they are entitled to it as purchasers of the ship (*g*); but if, at the time of the casualty, there is no freight pending, as, for instance, if the shipowner is carrying his own goods, the abandonment can give no right to freight (*h*). But freight is not an incident to the ownership of the vessel; and therefore, where a vessel was abandoned to the underwriters of the vessel upon a constructive total loss occurring through the fault of another vessel, it was held that they could not claim any share of the damages recovered from the owners of the wrong-doing vessel on account of the loss of freight (*i*). Where, after an embargo on a ship, the ship and freight were abandoned to the respective underwriters, and the embargo was taken off and the ship completed her voyage and earned freight, it was held that the shipowners had no right to the freight earned after the abandonment of the ship, and that the loss of freight was not demandable from the underwriters on freight, as it was not lost by means of the perils insured against, but by reason of the abandonment of the ship, which was the act of the insured themselves (*k*). A total loss of the ship, therefore, does not necessarily involve a total loss of the freight. The ship may get to port a mere wreck, and deliver her cargo and earn freight, and the shipowner may elect to abandon and proceed for a total loss; but, if he does so, the underwriters of the ship will be entitled to the freight, and the insured will have no claim to any indemnity from the underwriters on freight for the loss of freight. Thus, where a ship and freight were separately insured by separate policies, and the ship came into port greatly damaged, and after survey was found not worth repairing, and was finally abandoned, but the cargo was safely landed, and the freight was earned and received by the shipowners, and was then handed over by them to the underwriters, as incident to the ship, which being done, the shipowners proceeded against

(*f*) *Davidson* v. *Case*, 5 Moo. 116. But see *Sea Ins. Co.* v. *Hadden*, 13 Q.B.D. 706; 53 L.J. Q.B. 252.

(*g*) *Hickie* v. *Rodocanachi*, 4 H. & N. 466; 28 L.J. Ex. 273.

(*h*) *Miller* v. *Woodfall*, 8 E. & B. 504; 27 L.J. Q.B. 120.

(*i*) *Sea Ins. Co.* v. *Hadden*, *supra*.

(*k*) *M'Carthy* v. *Abel*, 5 East, 388.

the underwriters on freight for indemnity for loss of freight, it was held that they had no claim whatever in respect thereof, as the freight had been earned and actually received by the shipowners, and might have been retained by them for their own use, but for their subsequent voluntary election to abandon to the underwriters on the ship, and to constitute such underwriters the owners of the damaged ship and the freight earned by it (*l*).

But in all these cases where the underwriters are entitled to the freight after abandonment, the freight has been earned by the insured ship. If another ship finishes the voyage, the underwriters are not entitled to the freight, unless the substituted vessel is their vessel, or has been hired for their benefit by their agents (*m*). And, if the goods in the ship are the property of the owner of the ship, and he is carrying them on his own account, the abandonees of the ship have no claim to freight (*n*). The shipowner and charterer may agree that a portion of the freight shall be prepaid, in which case, as it cannot be recovered back, that portion is not a risk, and is not insurable; but the remaining portion may be insured, and if the ship is wrecked, and only such an amount of cargo is saved as corresponds with the prepaid freight, the insured may recover as for a total loss (*o*).

When insured may abandon—Total losses.—The general rule is that the insured may abandon in every case and claim for a total loss, when, by the occurrence of any of the misfortunes or perils insured against, the subject-matter of the insurance is so injured or deteriorated as to render any further dealing with it, in the mode contemplated at the time the policy was effected, worthless. If a vessel insured for a voyage is so much injured by perils of the sea that the cost of the repairs will be more than the vessel is worth when repaired, the insured may abandon and claim for a total loss (*p*). But not if the vessel is worth repairing, and can be repaired and re-fitted for sea at an expense less than her value when repaired (*q*). And where a ship has sunk in deep water, the underwriters cannot escape liability for a total loss by intervening and raising the ship at their own expense (*r*). So, if a stranded vessel can by any means within reach of the captain, which he could reasonably use, be recovered and saved, the vessel cannot be

(*l*) *Scot. Marine Ins. Co.* v. *Turner*, 17 Jur. 631; 4 H.L.C. 312, n.; *Benson* v. *Chapman*, 8 C.B. 964; 2 H.L.C. 696.

(*m*) *Hickie* v. *Rodocanachi*, 4 H. & N. 467; 28 L.J. Ex. 273.

(*n*) *Miller* v. *Woodfall*, 8 E. & B. 493; 27 L.J. Q.B. 120.

(*o*) *Allison* v. *Bristol Marine Ins. Co.*, 1 App.Cas. 209.

(*p*) *Young* v. *Turing*, 2 Sc. N.R. 762; *Irving* v. *Manning*, 1 H.L.C. 287; *Phillips* v. *Nairne*, 4 C.B. 358; 16 L.J. C.P. 194; *De Cuadra* v. *Swann*, 16 C.B. N.S. 772; *Kemp* v. *Halliday*, L.R. 1 Q.B. 520; 35 L.J. Q.B. 156.

(*q*) *Moss* v. *Smith*, 9 C.B. 103; 19 L.J. C.P. 225.

(*r*) *Blairmore Sailing Ship Co.* v. *Macredie*, (1898) A.C. 593; 67 L.J. P.C. 96.

abandoned by the insured; and, if the captain, to avoid the trouble of recovering the vessel, sells her as she lies, the sale will not entitle the insured to treat the loss as a total loss, and to abandon to the underwriters (*s*). When a ship and cargo are so submerged that both must be got up together, the expenditure incurred in raising them is for the common preservation of both, and the cargo must contribute thereto as well as the ship, and the amount to be contributed by the cargo must be taken into account for the purpose of ascertaining whether or not the ship is a total loss (*t*). But there is no principle of law which requires a person to contribute to an outlay merely because he has derived a benefit from it. So where a vessel was put into dry dock for necessary repairs by the insurers under the policy, and the owners took advantage of her being there to have her surveyed for a reclassification at Lloyd's, it was held that they were not called upon to contribute to the expenses of getting her into and out of dock (*u*). The loss of the voyage has nothing to do with the loss of the ship; and the shipowner who has insured his ship cannot abandon the ship merely because the voyage cannot be completed and the freight earned (*x*). If the policy is on freight, and the ship is detained by an embargo, the loss is *primâ facie* total; but, if the embargo be taken off and she then earns freight, the loss is partial only (*y*). If the vessel is driven by stress of weather into port to repair and re-fit, and the master hypothecates the ship, freight, and cargo for the payment of these repairs, and the amount exceeds the value of the ship and freight, the loss is a total loss (*z*). Where goods are, in consequence of the perils insured against, lying at a place different from their destination, damaged, but in such a state that they can at some cost be put in a condition to be carried to their destination, the question to be determined is, whether it is practically possible to carry them on, that is, whether to do so will cost more than they are worth; and in determining this there must be taken into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but there must not be taken into account the fact that, if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid, that being a charge to which the goods are

(*s*) *Knight* v. *Faith*, 15 Q.B. 657; 19 L.J. Q.B. 509; *Gardener* v. *Salvador*, 1 M. & Rob. 116; *Doyle* v. *Dallas*, *ib.* 48; *Tanner* v. *Bennett*, R. & M. 182.

(*t*) *Kemp* v. *Halliday*, *supra*. See *Marine Ins. Co.* v. *China S.S. Co.*, 11 App. Cas. 573; 56 L.J. Q.B. 100; *Ruabon S.S. Co.* v. *London Assurance*, (1898) 1 Q.B. 722; 67 L.J. Q.B. 548.

(*u*) *Ruabon S.S. Co.* v. *London Assurance*, (1900) A.C. 6; 69 L.J. Q.B. 86; explaining *Marine Ins. Co.* v. *China S.S. Co.*, *supra*.

(*x*) *Pole* v. *Fitzgerald*, Willes, 647.

(*y*) *Everth* v. *Smith*, 2 M. & S. 278.

(*z*) *Benson* v. *Chapman*, 7 Sc. N.R. 625; 2 H.L.C. 720.

liable when delivered, whether the perils of the sea affect them or not (*a*). Where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, there must not be taken into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened (*b*).

The mere suspension or retardation of the voyage in the case of an insurance on goods is no ground of abandonment (*c*). If, however, the voyage is not worth pursuing by reason of the delay, or if salvage services have been rendered, and the insured has no means of paying them, he may persist in the abandonment, and claim as for a total loss; but, if it appears that he could probably have raised money to liberate the vessel, and that he made no exertion to do it, he cannot treat the loss as a total loss; for he is bound in every case to exert himself to the uttermost of his power to prevent the loss from being a total loss (*d*). If the ship, being disabled at sea, is deserted by her crew, and is subsequently detained for salvage, and the cargo, being of a perishable nature, is so much damaged as not to be worth sending to the place of destination after satisfaction of the claim of the salvors, the loss is a total loss (*e*). If the cargo is taken out of the possession and control of the insured by the barratrous conduct of the master or crew, and some portion of it is afterwards recovered, the insured may nevertheless abandon and treat the loss as a total loss (*f*). If the cargo can be transhipped and forwarded to the port of destination without any material deterioration or delay, the insured has no right to abandon it and claim for a total loss; but it is his duty to go on with the adventure and turn it to the best advantage, and to proceed against the underwriter for a partial loss, being the amount of the actual damage sustained by the peril insured against (*g*).

Capture and re-capture and abandonment—Embargo—Spes recuperandi.—Capture by an enemy or a pirate, or an arrest of princes, or an embargo, entitles the insured to abandon and claim for a total loss, unless the embargo has been taken off, or the vessel has been re-captured and restored to the owners, or they have the

(*a*) *Farnworth* v. *Hyde*, L.R. 2 C.P. 204; 36 L.J. C.P. 33.
(*b*) *Rosetti* v. *Gurney*, 11 C.B. 176; 20 L.J. C.P. 257; *Farnworth* v. *Hyde*, *supra*.
(*c*) *Anderson* v. *Wallis*, 2 M. & S. 240.
(*d*) *Thornely* v. *Hebson*, 2 B. & Ald. 518.
(*e*) *Parry* v. *Aberdein*, 9 B. & C. 416; 7 L.J. (O.S.) K.B. 260.
(*f*) *Dixon* v. *Reid*, 5 B. & Ald. 597.
(*g*) *Hunt* v. *Royal Exch. Assur.*, 5 M. & S. 53; *Falkner* v. *Ritchie*, 2 M. & S. 290.

immediate means of recovering the vessel (*h*), and may reasonably be expected to take possession of it (*i*). On re-capture by an English vessel the shipowner has a right to the restitution of his ship on payment of salvage; and, if the insurance is on the ship, and the ship is re-captured and placed within the power of the insured, the loss, which was before a total loss, becomes then only a partial loss (*k*), unless the vessel is in a damaged and unseaworthy state, or the salvage and costs and expenses attendant upon the re-capture are likely to be more than the vessel is worth, and the voyage cannot be advantageously prosecuted. If the vessel be captured and re-captured, and the insured neither has the vessel restored to him nor any means of obtaining possession of it, or if the consequences of the capture are such as to occasion a total obstruction of the voyage, or render it not worth pursuing, if the salvage be high, if further expense be necessary, and the insurer will not, at all events, undertake to pay that expense, the loss continues a total loss, and the insured may abandon, notwithstanding the re-capture (*l*). Where a ship was captured and re-captured, and sold in a distant country to pay the salvage, and the residue of the proceeds remained in the Court of Admiralty there, it was held that the insured might abandon and recover for a total loss (*m*). If the insurance is on goods laden on board the vessel, and the vessel is captured, and notice of abandonment is given by the assured, and after that the vessel is re-captured with the goods on board uninjured, the insured cannot persist in his abandonment and claim for a total loss (*n*). And, if the vessel is unable to complete her voyage by reason of an embargo suddenly laid on English vessels at the port of destination, or by reason of the hostile interference of an enemy, the insured cannot, on that account, abandon the goods and claim for a total loss, unless the goods have been deteriorated, and rendered unfit for mercantile speculation (*o*). Where a ship insured under a policy covering war risks was captured, and notice of abandonment was given to the underwriters and refused, and an action was commenced on the policy, and subsequently the vessel was released, it was held that the return of the ship after the commencement of the action did not disentitle the owners to recover as for a total loss (*p*).

(*h*) *Goss* v. *Withers*, 2 Burr. 692; *Kleinwort* v. *Shepard*, 28 L.J. Q.B. 147; 1 E. & B. 447; *Cologan* v. *Lond. Assur.*, 5 M. & S. 455; *Wilson* v. *Forster*, 6 Taunt. 25.

(*i*) *Lozano* v. *Janson*, 28 L.J. Q.B. 343; 2 E. & E. 160.

(*k*) *Hamilton* v. *Mendez*, 2 Burr. 1198; 1 W. Bl. 276; *Brotherston* v. *Barber*, 5 M. & S. 418; *Bainbridge* v. *Neilson*, 10 East, 329.

(*l*) *Dean* v. *Hornby*, 3 E. & B. 190; 23 L.J. Q.B. 129; *Milles* v. *Fletcher*, 1 Doug. 232; *M'Iver* v. *Henderson*, 4 M. & S. 584.

(*m*) *Pringle* v. *Hartley*, 3 Atk. 195.

(*n*) *Naylor* v. *Taylor*, 9 B. & C. 718.

(*o*) *Hadkinson* v. *Robinson*, 3 Bos. & P. 388; but see *Barker* v. *Blakes*, 9 East, 293.

(*p*) *Ruys* v. *Royal Exch. Assur.*, (1897) 2 Q.B. 135; 66 L.J. Q.B. 534.

Unreasonable abandonment.—"The privilege of abandoning," it has been justly observed, "is liable to great abuse. Where, as in the case of capture, the thing insured is completely gone out of the power of the insured, it is proper that he should recover at once as for a total loss, and leave the *spes recuperandi* to the insurer. But it seems unreasonable that the owner of a ship which is stranded (the captain and crew, his servants, being on the spot and in possession of the ship and cargo), should be at liberty to abandon these to a number of underwriters, who sometimes find it difficult to act in concert, and who have, perhaps, no means of disposing of the property thus thrown upon their hands but to the greatest disadvantage" (*q*). "I am not disposed," observes Lord Ellenborough, "to enlarge the grounds of abandonment against underwriters, a privilege which every one knows has been much abused. In almost every case of a valued policy it is the interest of the assured to abandon; and it therefore behoves the court to watch every such case, and in no instance to enlarge that, which in the nature of the thing is only a partial, into a total, loss" (*r*).

Partial loss—Exception of partial losses.—A partial loss is not paid for, if there is a total loss of the vessel from perils insured against during the period covered by the policy; because, when the underwriter pays the total loss, he actually discharges all partial losses occurring during the voyage, except such as fall within the suing and labouring clause, which are apart from the sum insured. He never stipulated to pay more than the total loss; and, if he were to pay for a partial loss, and also the whole value of the vessel, he would be paying more than he undertook to indemnify the insured against. If a partial loss is sustained, and then the whole subject-matter of the insurance is totally lost from a peril excepted from the policy, the underwriters will not be responsible for the partial loss, unless it has occasioned actual pecuniary loss to the insured (*s*). But if the total loss does not take place until after the expiration of the period covered by the policy, the underwriter will be responsible for the partial loss, and must pay the amount of the diminution in the value of the vessel occasioned by the partial loss, without reference to whether the vessel had been repaired or not before the total loss occurred (*t*). Where a vessel insured against perils of the sea was stranded and sustained such injuries that the cost of repairing her would have been greater than her value, and immediately afterwards was destroyed by fire,

(*q*) Marshall on Insurance, 444 (ed. 4).

(*r*) *Bainbridge* v. *Neilson*, 10 East, 343.

(*s*) *Livie* v. *Janson*, 12 East, 656; *The Dora Forster*, (1900) P. 241; 69 L.J. P. 85.

(*t*) *Lidgett* v. *Secretan*, L.R. 6 C.P. 616; 40 L.J. C.P. 257.

it was held that the insurers against fire were liable for the full amount in which they had insured the vessel (*u*). If a vessel loses a mast by a peril insured against, and is re-fitted, the loss is a partial loss; and, if the vessel then puts to sea, and is totally lost, the insured is entitled to be indemnified in respect of the partial loss, as well as the total loss; but, if, before the vessel is re-fitted, she is totally lost, the insured cannot then recover in respect of the partial loss (*x*). In case of a partial loss, and in the absence of other means of arriving at the loss, the insured is entitled to recover the cost of repairs up to the amount insured with the reduction of one-third new for old, even although this amount might be more than the amount payable for a total loss with benefit of salvage (*y*). A memorandum is frequently introduced at the foot of maritime policies, exempting the underwriters from all partial losses upon certain articles and descriptions of merchandise, and from all partial losses not amounting to 5*l.* per cent. upon other classes of merchandise, and from all partial losses upon ship and freight not amounting to 3*l.* per cent., unless the loss be a general average and contribution loss (*ante*, pp. 931—936). In many policies the underwriters exempt themselves from all partial or average losses of every description, excepting general average losses, so that they are not responsible at all upon the policy unless there is a total loss, or unless there has been a general average contribution. When the policy is warranted "free from particular average," no damage short of the absolute destruction of the thing insured will amount to a total loss. An exemption of this kind opens a wide door to fraud, inasmuch as a direct premium is offered to the insured to turn every partial loss into a total loss, in order that it may be covered by the policy (*z*).

General and particular average—Policies warranted free from average.—The term "average" is used, in insurance contracts and trading adventures, to denote every kind of partial loss or damage happening either to the ship or the cargo, from any cause whatever. It has been truly observed, that ambiguities frequently arise from the indiscriminate use, in mercantile matters, of the word AVERAGE, which has no less than four different meanings amongst commercial men. In policies of insurance we constantly meet with the terms general average and particular average; the first signifies general average losses arising from the general contribution made by all parties interested in a ship or cargo towards a loss sustained by

(*u*) *Woodside* v. *Globe Marine Ins. Co.*, (1896) 1 Q.B. 105; 65 L.J. Q.B. 117.

(*x*) *Stewart* v. *Steele*, 5 Sc. N.R. 941; 11 L.J. C.P. 155.

(*y*) *Aitchison* v. *Lohre*, 4 App.Cas. 755; 49 L.J. Q.B. 123, where repairs were actually done: *aliter* where not done, see *Pitman* v. *Universal Ins. Co.*, 9 Q.B.D. 192; 51 L.J. Q.B. 561, diss. Brett, L.J.

(*z*) *Dyson* v. *Rowcroft*, 3 Bos. & P. 476.

some for the benefit of all, under the circumstances previously described (*ante*, p. 931); and the second, the particular or partial loss sustained by the insured, not connected with the loss of any other party, and not occasioned by a general average contribution. For example, if a small portion of corn or flax receives damage from sea-water to the extent of 45*l.*, and the entire value of the whole cargo is 1,000*l.*, this is an average loss of 4½ per cent. upon the whole, and is called "average" in mercantile phraseology; so that, if the cargo is warranted "free from average under 5*l.* per cent.," the underwriters will be exempted from all responsibility in respect of this partial or average loss (*a*). If a cargo of corn insured "free from average" receives damage from sea-water, and the vessel puts into port for the purpose of drying the corn and preventing its total destruction, and the corn is so much damaged that if brought home it could not have been sold for an amount exceeding the expenses of unshipping, drying it, and bringing it home, the loss is total; but, if the value of the corn in England would exceed these expenses, the loss is an average loss within the warranty exempting the underwriters from liability. An insurance on goods warranted free of average, unless general, is equivalent to an insurance against their total loss only. As a general rule, where the whole or any part of the cargo is capable of being sent in a marketable state to the port of destination without laying out more money than it is worth, the master cannot sell, nor can the insured recover for a total loss (*b*). But the effect of a warranty against particular average is merely to limit the operation of the insurance to a total loss of the subject-matter, and is not to prevent a recovery under the suing and labouring clause of extraordinary expense which may be incurred in preserving it (*c*).

Insurance on separate bales or packages—Average and total losses.—If the merchandise insured is packed in separate bales, hogsheads, or packages, and the insurance is effected on each bale, hogshead, &c., separately, and some bales or hogsheads are totally lost, and others saved, the loss of each separate bale, hogshead, &c., is a total loss *pro tanto* (*d*); but, when the insurance is upon the bulk, and the goods are all of the same species, unless the loss exceeds the value specified in the memorandum, there is no average

(*a*) *Wilson* v. *Smith*, 3 Burr. 1550; *M'Andrews* v. *Vaughan*, 1 Park, Ins. 252; *Mason* v. *Skurry*, *ib.* 253; *Oppenheim* v. *Fry*, 33 L.J. Q.B. 267; 5 B. & S. 348.

(*b*) *Reimer* v. *Ringrose*, 6 Exch. 267; 20 L.J. Ex. 175; *Rosetti* v. *Gurney*, 11 C.B. 187, 20 L.J. C.P. 257; *Gt. Ind. Penins. Rail.* v. *Saunders*, 31 L.J. Q.B. 206; 1 B. & S. 41; 2 B. & S. 266; *Booth* v. *Gair*, 15 C.B. N.S. 291; 33 L.J. C.P. 99. See *The Pomeranian*, (1895) P. 349; 65 L.J. P. 39.

(*c*) *Kidston* v. *Empire Ins. Co.*, L.R. 2 C.P. 357; 36 L.J. C.P. 156; *Meyer* v. *Ralli*, 1 C.P.D. 358; 45 L.J. C.P. 741.

(*d*) *Entwisle* v. *Ellis*, 2 H. & N. 555; 27 L.J. Ex. 105; *Davy* v. *Milford*, 15 East, 559.

or partial loss, and there cannot, in such a case, be a total loss of a portion of the cargo (*e*). Where an insurance had been effected on goods generally, and several thousand bags of linseed were put on board, and, by the memorandum as to average, seed was warranted free from average, the Court of Exchequer Chamber thought it was necessary, in the natural construction of the terms of the policy, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the warranty could not apply to each bag in which the seed happened to be packed as a distinct object (*f*); but, where the goods insured were described in the policy as "master's effects," and the memorandum was "free from all average," and some of the goods thus insured were totally lost, and others were saved, it was held that, as the articles which constituted "master's effects" were essentially different in their nature, and kind, and value, the insurer was liable in respect of the total loss of particular articles constituting "master's effects." To hold that, if the insured happens to be successful in rescuing any of the articles insured, even the clothes he may be wearing, he will thereby incur the penalty of forfeiting his insurance on the rest, though they are all totally lost, would lead to a result quite at variance with the object for which the memorandum as to average was introduced into policies (*g*). As soon as it is ascertained that the goods are of different species, it is as if the different species had been enumerated (*h*).

If the contents of any particular package, hogshead, &c., separately insured, are not totally destroyed, the loss is then only a partial or average loss, and the underwriters are exempted, by the memorandum, from liability (*i*). It is usual, therefore, to modify the effect of the memorandum by an express stipulation to the effect that the underwriters are to pay "average on each species of produce, or package of manufactured goods, or on each ten, fifteen, or twenty hogsheads, &c." so as to give the insured a right to claim for an average or partial loss separately on each species, if the loss amounts to three or five per cent., although there may not have been a three or five per cent. loss upon the whole. This stipulation does not oust the claim of the assured in respect of a general average loss (*k*). If several average or partial losses take place under three or five per cent. *each*, but the aggregate amount of the whole exceeds three or five per cent., the underwriters will

(*e*) *Hills* v. *Lond. Assur. Corp.*, 5 M. & W. 569; 9 L.J. Ex. 25.

(*f*) *Ralli* v. *Janson*, 6 E. & B. 422; 25 L.J. Q.B. 300.

(*g*) *Duff* v. *Mackenzie*, 3 C.B. N.S. 16; 26 L.J. C.P. 313.

(*h*) *Wilkinson* v. *Hyde*, 3 C.B. N.S. 30; 27 L.J. C.P. 116.

(*i*) *Hedburg* v. *Pearson*, 7 Taunt. 154; *Navone* v. *Haddon*, 9 C.B. 43; 19 L.J. C.P. 161.

(*k*) *Hagedorn* v. *Whitmore*, 1 Stark. 157.

be liable (*l*). But a general average loss cannot be added to a particular average loss to make up a loss amounting to the specified percentage, when the subject-matter of the insurance is warranted "free from average under so much per cent. unless general" (*m*). Whenever the policy is made free from average under so much per cent., and a loss happens, the proportion which the loss bears to the cargo must be calculated upon the cargo which was on board at the time of the loss (*n*). The petty charges of primage and average, previously mentioned (*ante*, p. 931) as incident to navigation, form part of the necessary and ordinary expenses of the voyage; and the payment of them is not considered a loss within the meaning of the policy.

Exceptions of general average losses and stranding of vessel.—General average losses arising from general contribution by the owners of property exposed to a common peril of the seas to make good a loss incurred for the preservation of the common property of all (*ante*, p. 931), must be made good by the underwriter under the general terms of the policy; and, when they are excepted from the average clause, the underwriter, of course, continues responsible in respect of them, although he is exempted from liability in respect of all other partial or average losses. It has been held that where ship and cargo both belong to the same person, as there can be no contribution in fact, the underwriter of a policy of insurance on cargo is not liable in respect of a general average loss (*o*); but this decision has been disapproved of (*p*). To the clause "warranted free from average" is frequently annexed, as we have already seen, the exception "unless the ship be stranded." By the stranding of the vessel, under such a clause, the exemption from average is destroyed; and the loss falls within the general words of the policy, although it was not in anywise occasioned by the stranding (*q*). It is said to be a rule that, where a vessel takes the ground in the ordinary course of navigation in a tidal river or harbour upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of the tide, such an event is not to be considered a stranding within the sense of the memorandum; but it is otherwise where the ground is taken by reason of some unusual occurrence (*r*). Where a ship ran on some

(*l*) *Blackett* v. *Royal Exch. Assur. Co.*, 2 Cr. & J. 244; 1 L.J. Ex. 101; but see, as to successive losses on the same thing, *Stewart* v. *Merchants' Marine Ins. Co.*, 16 Q.B.D. 619; 55 L.J. Q.B. 81.

(*m*) *Price* v. *A* 1 *Ships Small Damage Ins. Assoc.*, 22 Q.B.D. 580: 58 L.J. Q.B. 269.

(*n*) *Rohl* v. *Parr*, 1 Esp. 444.

(*o*) Per Barnes, J., *The Brigella*, (1893) P. 189; 62 L.J. P. 81.

(*p*) *Montgomery* v. *Indemnity Mutual Marine Ins. Co.*, (1902) 2 K.B. 734; 71 L.J. K.B. 467.

(*q*) *Burnett* v. *Kensington*, 7 T.R. 210; *Roux* v. *Salvador*, 4 Sc. 1; 7 L.J. Ex. 328; *Thames & Mersey Marine Ins. Co.* v. *Pitts*, (1893) 1 Q.B. 476.

(*r*) *Wells* v. *Hopwood*, 3 B. & Ad. 34; *Kingsford* v. *Marshall*, 8 Bing. 458; 1

wooden piles four feet under water which had been erected in a river about nine yards from the shore to keep up the banks, and lay on such piles until they were cut away, this was held to be a stranding within the policy (*s*). But, if the vessel merely grounds on a rock and gets off when the tide rises, and pursues her voyage, this is not a stranding, though the vessel may be injured; "if it is touch and go with the ship, there is no stranding" (*t*). But, when the ship accidentally takes the ground and remains there for any time, this constitutes a stranding, without reference to the damage sustained by the vessel (*u*). If the shore tackling, placed to keep the vessel upright when the tide leaves her, breaks, and she rolls over on her side and is stove in, this is a stranding (*x*). Where a ship, having encountered bad weather, and lost both her anchors, and had her masts cut away, was taken in tow by salvors, and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable further injury, it was held that there was a stranding (*y*). The stranding of a lighter, in which goods are being taken from the ship to the shore, is not a stranding of the vessel within the exception in the policy (*z*). The stranding must of course, in all cases, take place during the voyage covered by the policy, and while the insured goods are on board the vessel (*a*).

A clause in a policy "general average as per foreign statement," means that general average in the policy shall include such losses as the law of the port of adjustment regards as intentional sacrifices made for the benefit of the whole adventure although such losses may not be general average according to English law (*b*). The mere temporary suspension of the voyage for repairs at a port of refuge does not warrant an average adjustment at that port as between shipowner and owner of cargo; and the shipowner is not entitled to *pro ratâ* freight, unless it is shown that the owner of the goods had an option of having them sent on or of accepting them at that port (*c*).

Suing and labouring clause.—This clause, in its usual form, is not limited in construction to a case where the insured abandons,

L.J. C.P. 135; *Letchford* v. *Oldham*, 5 Q.B.D. 538; 49 L.J. Q.B. 458.

(*s*) *Dobson* v. *Bolton*, 1 Park, Ins. 239; *Rayner* v. *Godmond*, 5 B. & Ald. 225.

(*t*) Ld. Ellenborough, *Macdougle* v. *Royal Exch. Assur.*, 4 Campb. 283.

(*u*) *Harman* v. *Vaux*, 3 Campb. 429; *Barrow* v. *Bell*, 4 B. & C. 736; 4 L.J. (O.S.) K.B. 47.

(*x*) *Bishop* v. *Pentland*, 7 B. & C. 219; 6 L.J. (O.S.) K.B. 6.

(*y*) *De Mattos* v. *Saunders*, L.R. 7 C.P. 570.

(*z*) *Hoffman* v. *Marshall*, 2 Sc. 559; 5 L.J. C.P. 70.

(*a*) *The Alsace Lorraine*, (1893) P. 209; 62 L.J. P. 107; as to the meaning to be attached to the word "burnt" in an exception, see *The Glenlivet*, (1894) P. 48; 63 L.J. P. 45.

(*b*) *Mavro* v. *Ocean Marine Ins. Co.*, L.R. 10 C.P. 414; 44 L.J. C.P. 229; *The Mary Thomas*, (1894) P. 108; 63 L.J. P. 49.

(*c*) *Hill* v. *Wilson*, 4 C.P.D. 329; 48 L.J. C.P. 764.

or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes or may become theirs. It extends to every case in which the subject of insurance is exposed to loss or damage for the consequences of which the underwriters would be answerable and in warding off which labour is expended (*d*). Where a shipowner has incurred expense for the purpose of averting a loss of freight, he is entitled to recover under the suing and labouring clause so much thereof as was reasonably incurred (*e*). The application of this clause is not excluded by the words "warranted free from particular average" (*f*). The plaintiff insured a ship with the defendant, which suffered sea damage and incurred salvage expenses. When repaired, the ship was more valuable than when insured. The plaintiff brought his action for a partial loss. There was a suing and labouring clause. It was held that the plaintiff was not entitled to recover a proportion of the salvage expenses in addition to the sum insured; for that salvage (properly so called) and general average expenses do not come within the words or object of a suing and labouring clause (*g*).

Valuation and adjustment of losses—Valued and open policies—Over-valued policies—Calculation of the value—Deduction for new materials.—The question as to whether there is a total or partial loss is independent of the question whether the policy is valued or not valued. If the whole of the subject-matter covered by the insurance is lost, it is a total loss; if a part only is lost, the loss is a partial loss, the amount of which depends on the proportion the part lost bears to the whole subject-matter of the insurance. Thus, if the policy is a valued policy, the value being admitted, the assured is entitled to be indemnified to the extent of the declared value in the policy, and is released, as previously mentioned, from proving the value, unless the valuation can be impeached by the underwriter. If the policy be an open policy, the value of the whole subject-matter of insurance must be proved (*h*). If the policy can be proved to have been fraudulently overvalued, it will be void (*ante*, pp. 1028, 1029). But if the assured has valued that which he intends should be at risk upon the basis of a value which turns out to be erroneous because of facts of which he was ignorant when he took out the policy, yet, if the policy

(*d*) *Kidston* v. *Empire Ins. Co.*, L.R. 2 C.P. 357; 36 L.J. C.P. 156.

(*e*) *Lee* v. *Southern Ins. Co.*, L.R. 5 C.P. 397; 39 L.J. C.P. 218.

(*f*) *Kidston* v. *Empire Ins. Co.*, *supra*; *Meyer* v. *Ralli*, 1 C.P.D. 358; 45 L.J. C.P. 741.

(*g*) *Aitchison* v. *Lohre*, 4 App.Cas. 755; 49 L.J. Q.B. 123.

(*h*) *Tobin* v. *Harford*, 34 L.J. C.P. 37; 17 C.B. N.S. 528.

attaches, the amount which he has valued as that which is to be at risk is to be taken as conclusive, although the amount actually at risk is very much less (*i*). Where several valued policies of insurance are effected upon the same vessel valued differently, and upon a total loss occurring the insured receives under some of the policies part of the sums insured, in an action upon another policy, he is only entitled to recover the difference between the amount received and the agreed value in that policy (*k*). If the policy be an open policy on a ship, the value is taken to be the sum the ship is worth to the owner at the port where the voyage commences, including stores, furniture, provisions, wages, advances to sailors, and all expenses of outfit, to which are added the premium and costs of insurance. If it be an open policy on goods, the value is taken to be the prime cost of the goods as proved by the invoices and tradesmen's bills, adding thereto the shipping charges, and premium, and costs of insurance. The presumed value of the goods, if they had reached their place of destination and been sold there, has nothing to do with the calculation of the outset value. The insurer has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods. If they be totally lost, he must pay the prime cost, that is, the value of the thing he insured at the outset: he has no concern in any subsequent value (*l*). If the policy is a valued policy on a ship at and from A. to B., and the ship while at A. undergoing repairs is burnt so as to become a total loss, the underwriter is not entitled to deduct from the value the estimated expense of the repairs necessary to make the ship seaworthy for the voyage, but must pay the total agreed value (*m*). If a ship insured has sustained a partial loss, as, for instance, if she has been damaged, and the damage has been repaired by the owner, the latter will not be allowed to receive from the underwriter more than two-thirds of the costs of the repairs, it being considered that a deduction of one-third ought to be made in favour of the underwriters, by reason of the owner's having the benefit of new materials instead of old (*n*), unless the vessel is on her first voyage (*o*).

Standard of value and measure of depreciation.—If a partial loss has been sustained on goods and merchandise, this loss is calculated and adjusted by comparing the selling price of the sound commodity with the selling price of the damaged part of the same

(*i*) *The Main*, (1894) P. 320; 63 L.J. P. 69.
(*k*) *Bruce* v. *Jones*, 1 H. & C. 769; 32 L.J. Ex. 132.
(*l*) *Lewis* v. *Rucker*, 2 Burr. 1170.
(*m*) *Lidgett* v. *Secretan*, L.R. 6 C.P. 616; 40 L.J. C.P. 257.
(*n*) *Poingdestre* v. *R. Ex.*, R. & M. 378; *Da Costa* v. *Newnham*, 2 T.R. 412. But see *Henderson* v. *Shankland*, (1896) 1 Q.B. 525; 65 L.J. Q.B. 340.
(*o*) *Pirie* v. *Steele*, 2 Mood. & R. 49.

commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, *i.e.*, it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against, and for which the insured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated portion of loss to the standard by which the value is calculated (*i.e.*, to the declared value in the case of a valued policy, and to the invoice price, &c., in the case of an open policy), "and you then get the one-half, the one-fourth, or one-eighth of the loss to be made good in terms of money" (*p*). If part of the cargo, capable of a several and distinct valuation at the outset, be totally lost, as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold. But, where one hogshead happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage; but, if you can fix whether it be a third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. This is to be found out, not by any price at the outset port, but at the port of delivery, where the voyage is completed and the whole damage known. Whether the price there be high or low, it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth of the value; and, as the insurer pays the whole prime cost if the thing be wholly lost, so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged. For instance, suppose the value in the policy to be 30*l.*, the goods are damaged, but sell for 40*l.*; if they had been sound, they would have sold for 50*l.* The difference then between the sound and the damaged is a fifth; consequently, the insurer must pay a fifth of the prime cost or value in the policy, that is, 6*l.*: *e converso*, if they come to a losing market and sell for 10*l.*, being damaged, but would have sold for 20*l.* if sound, the difference is one-half, and the insurer must pay half the prime cost or value in the policy, that is, 15*l.* (*q*). To put the matter in another shape, "If goods valued at 100*l.*, and coming to a good market, would, if sound, have been sold for 120*l.*, but are so damaged as not to fetch more than 40*l.*, the loss will be that proportion of the prime cost (100*l.*), which the difference between the price of the damaged and the price of the sound goods (80*l.*) bears to the price of the sound, 120*l.* Thus, if

(*p*) *Usher* v. *Noble*, 12 East, 647. (*q*) *Lewis* v. *Rucker*, 2 Burr. 1170.

120*l.* : 80*l.* : : 100*l.* :—the answer is 66*l.* 13*s.* 4*d.*, the true loss" (*r*). This mode of calculation furnishes a criterion by which the amount of the deterioration on the damaged goods may be ascertained, without involving the underwriter in the fluctuations of a rising or falling market. The merchant in this way makes the market prices of the sound and damaged commodity serve as the scales in which to weigh the depreciation (*s*).

Liabilities of underwriters with reference to amount of subscriptions.—The underwriters are liable for total or average losses in proportion to the sums they have underwritten. Thus, if a man underwrite 100*l.* upon property valued at 500*l.* and a total loss happen, he shall pay 100*l.*, that being the amount of his subscription; and, if only an average loss, amounting to 60*l.* or 70*l.* per cent., then he shall pay only 60*l.* or 70*l.*, being his proportion of the loss. The liability of the underwriter is not restricted to the amount of his subscription; for he may be subject to an average and a total loss in the same voyage, or for several average or partial losses amounting together to more than his subscription (*t*). But the insured cannot, of course, in any case, recover anything beyond that which is a strict indemnity for losses actually sustained. If several articles be insured for one sum, with a distinct valuation on each, or so much upon ship, and so much upon cargo, and no part of the cargo be taken on board, so that the risk upon that never attaches, the insured will recover only such a portion of the sum insured as the value of the article lost bore to the value of the whole (*u*). In the case of open policies on freight, the usage is to calculate the loss upon the gross amount, and not upon the net value of the freight (*x*). When part of the goods insured is saved and the salvage exceeds the amount of the freight, the practice is to deduct the freight from the value of the goods saved, and to make up the loss upon the difference (*y*).

Signed adjustments.—When an adjustment has been made of the amount of the loss, and indorsed upon the policy and signed by the underwriter, this binds the latter, unless he can show that it was made on wrong information, or under a mistake, or under the influence of misrepresentations (*z*). The adjustment is not an absolute and final settlement which is to be conclusively binding upon the parties (*a*); but, when the underwriter has once settled

(*r*) Marshall on Insurance, 504 (ed. 4); *Johnson* v. *Sheddon*, 2 East, 581; *Hurry* v. *R. Ex. Assur. Co.*, 3 Bos. & P. 308; *Tunno* v. *Edwards*, 12 East, 488.

(*s*) Stevens on Average, 84.

(*t*) *Le Cheminant* v. *Pearson*, 4 Taunt. 367; *Brooks* v. *M'Donnell*, 1 Y. & C. 515; 4 L.J. Ex. (Eq.) 60.

(*u*) *Amery* v. *Rogers*, 1 Esp. 208.

(*x*) *Palmer* v. *Blackburn*, 1 Bing. 61; 1 L.J. (O.S.) C.P. 1.

(*y*) *Boyfield* v. *Brown*, 2 Str. 1065.

(*z*) *Herbert* v. *Champion*, 1 Campb. 134; *Shepherd* v. *Chewter*, *ib.* 274; *Gammon* v. *Beverley*, 8 Taunt. 124.

(*a*) *Luckie* v. *Bushby*, 13 C.B. 878; 22 L.J. C.P. 220.

for the loss, he cannot recover back the money he has paid, unless there has been actual fraud on the part of the insured. If he pays for a total loss, which afterwards turns out to have been only an average loss, he cannot recover back his money, but must do the best he can with the property saved (*b*).

Right of insurer to recover compensation where loss or damage caused by negligence of third party.—After satisfaction made to the owner for the loss or damage, the insurer stands in the place of the insured, and is not only entitled to what can be saved or restored *in specie*, but also to compensation, when compensation is recoverable, for the injury (*c*); and he is therefore entitled to sue the wrongdoer in the name of the owner of the lost or damaged property, in order to recover compensation for such loss or damage (*d*). If the policy is a valued policy, the damages recovered will belong wholly to the underwriter, although the real value of the ship may exceed that stated in the policy (*e*).

Non-inception of risk—Over-insurance by mistake—Return of the premium.—If the risk upon the policy never commences, the premium paid to the underwriter is recoverable by the insured, unless the policy has been rendered void by some positive fraud on the part of the latter. Where the risk has not been run, the consideration for the premium fails; but, if the risk of the contract has once commenced, there can be no apportionment or return of the premium afterwards (*f*). If there are separate voyages and several risks to be run, some of the premiums may be returnable and others not; but, if there is one entire voyage, and one risk, and the risk has commenced, there can be no return of premium (*g*). If the vessel sails in an unseaworthy condition, and there is no fraudulent representation or warranty of seaworthiness in the policy, and no evidence of fraud, the premium is returnable, as the underwriter's risk upon the policy never commenced, by reason of the seaworthiness of the vessel being, as we have before seen, a condition precedent to his liability (*h*). If the policy be on goods to be laden on board the particular vessel, and no goods are put on board, the premium is returnable (*i*); and, if part of the goods covered by the policy only are put on board, a portion of the premium corresponding with the deficiency may be claimed back (*k*).

(*b*) *Da Costa* v. *Firth*, 4 Burr. 1966.

(*c*) *Randal* v. *Cockran*, 1 Ves. sen. 98; *Dickenson* v. *Jardine*, L.R. 3 C.P. 639; 37 L.J. C.P. 321.

(*d*) *Mason* v. *Sainsbury*, 3 Doug. 64; *Yates* v. *Whyte*, 5 Sc. 640; 7 L.J. C.P. 116; *post*, p. 1092.

(*e*) *North of England Ins. Assoc.* v. *Armstrong*, L.R. 5 Q.B. 244; 39 L.J. Q.B. 81.

(*f*) *Stevenson* v. *Snow*, 3 Burr. 1238; *Tyrie* v. *Fletcher*, Cowp. 666; *Loraine* v. *Thomlinson*, 2 Doug. 585.

(*g*) *Bermon* v. *Woodbridge*, 2 Doug. 781.

(*h*) *Penson* v. *Lee*, 2 Bos. & P. 330.

(*i*) *Martin* v. *Sitwell*, 1 Show. 151.

(*k*) *Horneyer* v. *Lushington*, 15 East, 46.

But, if the policy be on freight, the risk may, as we have seen (*ante*, p. 1058), attach, although no goods have been put on board; and, if the risk once attaches, the premium cannot be recovered back (*l*). Where several policies have been effected, and, before the risk thereon has commenced, the interest turns out to be less than the amount insured on the whole, the insured is entitled to a reasonable return of premium upon all the policies; but, where an insurance has been effected by one or more policies, and the risk has commenced, and subsequent policies are afterwards signed, and a loss happens between the signing of the first and subsequent policies, the underwriters on the first will be liable in proportion to their subscriptions to the extent of the whole sum insured, and therefore, the risk having been incurred by them, a return of the premium cannot be claimed (*m*). Where property has by mistake been insured for more than it is worth, the underwriter is bound to return the overplus premium; and, whenever it is established to be the custom and usage of trade to return a certain portion of the premium upon certain contingencies, the insured will be entitled to avail himself of the custom (*n*). Clauses are frequently inserted in policies expressly providing for a return of part of the premium in certain events and contingencies (*o*). Where an insurance was effected on a ship for a year, and part of the premium was to be returned "for every uncommenced month if sold or laid up," and the vessel had been laid up for several months within the year, but was employed again within the year, this was held not to be such a laying up as entitled the insured to a return of premium (*p*).

Void policy—Return of premium.—If a policy is rendered null and void by reason of a written misrepresentation or misstatement made by the insured by mistake and without fraud, the insured will be entitled to a return of his premium (*q*). But, if the insured has effected a fraudulent insurance with the view of cheating the underwriters, the law will not enable him to recover back the premium he has paid (*r*). If the insurance is illegal, as, for instance, if it has been effected upon an unlawful voyage or adventure, such as a smuggling enterprise, or a trading with foreign enemies, or a trading in breach of the navigation laws, and is consequently void, the premium cannot be recovered back if the unlawful voyage or adventure has been undertaken and both

(*l*) *Moses* v. *Pratt*, 4 Camp. 297.
(*m*) *Fisk* v. *Masterman*, 8 M. & W. 165; 10 L.J. Ex. 306.
(*n*) *Long* v. *Allen*, 2 Park, Ins. 797 (ed. 8).
(*o*) *Aguilar* v. *Rodgers*, 7 T.R. 421.
(*p*) *Hunter* v. *Wright*, 10 B. & C. 714; 8 L.J. (O.S.) K.B. 259.
(*q*) *Feise* v. *Parkinson*, 4 Taunt. 640.
(*r*) *Chapman* v. *Fraser*, 1 Park, Ins. 456.

parties are *in pari delicto;* but there is a *locus pœnitentiæ*, so long as the contract continues executory (*s*). And, if an insurance be effected on a trading adventure with foreign enemies, and be consequently illegal in its inception, so that the risk never commences, yet, if it was always in the contemplation of the parties to obtain a licence legalising the trade, and they intended to insure a legal and not an illegal voyage, but from some mistake or misapprehension the licence was not obtained in sufficient time to legalise the adventure and enable the insured to recover upon the policy, the premium paid for such insurance is recoverable, as there was no intention on the part of the insured to violate the law (*t*). So, if the insured was ignorant of the illegality of the voyage at the time he effected the insurance and paid the premium, as, for instance, if he did not know that hostilities had broken out, and that the parties with whom he was trading had at the time become foreign enemies, the premium is recoverable (*u*). Non-compliance with the requirements of the Merchant Shipping Act respecting the engagement of the crews of British vessels does not render the voyage illegal, but only furnishes ground for proceedings against the master for the breach of the statute (*x*). On the sale of a thing insured, no interest in the policy passes to the vendee unless at the time of the sale the policy is assigned either expressly or impliedly (*y*).

SECTION III.

OF FIRE INSURANCE.

Insurance against peril by fire.—When the underwriter, in consideration of a premium, undertakes to indemnify the insured against loss of, or injury to, property from fire, the contract is a contract of fire insurance, and the instrument by which it is effected is called a FIRE POLICY. In a contract of this kind, the insurers, after reciting the receipt of the premium, usually covenant or agree that, from a day named in the policy, unto, and inclusive of, another day named therein, and so long as the insured shall pay or cause to be paid the premium agreed upon, and the

(*s*) *Johnston* v. *Sutton*, 1 Doug. 254; *Lubbock* v. *Potts*, 7 East, 449.

(*t*) *Hentig* v. *Staniforth*, 5 M. & S. 122.

(*u*) *Oom* v. *Bruce*, 12 East, 225.

(*x*) *Redmond* v. *Smith*, 8 Sc. N.R. 268; 13 L.J. C.P. 159.

(*y*) *Powles* v. *Innes*, 11 M. & W. 10; 12 L.J. Ex. 163; *North of England Oil Cake Co.* v. *Archangel Ins. Co.*, L.R. 10 Q.B. 249; 44 L.J. Q B. 121.

insurers shall accept the same, they, the insurers, will make good any loss or damage by fire to the property insured, except loss or damage from fire caused by foreign enemies, &c. When the policy refers to printed proposals, as embodying the terms upon which the insurance is effected, these proposals form part of the contract, and the policy and proposals must be read and construed together. Where, however, a slip containing particulars of the risk had been initialled by underwriters, but no policy had been signed, it was held that there was a complete and binding contract of insurance (*a*). The insured must have a pecuniary interest in the property exposed to risk, or he must be accountable or responsible to some person for the safety or security of the property (*b*). If he has no such interest or accountability, the contract will be void at common law, independently of the 14 Geo. 3, c. 48, as being contrary to public policy, and holding out the strongest possible temptation to arson; but it is not necessary, to give the insured an insurable interest, that he should have the absolute property in the things insured. If he has a lien on them for money due to him, or if he holds them as a bailee, or depositary, or warehouseman, or as a commission-agent for sale, or as an artificer, or a common carrier, or is employing his work and labour upon them, he may lawfully insure them to their full value as goods held in trust or on commission, and may keep up a floating policy upon them for his own benefit and the benefit of his present and future customers (*c*). Where, however, the insurers had specially limited their liability to "goods on trust or on commission for which the insured are responsible," it was held that they were not liable for loss to goods sold, and in which the property had passed to the purchaser, although the insured held the delivery warrants for the convenience of paying the charges on the goods which were in bond (*d*). If the insured is a bankrupt in possession of after-acquired property by permission of his trustee, he has an insurable interest (*e*).

Parties entitled to benefit of insurance.—By sect. 7 of 22 & 23 Vict. c. 35, the person entitled to the benefit of a covenant to insure against loss or damage by fire shall have the same advantage from any insurance not effected in conformity with the covenant, as he would have from an insurance effected in conformity with

(*a*) *Thompson* v. *Adams*, 23 Q.B.D. 361.

(*b*) *Marks* v. *Hamilton*, 7 Exch. 323; 21 L.J. Ex. 109.

(*c*) *Tasker* v. *Scott*, 6 Taunt. 234; 1 Marsh. 556; *L. & N. W. Ry.* v. *Glyn*, 28 L.J. Q.B. 193; 1 E. & E. 652; *Waters* v. *Monarch Ins. Co.*, 5 E. & B. 870; 25 L.J. Q.B. 102.

(*d*) *North British Ins. Co.* v. *Moffatt*, L.R. 7 C.P. 25; 41 L.J. C.P. 1; and see *Martineau* v. *Kitching*, L.R. 7 Q.B. 436, 457; 41 L.J. Q.B. 227.

(*e*) *Marks* v. *Hamilton*, 7 Exch. 323; 21 L.J. Ex. 109.

the covenant; but this section has been repealed by sect. 14 of 44 & 45 Vict. c. 41, and Sch. II., Part I., and its place is practically supplied by the relief against forfeiture contained in sect. 14 of the above Act (*f*). A purchaser of property insured against fire does not, by the purchase, acquire a right to the benefit of the policy (*g*). Where machinery was mortgaged by a bill of sale, which contained a covenant to insure, but no provision for the application of the policy moneys in case of fire in liquidation of the mortgage debt, and the machinery was burnt, it was held that the mortgagee had no claim to the benefit of the policy as against the mortgagor (*h*). So also a lessee with an option of purchase has no right after a fire to exercise his option and claim the insurance money (*i*).

Things covered by policy.—An insurance on "household furniture, linen, and wearing apparel," will not include linen-drapery bought on speculation (*k*); nor will an insurance on the "interest in an inn" include the profits of the publican's trade (*l*); nor an insurance on "an oil mill and millwright's gear therein" include machinery in a separate detached building, although it is worked by the same moving power, and considered to be part of the mill (*m*). If a building be described as of one class instead of another requiring a larger premium, the policy will be nugatory (*n*).

Warranties.—Every statement, condition, and representation, material to the risk, will amount to a warranty, but not statements and representations concerning matters which do not form the basis of the contract and regulate the risk (*o*).

Alteration of premises increasing risk.—In every policy of insurance against fire there is an implied promise or undertaking on the part of the insured that he will not, after the making of the policy, alter the premises so as to increase the risk. If he converts a house of two stories into a house of three stories, the liability of the insurer is increased; the premium, if previously fair, has then become inadequate, and the underwriter is discharged (*p*). It has been held that, if it is stated or asserted in the description of the premises in the policy, "that no fire is kept on the premises, and no hazardous goods deposited thereon," this refers merely to the

(*f*) See *ante*, p. 660.

(*g*) *Poole* v. *Adams*, 33 L.J. Ch. 639.

(*h*) *Lees* v. *Whiteley*, L.R. 2 Eq. 143; 35 L.J. Ch. 412.

(*i*) *Edwards* v. *West*, 7 Ch.D. 858; 47 L.J. Ch. 463.

(*k*) *Watchorn* v. *Langford*, 3 Campb. 422.

(*l*) *Wright* v. *Pole*, 1 Ad. & E. 621.

(*m*) *Hare* v. *Barstow*, 8 Jur. 928.

(*n*) *Newcastle Fire Ins. Co.* v. *Macmorran*, 3 Dow, 255.

(*o*) *Benham* v. *United Guar. Assur. Co.*, 7 Exch. 744; 21 L.J. Ex. 317; *Baxendale* v. *Harvey*, 4 H. & N. 450; S. C. nom. *Baxendale* v. *Harding*, 28 L.J. Ex. 236.

(*p*) *Sillem* v. *Thornton*, 3 E. & B. 882; 23 L.J. Q.B. 368.

ordinary state and condition of the property; and if on some particular occasion, for some temporary purpose, fire is brought upon the premises, or hazardous goods are temporarily or casually placed thereon, and a loss by fire consequently occurs, the policy is not forfeited, and the underwriters are not discharged (*q*).

Notice of alterations.—If by the terms of the policy the insured is to give notice of the erection or use of new stoves or furnaces, or of the making of any alterations increasing the risk, and pay an increased premium, this, it has been held, refers to some permanent alteration or user, and not to a mere temporary or casual matter (*r*). But the authority of these cases is somewhat doubtful; and it has been held that, where, by the terms of the policy, steam-engines, stoves, or any description of fire-heat other than common fire-places, are not to be used unless notice has been given and the use allowed, the policy will be avoided if a steam-engine, with furnace attached, is brought on the premises, and used only on one or two occasions for experimental purposes, and not in the business of the insured (*s*); but it must be proved that the risk of fire was increased by the thing done (*t*).

Misdescription of insured premises.—Where by the terms of a policy, the houses, buildings, or other places where insured goods were deposited, were to be accurately described, and a lodger who had only one room in a house effected an insurance upon goods therein, describing them as being in his "dwelling-house," it was held that the description was sufficiently accurate (*u*). A coffee-house keeper who does not furnish beds and lodgings for the night does not carry on the trade of an innkeeper within the meaning of a policy enumerating the trade of an innkeeper as doubly hazardous, and requiring an increased premium for the insurance of buildings where it is carried on (*x*). When mills are warranted to be worked by day only, and they are put in motion by means of shafts worked by steam power in an adjoining building, the warranty is not broken by the steam-engine and shafts being kept going all night to turn other mills, if it appears that the machinery of the insured mill was disconnected at night from the moveable shafts, and that the mill itself had ceased to work (*y*).

Fraudulent concealment of facts materially affecting risk.—If any extraordinary risk is known by the insured to exist at the time the

(*q*) *Dobson* v. *Sotheby*, M. & M. 90; *Shaw* v. *Robberds*, 6 Ad. & E. 83; 6 L.J. K.B. 106. See, however, *infra*, Notice of Alterations.

(*r*) *Pim* v. *Reid*, 6 Sc. N.R. 982; 12 L.J. C.P. 299; *Barrett* v. *Jermy*, 3 Exch. 545; 18 L.J. Ex. 215.

(*s*) *Glen* v. *Lewis*, 8 Exch. 617; 22 L.J. Ex. 228.

(*t*) *Stokes* v. *Cox*, 1 H. & N. 533; 26 L.J. Ex. 113.

(*u*) *Friedlander* v. *London Assur. Co.*, 1 M. & Rob. 171.

(*x*) *Doe* v. *Laming*, 4 Campb. 73.

(*y*) *Whitehead* v. *Price*, 2 Cr. M. & R. 447; *Mayall* v. *Mitford*, 6 Ad. & E. 670.

policy is effected, and is not disclosed to the underwriter, this is a fraudulent concealment, which deprives the insured of all right of action upon the policy. Where a warehouse adjoining a boat-builder's shop took fire, and the fire was apparently extinguished, and the boat-builder sent immediate instructions for the insurance of his shop and premises, without communicating the fact of the neighbouring fire to the insurers, and the fire was not in fact extinguished, but broke out again on the following morning, and extended to the boat-builder's shop and premises and consumed them, it was held that the concealment of the increased risk from the recent existence of the adjoining fire avoided the policy (*z*).

Risks covered by policy.—As the insurers in most cases take upon themselves only the risk of fire, they will not be responsible unless there has been actual ignition of the property insured. If it has been damaged merely from atmospheric concussion caused by an explosion of gunpowder at a distance (*a*), or from the heat or smoke of ordinary flues and chimneys which have been overheated and mismanaged, and there has been no outbreak of fire, they will not be responsible upon the policy (*b*). Where it was provided that the insurers should not be liable if the property should be burnt "by foreign enemies, or any military or usurped power," and it was set on fire by a mob excited by the high price of provisions, it was held that this was not a burning by an usurped power within the meaning of the proviso (*c*). But, if the insurers exempt themselves from liability for losses by fire "happening from civil commotion," they will not be responsible for damage resulting from the incendiarism of a rebellious mob, or from the insurrection of the people (*d*). The insurer who paid a loss of this kind could formerly sue the hundred upon the Riot Act in the name of the insured (*e*). A policy contained an exception of "loss or damage by explosion, except for such loss or damage as shall arise from explosion of gas;" an explosive vapour escaped and caught fire, setting fire to other things; it afterwards exploded and caused a further fire, besides doing damage by the explosion; it was held that the word "gas" meant ordinary coal gas, and did not include the explosive vapour, and that the exemption applied to the damage caused by the subsequent explosion and its consequences just as much as to a fire originated by explosion (*f*). Where a

(*z*) *Bufe* v. *Turner*, 6 Taunt. 338.

(*a*) *Everett* v. *Lond. Assur. Co.*, 19 C.B. N.S. 126; 34 L.J. C.P. 299.

(*b*) *Austin* v. *Drewe*, 6 Taunt. 436.

(*c*) *Drinkwater* v. *Lond. Assur. Co.*, 2 Wils. 363.

(*d*) *Langdale* v. *Mason*, 2 Park, Ins. 965.

(*e*) *Clark* v. *Hundred of Blything*, 2 B. & C. 254; *Yates* v. *Whyte*, 5 Sc. 640; 7 L.J. C.P. 116. As to the procedure now, see 49 & 50 Vict. c. 38, ss. 2 (2), 4, and Sched. I.

(*f*) *Stanley* v. *Western Ins. Co.*, L.R. 3 Ex. 71; 37 L.J. Ex. 73.

ship was insured for three months against fire, and was described as lying in the Victoria wet docks, with liberty to go into a dry dock for repairs, it was held that she was covered by the policy whilst passing along the Thames, on her way from the wet dock to the dry dock, but not whilst she was lying in the river for the purpose of re-fixing her paddle-wheels, or for purposes of repair (*g*). And where the risk was stated to be on four pumps "at and from Ardrossan to the steamer ashore at Drogheda, and while there engaged at the wreck and until again returned to Ardrossan, &c.," it was held that this did not include the risk while the pumps were on board the wreck on a voyage to Belfast, a port of safety (*h*). Under the words "from the 14th of February until the 14th of August," the whole of the 14th of August was held to be included (*i*).

Fires caused by negligence—Extraordinary risks.—One of the objects of insurance against fire is to guard against the negligence of servants and others; and therefore the simple fact of negligence has never been held to constitute a defence against the claim of the insured; and there is no distinction between the negligence of servants and agents and of the insured himself (*k*). But the underwriters do not take upon themselves extraordinary risks, unless those risks are expressly brought to their notice, and are accepted and insured against by them at the time the policy is effected.

Notice of loss—Partial losses.—By the terms of most contracts for insurance against fire, the insured is required to give, within a certain number of days, notice of the loss to the insurers, and to deliver full particulars of the damage sustained, and prove the amount of it; and the strict performance of these things in point of time, and the substantial performance of them in other respects, constitute a condition precedent to the right of the insured to be indemnified for his loss (*l*). By the term "full particulars" is meant the best particulars the insured can reasonably give (*m*). When a partial loss only has been sustained of the property insured, the insured is, of course, entitled only to be indemnified to the extent of such partial loss; to permit him to recover more, and put himself in a better situation than he was in before the loss occurred, would be totally opposed to the nature of a contract of insurance as a mere contract of indemnity. If a reasonable suspicion exists

(*g*) *Pearson* v. *Commercial Un. Assur. Co.*, 1 App.Cas. 498; 45 L.J. Ex. 761; *ante*, p. 1048.

(*h*) *Wingate* v. *Foster*, 3 Q.B.D. 582; 47 L.J. Q.B. 525.

(*i*) *Isaacs* v. *Royal Ins. Co.*, L.R. 5 Ex. 296; 39 L.J. Ex. 189.

(*k*) *Busk* v. *Roy. Ex. Assur. Co.*, 2 B. & Ald. 73.

(*l*) *Roper* v. *Lendon*, 28 L.J. Q.B. 260; 1 E. & E. 825; *Worsley* v. *Wood*, 6 T.R. 710.

(*m*) *Mason* v. *Harvey*, 8 Exch. 819; 22 L.J. Ex. 336.

that buildings situate within the bills of mortality have been insured for more than their value and fired, but proof is wanting, the insurers may rebuild or repair at their own expense, and resist the claim of the insured for the money secured by the policy (*n*).

Forfeiture of policy—Non-payment of premium—Days of grace.—Where the insurance is for a year, and so on from year to year, or for a quarter of a year, and so on from quarter to quarter, it is not kept alive after the expiration of the year or quarter by a mere proviso or condition giving a certain number of days of grace for the payment of the premium; but there should be an express stipulation that the insurance shall be continued and the property covered by the policy, until the expiration of the days of grace (*o*). Where a policy of insurance against loss by fire from year to year provided that the insured should, "as long as the managers agreed to accept the same, make all future payments annually at the office within fifteen days after the day limited by the policy, upon pain of forfeiture of the benefit thereof, and no insurance is to take place until the premium be actually paid," and a loss happened within fifteen days after the end of one year, but before the premium for the next was paid, it was held that the insurers were not liable, although the insured tendered the premium within the fifteen days, but after the loss; that the insurance was for a year, and not a year and fifteen days, and the policy at an end by non-payment at the very day; and that, the receipt of the premium being in the discretion of the insurers, they had clearly a right to refuse to continue the policy (*p*). Where there was a condition in a policy that the insured "should forfeit all benefit under his policy," if there was any false swearing in support of the claim he made, and the insured made an affidavit of damage to the amount of 1,081*l.*, and the claim was contested, and a jury gave a verdict for 500*l.* only, the court granted a new trial (*q*).

Divers insurances on same property.—If the insured has effected two or more insurances upon the same property, he can, as we have before seen, recover no more than his actual loss; and, when he has obtained a full indemnity from the one he cannot resort to the other; but, as he is allowed to fix on which insurer he pleases, the law permits the one who has been compelled to make good the loss to resort to the others for contribution, and to recover from them a rateable proportion of the loss against which

(*n*) *Vernon* v. *Smith*, 5 B. & Ald. 1; and see *post*, p. 1092.

(*o*) *Salvin* v. *Janes*, 6 East, 571.

(*p*) *Turleton* v. *Staniforth*, 5 T. R. 700; 1 B. & P. 471; *Simpson* v. *Accid. Death Ins. Co.*, 2 C.B. N.S. 257; 26 L.J. C.P. 289; *Roberts* v. *Security Co.*, (1897) 1 Q.B. 111; 66 L.J. Q.B. 119.

(*q*) *Levy* v. *Baillie*, 7 Bing. 349; 9 L.J. (O.S.) C.P. 108.

they have all insured (*r*). If the insurer pays the money, and subsequently the insured receives compensation from any other sources for his loss, the insurer is entitled to recover from the insured any sum in excess of the loss (*s*). A policy of fire insurance being a contract of indemnity merely, the insurer on making good the loss insured against is entitled, even though payment be made with knowledge of a then subsisting contract relating to the subject-matter between the assured and third parties, to stand in the place of the assured, and to recover from him the full value of any rights or remedies which he had renounced, and to which, but for renunciation, the insurer would have a right to be subrogated (*t*). There is no reason why the principles in respect of contribution should not be the same in respect of fire policies as they are in respect of marine policies; and if the *same person in respect of the same right* insures in two offices, there is no reason why they should not contribute in equal proportion in respect of a fire policy as they would in respect of a marine policy (*u*). Several mortgages were given upon the same premises, and the mortgagees severally insured in different offices; the premises were partly destroyed by fire; the plaintiffs were the last mortgagees; the prior mortgagees were paid an amount sufficient to reinstate the premises, and to pay the rent during the period of reinstatement, but the premises were not reinstated; the value of the premises before the fire was sufficient to cover all the mortgages, but, after the fire, was not sufficient to pay the prior mortgagees the balance due to them; it was held that, notwithstanding the payments to the prior mortgagees, the plaintiffs were entitled to recover to the full extent of their loss by the fire, except the loss of rent (*x*).

Insurances by warehousemen and bailees of customers' goods.—A warehouseman, wharfinger, common carrier, or bailee of goods, may insure the goods which come to his hands from time to time, in the ordinary course of trade, and may keep up a floating policy for the protection of the goods of his customers (*y*). It is not necessary that the bailee should have had any previous authority from the owners to insure in order to give him an insurable interest (*z*), nor that he should have made any charge for insurance, nor that he should be in anywise liable to make good to his

(*r*) *Davis* v. *Gildart*, 2 Park, Ins. 601 (ed. 8); *Godin* v. *London Assur. Co.*, 1 W. Bl. 103.

(*s*) *Darrell* v. *Tibbitts*, 5 Q.B.D. 560; 50 L.J. Q.B. 33. See also *Castellain* v. *Preston*, 11 Q.B.D. 380; 52 L.J. Q.B. 366.

(*t*) *West of England Fire Ins. Co.* v. *Isaacs*, (1897) 1 Q.B. 226; 66 L.J. Q.B. 6.

(*u*) *North British Ins. Co.* v. *London Ins. Co.*, 5 Ch.D. 569; 46 L.J. Ch. 537.

(*x*) *Westminster Fire Office* v. *Glasgow Provident Soc.*, 13 App.Cas. 699.

(*y*) *L. & N. W. Ry.* v. *Glyn*, 1 E. & E. 652; 28 L.J. Q.B. 188; *Crowley* v. *Cohen*, 3 B. & Ad. 478; 1 L.J. K.B. 158.

(*z*) *Hagedorn* v. *Oliverson*, 2 M. & S. 485.

customers the loss that has been sustained in order to entitle him to recover the full amount of the insurance from the insurers (*a*); but he is not entitled, when he has received the money, to appropriate it to his own use. The money is the money of the owners of the goods, and may be recovered by them from the insured who has received it (*b*).

Inability of insured to sue when no damage sustained.—Policies against fire being contracts of indemnity, whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. If, therefore, the loss or damage insured against has been caused by the act or default of some wrongdoer, and the insured has brought an action and recovered full compensation from such wrongdoer, he has then no ground to sue for an indemnity upon the contract of insurance; but, if the compensation he receives falls short of the real injury, an action would be maintainable for so much as would suffice to constitute a complete indemnity.

Rights of insurer and insured as against wrongdoers causing the loss.—Every insurer has a right to be put in the place of the insured, and to use the name of the latter in order to recover compensation from a wrongdoer who has caused the loss (*c*). If, therefore, the insurer has paid the amount of a loss caused by the wrongful act of a third party, he has a right to sue the latter in the name of the insured to recover compensation for the injury; and, if the insured receives from the insurer the amount insured, or full indemnity for his loss, and, after that, brings an action against, and obtains compensation from, a wrongdoer, he is not entitled to double satisfaction, and cannot put the money into his own pocket, but is a trustee thereof for the benefit of the insurer, and is bound to hand it over to the latter.

Assignment of fire policies.—A purchaser of property which is insured does not, by the mere fact of the purchase, and in the absence of any agreement to that effect, acquire any right to the insurance moneys (*d*).

Laying out insurance money in rebuilding.—By the 14 Geo. 3, c. 78, s. 83, the governors and directors of insurance offices are authorised, upon the request of any persons entitled to any house or other buildings which may be burnt down or damaged by fire,

(*a*) *Waters* v. *Mon. Life Co.*, 5 E. & B. 880; 25 L.J. Q.B. 102; *L. & N. W. Ry.* v. *Glyn*, *ante*, p. 1091.

(*b*) *Randal* v. *Cockran*, 1 Ves. sen. 97; *Yates* v. *Whyte*, 5 Sc. 640; 7 L.J. C.P. 116; *Sidaways* v. *Todd*, 2 Stark. 400; *L. & N. W. Ry.* v. *Glyn*, *supra*.

(*c*) *Mason* v. *Sainsbury*, 3 Doug. 64; *Clark* v. *Hundred of Blything*, 2 B. & C. 254; see *Simpson* v. *Thomson*, 3 App. Cas. 279; *King* v. *Victoria Ins. Co.*, (1896) A.C. 250; 65 L.J. P.C. 38.

(*d*) *Poole* v. *Adams*, 33 L.J. Ch. 639.

or upon any grounds of suspicion that the owners or occupiers, or other parties effecting the insurance, have been guilty of fraud or incendiarism, to cause the insurance money to be laid out in rebuilding (*e*). Trade fixtures put up by a tenant, being removable by him, are not comprised in the expression "house or other buildings" in the statute. Therefore, where such fixtures are separately insured and destroyed by fire during the tenancy, the landlord is not entitled to have the insurance money laid out under the Act; and a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, as conferring a mere personal right resting in contract, makes no difference in this respect (*f*). In order to entitle an owner to have the money laid out in rebuilding, he must make a distinct request to that effect to the insurance office before they have settled with the tenant insuring; and in no case is the owner entitled himself to rebuild and claim the policy money (*g*).

SECTION IV.

OF LIFE INSURANCE.

Contracts of life assurance (*h*).—"The contract commonly called life assurance is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable" (*i*). This species of insurance is not, strictly speaking, a contract of indemnity; but it has so many features in common with those contracts, that it is convenient to consider it along with them. The acceptance of a proposal for an insurance on the life of the proposer would appear not to be binding upon the insurers until the premium is paid; and therefore, where, after acceptance of such a proposal, but before tender of the premium, there was a material alteration in the health of the proposer, it was held that there was no contract binding the company to issue a policy (*k*).

(*e*) The operation of this section is not limited to the metropolis, but is of universal application: *Filliter* v. *Phippard*, 11 Q.B. 347; 17 L.J. Q.B. 89; *Gorely, Ex parte*, 34 L.J. Bank. 1.

(*f*) *Gorely, Ex parte, supra.*

(*g*) *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L.J. Ch. 329.

(*h*) As to insuring lives of children, see 59 & 60 Vict. c. 25, ss. 62—67 and 84.

(*i*) Parke, B., *Dalby* v. *Ind. & Lond. Life Ins. Co.*, 15 C.B. 387; 24 L.J. C.P. 6.

(*k*) *Canning* v. *Farquhar*, 16 Q.B.D. 727; 55 L.J. Q.B. 225.

Contracts with de facto *directors.*—A person who effects a policy with a life insurance company in the ordinary course of business is not bound to inquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company; it is sufficient if the policy appears on the face of it to be consistent with the articles of association of the company, and the Acts of Parliament under which it is incorporated (*l*).

Interest of insured.—By 14 Geo. 3, c. 48, s. 1, no insurance shall be made on the life of any person wherein the person for whose use and benefit, or on whose account, the policy shall be made, shall have no interest, by way of gaming or wagering (*ante*, pp. 1029, 1030); it shall not be lawful to make any policy on life or lives without inserting therein the name of the person interested therein, or for whose use and benefit, and on whose account, the policy was made (*m*); and (s. 3) in all cases where the insured has an interest in such life or lives, no greater sum shall be recovered and received from the insurer than the amount or value of the interest of the insured in such life or lives; but nothing therein contained is (s. 4) to extend to insurances on ships, goods, or merchandises. If an insurance company lends money at interest upon the terms that the borrower do insure his life in double the money lent, the policy executed in furtherance of this agreement is not a gaming or wagering policy within the meaning of the statute (*n*). The interest of the insured must be a pecuniary interest in the duration of the life insured (*o*); such as the interest which a creditor has in the life of his debtor (*p*), or a trustee in his trust moneys and revenues (*q*), or a wife in the life of her husband who is bound by law to support and maintain her (*r*), or the interest which a husband has in an annuity payable to his wife for life (*s*). By the Married Women's Property Act, 1882 (*t*), a married woman may effect a policy upon her own life or the life of her husband for her separate use; and a policy effected by her on her own life for the benefit of her husband and children, or by the husband on his own life for the benefit of his wife or children, will create a trust for the benefit of the objects named, and does not form part of the estate of the insured (*u*), unless the policy

(*l*) *County Life Assur. Co., In re*, L.R. 5 Ch. 288; 39 L.J. Ch. 471.
(*m*) *Hodson* v. *Observ. Life Assur. Co.*, 8 E. & B. 40; 26 L.J. Q.B. 303; *Shilling* v. *Accid. Death Ins. Co.*, 2 H. & N. 42; 27 L.J. Ex. 16.
(*n*) *Downes* v. *Green*, 12 M. & W. 490; 13 L.J. Ex. 159.
(*o*) *Halford* v. *Kymer*, 10 B. & C. 724; 8 L.J. (O.S.) K.B. 311.
(*p*) *Anderson* v. *Edie*, 2 Park, Ins. 914.
(*q*) *Tidswell* v. *Ankerstein*, Peake, 151.
(*r*) *Reed* v. *R. Ex. Assur. Co.*, 2 Peake, 70.
(*s*) *Henson* v. *Blackwell*, 4 Hare, 434; 14 L.J. Ch. 329.
(*t*) 45 & 46 Vict. c. 75, s. 11.
(*u*) *Mellor's Policy Trusts, In re*, 7 Ch.D. 200; 47 L.J. Ch. 246; *Seyton, In re*, 34 Ch.D. 511; 56 L.J. Ch. 775;

has been effected with intent to defraud creditors. A husband insured his life for the benefit of his wife under the section; he died, and his wife was tried for and convicted of his murder: it was held that the effect of the section was to create a trust in favour of the wife in respect of the sum insured; but that, inasmuch as it was against public policy for the wife to benefit by her own criminal act, the trust in her favour failed, and a resulting trust arose in favour of the deceased husband's estate, in respect of which his executors were entitled to recover the sum insured from the insurance company (*x*). Where a creditor promised his debtor that he would not exact payment of the debt during his life, but there was no consideration or other circumstances to make the promise binding, the court held that the promise did not give the debtor an insurable interest in the life of the creditor (*y*). But a contract for employment at a fixed salary for a certain term gives the employed an insurable interest in the life of the employer (*z*).

In an action to recover the amount of a policy of insurance upon the life of a child, the plaintiff's step-sister, evidence was given of a promise made by the plaintiff to the mother of the child to take care of the child and help to maintain it; no objection was taken on behalf of the defendants that the plaintiff had not in fact incurred any expenditure in respect of the child: it was held that the plaintiff had an insurable interest in the child's life, and was entitled, in the absence of any objection as to the amount in fact expended by her, to recover the amount of the policy (*a*). If one person has a present interest in the policy, though, after that present purpose is satisfied, another person may be the party interested, the name of both persons must be inserted in the policy (*b*). If the insured has an insurable interest in the duration of the life at the time he effects the policy, and his interest afterwards ceases, he is not thereby prevented from suing upon the policy to recover so much of the sum insured as his interest in the life extended to at the time of the making of the policy. If, therefore, a creditor insures the life of his debtor for a certain sum, and the debt is paid, the creditor is not thereby deprived of his right of action upon the policy (*c*). But, though upon a life policy the insurable interest at the time of the making of the policy, and not the interest at

Davies' Policy Trusts, In re, (1892) 1 Ch. 90; 61 L.J. Ch. 650.

(*x*) *Cleaver* v. *Mutual Reserve Fund*, 61 L.J. Q.B. 128; (1892) 1 Q.B. 147.

(*y*) *Hebden* v. *West*, 3 B. & S. 579; 32 L.J. Q.B. 85.

(*z*) *Hebden* v. *West*, *supra*.

(*a*) *Barnes* v. *London, Edinb. & Glasg. Assur. Co.*, (1892) 1 Q.B. 864.

(*b*) *Evans* v. *Bignold*, L.R. 4 Q.B. 622; 38 L.J. Q.B. 293.

(*c*) *Dalby* v. *Ind. & Lond. Life Ins. Co.*, 24 L.J. C.P. 3; 15 C.B. 365; *Law* v. *Lond. Indisp. Policy Co.*, 24 L.J. Ch. 196; 1 Kay & J. 223.

the time of the death, is to be considered, the insured cannot recover from the insurers, whether upon one policy or many, more than the insurable interest which the person making the insurance had at the time he insured the life. If for greater security he thinks fit to insure with many persons, and by different contracts of insurance, and to pay the premiums upon each policy, he is at liberty to do so; but he can only recover or receive upon the whole the amount of his insurable interest; and if, therefore, he has received the whole amount from one insurer, he is precluded from recovering any more from the others (*d*). If the underwriter becomes bankrupt before the death has taken place and the amount insured has become payable, the interest of the insured in the policy may be valued and proved under the bankruptcy against such bankrupt underwriter (*e*).

Warranties—Conditions.—A statement respecting the life insured does not amount to a warranty unless it is made the basis of the contract, and was intended by the parties to have that effect (*f*); but policies are generally granted subject to the condition that, if any untrue statement is contained in any of the documents addressed to the insurers in relation to the life insured, the policy shall be void (*g*). By untrue statement is sometimes meant a statement that is wilfully and designedly untrue (*h*). In other cases the policy will be void if the statement is unintentionally untrue (*i*), and is material (*k*). When there is a warranty that the person whose life is to be insured is in good health, it means that he is in a reasonably good state of health, not that he is perfectly free from illness. If there is a warranty that the party is "free from any disorder tending to shorten life," it does not mean that he has no disease at all; and it is not to be concluded that a disorder with which a person is afflicted at the time the insurance is effected is a disorder tending to shorten life, merely because he afterwards dies of it (*l*). A warranty that the party whose life is insured "has not been afflicted with, nor is subject to, vertigo, fits, &c.," does not mean that the party has never had a fit in his life, but that he is not at the time the insurance is made a person habitually or constitutionally afflicted with fits (*m*). If the insured,

(*d*) *Hebden* v. *West*, *ante*, p. 1095.

(*e*) *Cox* v. *Liotard*, 1 Doug. 166, n.

(*f*) *Wheelton* v. *Hardisty*, 8 E. & B. 232; 26 L.J. Q.B. 265; 27 *ib.* 241.

(*g*) *Cazenove* v. *Brit. Eq. Assur. Co.*, 28 L.J. C.P. 259; 6 C.B. N.S. 437; aff. 29 L.J. C.P. 160.

(*h*) *Fowkes* v. *Manch., &c. Ins. A.*, 3 B. & S. 917; 32 L.J. Q.B. 153; *Perrins* v. *Marine & Gen. Ins. Co.*, 2 E. & E. 317; 27 L.J. Q.B. 242; *Sweeny* v. *Promoter Life Assur. Co.*, 14 Ir. C.L.R. 487.

(*i*) *Macdonald* v. *Law Union Ins. Co.*, L. R. 9 Q.B. 328; 43 L.J. Q.B. 131.

(*k*) *London Assur. Co.* v. *Mansel*, 11 Ch.D. 363; 48 L.J. Ch. 331.

(*l*) *Willis* v. *Poole*, 2 Park, Ins. 935; *Watson* v. *Mainwaring*, 4 Taunt. 763; *Aveson* v. *Kinnaird* (*Lord*), 6 East, 188.

(*m*) *Chattock* v. *Shawe*, 1 Mood. & Rob. 498.

or his broker, or the agent effecting the policy, merely says that he believes, but will not warrant, the life to be a good one, the underwriter will be liable, unless he can show that the party so stating his belief knew that the life was not good (*n*). Unless it is so specifically stated, a condition that, in cases of fatal accident, notice must be given to the insurers within seven days, is not a condition precedent to recovery upon the policy (*o*).

Fraudulent misrepresentation and fraudulent concealment of circumstances material to be known to the underwriter naturally avoid life policies in common with all other contracts, the materiality of the misstatement or concealment being a question for the jury (*p*). Some policies, however, make the insurance company itself sole judge of the materiality of the falsehood, and adopt the most stringent provisions against misstatement, whether material or immaterial, known or not known to be untrue by the party making them, so that, observed Lord St. Leonards, "I am bound to say, unless they are fully explained to the parties, a vast number of persons will be led to suppose that they have made a provision for their families by an insurance on their lives, when, in point of fact, the policy is not worth the paper on which it is written" (*q*). False answers given to verbal inquiries as to whether the life sought to be insured had been previously insured at other offices have been held to be fraudulent misrepresentations avoiding the policy (*r*); and so have false answers respecting spitting of blood, consumptive symptoms, &c., or concerning the general health and state and condition of the life insured (*s*). If the insurer is referred for information to a former medical attendant of the life insured, and not to the immediate and usual medical attendant, such an omission to refer to the proper person will vacate the policy.

Principal and agent.—If an untrue statement, or a concealment of a fact, or non-communication of a material circumstance, takes place through the instrumentality of an agent, the insured, who is to benefit by the policy, is bound by it, though he himself is not privy to the falsehood of the representation, or the non-communication of the material fact. But the knowledge of a person who is an agent only for the purpose of obtaining proposals has been held, under certain circumstances, to be the knowledge of his principal (*t*). Where a party effects a policy on the life of another,

(*n*) *Stackpole* v. *Simon*, 2 Park, Ins. 932.

(*o*) *Stoneham* v. *Ocean Ins. Co.*, 19 Q.B.D. 237.

(*p*) *Lindenau* v. *Desborough*, 8 B. & C. 586; *Jones* v. *Provinc. Ins. Co.*, 3 C.B. N.S. 65; 26 L.J. C.P. 272.

(*q*) *Anderson* v. *Fitzgerald*, 4 H.L.C. 507; *Towle* v. *National Guardian Assur. Soc.*, 2 Giff. 42; 30 L.J. Ch. 900.

(*r*) *Wainwright* v. *Bland*, 1 M. & W. 32; 5 L.J. Ex. 147.

(*s*) *Geach* v. *Ingall*, 14 M. & W. 95; 15 L.J. Ex. 37; *Thomson* v. *Weems*, 9 App.Cas. 671.

(*t*) *Bawden* v. *London, Edinb. & Glasg. Assur. Co.*, (1892) 2 Q.B. 534; 61 L.J. Q.B. 792.

the person whose life is insured is not the general agent of the person procuring the insurance, so as to make his false representations those of the party procuring the insurance; and the same may be said of false representations of medical attendants and referees, unless these representations are expressly made the basis of the policy, or the parties making them are themselves the persons negotiating the contract. There is no analogy between the statements of the "life," or of the referees in the negotiation of a life insurance, and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy (*u*). But policies may be framed making the insured responsible for any material misrepresentation or concealment by the "life" or by the referees. Where the canvasser filled up the answers to the questions which formed the basis of the policy without any authority from the proposed insurer, who was ignorant that the canvasser had answered the questions falsely, it was held that the insurance company was not liable on the policy, since the canvasser must be regarded, in these circumstances, as having been the agent of the proposer and not of the company (*x*).

Indisputable policies.—Many insurance companies issue prospectuses and transact their business on the terms that all policies effected by them shall be unquestionable or indisputable, unless obtained by fraud (*y*).

Risks covered by life policies.—"When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risks, unless there was some fraud in the person insuring, either by his suppressing circumstances which he knew, or alleging what was false" (*z*). Where, therefore, there is no express provision in the policy that in the event of the insured dying by his own hand the policy shall become void, the policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity (*a*). But, if a man insures his own life for a certain sum to be paid to his executors after his decease, in consideration of annual premiums to be paid by him to an insurance company, the policy will be void, and the amount irrecoverable, if he is killed in a duel, or feloniously destroys himself, or dies by the hand of the common hangman or public executioner (*b*). In some policies,

(*u*) *Wheelton* v. *Hardisty*, 8 E. & B. 232, 285; 27 L.J. Q.B. 241.

(*x*) *Biggar* v. *Rock Life Assur. Co.*, (1902) 1 K.B. 516; 71 L.J. K.B. 79. As to the knowledge of insurer's agent being the knowledge of insurer, see *Bawden* v. *London, Edinb. & Glasg. Assur. Co.*, (1892) 2 Q.B. 534; 61 L.J. Q.B. 792.

(*y*) *Wood* v. *Dwarris*, 11 Exch. 493; 25 L.J. Ex. 129; *Wheelton* v. *Hardisty*, *supra*.

(*z*) *Ross* v. *Bradshaw*, 2 Park, Ins. 649 (ed. 7); 1 W. Bl. 312.

(*a*) *Horn* v. *Anglo-Austral. Assur. Co.*, 30 L.J. Ch. 511.

(*b*) *Amicable Society* v. *Bolland*, 4 Bligh, N.S. 194.

where parties insure their own lives, a condition is inserted making void the policy in case the party shall die by his own hands, or by the hands of justice, or in consequence of a duel; and it has been held that such a condition is not limited to felonious self-destruction, but extends to all cases of voluntary self-destruction, so that, if a man destroys himself in a fit of phrenzy or delirium, the insurers will be discharged from liability (*c*). Such policies sometimes contain an exception to the effect that the policy in such a case shall not be void to the extent of any *bonâ fide* interest therein which at the time of such death shall be vested in any other person for a sufficient pecuniary or other consideration; and, where the insurance company with whom the policy was effected had advanced money to the insured upon mortgage and upon the deposit of the policy as a collateral security, it was held that they had such a *bonâ fide* interest, and that the policy was not void upon the suicide of the insured (*d*).

If the life is insured for one year from the day of the date of the policy, and the death occurs that very day twelvemonth, the insurer will be liable; for "from the day of the date excludes the day" (*e*). But the word "from" may mean either inclusive or exclusive, according to the apparent intention of the parties, to be gathered from the general context of the written instrument (*f*). An insurance to cover death "within the United Kingdom" is satisfied by a death in Jersey (*g*).

Forfeiture of policies—Non-payment of premium—Days of grace.—Whenever the policy is to become forfeited if the premium is not paid by a given day, but the policy may nevertheless be revived on payment of the premium within a certain extended period of time, it has been held to be essential to the revival of the policy that the life insured is in being at the time of the payment and acceptance of the premium (*h*). Where the policy was to continue provided *the insured* paid the premium within twenty-one days after it became due, and the premium became due and was not paid, and the insured died within the twenty-one days, it was held that the premium could not be paid and the policy kept on foot by his executors (*i*). Many policies, however, expressly provide that in case any person on whose life any insurance shall have been

(*c*) *Clift* v. *Schwabe*, 17 L.J. C.P. 2; 3 C.B. 437; *Dormay* v. *Borradaile*, 16 L.J. C.P. 337; 5 C.B. 380; *Moore* v. *Woolsey*, 24 L.J. Q.B. 40; 4 E. & B. 243; *Dufour* v. *Profess. Life Assur. Co.*, 27 L.J. Ch. 817; 25 Beav. 599.

(*d*) *White* v. *British Empire Mutual Life Assur. Co.*, L.R. 7 Eq. 394; 38 L.J. Ch. 53.

(*e*) *Howard's case*, 2 Salk. 625.

(*f*) *Pugh* v. *Leeds* (*Duke*), Cowp. 714.

(*g*) *Stoneham* v. *Ocean Ins. Co.*, 19 Q.B.D. 237.

(*h*) *Pritchard* v. *Merch. Life Assur. Co.*, 3 C.B. N.S. 642; 27 L.J. C.P. 169.

(*i*) *Simpson* v. *Accid. Death Ins. Co.*, 2 C.B. N.S. 295; 26 L.J. C.P. 289; *Want* v. *Blunt*, 12 East, 183; *Tarleton* v. *Staniforth*, 5 T.R. 695.

effected shall happen to die after the premium has become due, but before payment, the insurance shall nevertheless be valid, provided the premium is paid within the days of grace (*k*). The debiting by the insurer of the agent of the insured with the premium is not a payment to the insurer by the insured (*l*). A claim under a winding-up in respect of a policy of life insurance is not affected by non-payment of the premium where the days of grace have not expired until after the commencement of the winding-up (*m*).

Non-inception of risk—Return of premium.—When the policy is rendered null and void by reason of a misstatement made by the insured by mistake, and without fraud, and the risk has never attached, the premium is, in the case of marine insurance (see *ante*, p. 1082), recoverable; but if the policy is avoided by reason of the fraud or deceit of the insured or his agent, the premiums cannot then be recovered back (*n*). The policies of most insurance companies now provide, not only that the contract shall be void if there is any false statement or misrepresentation on the part of the insured of any material circumstance, but that all the premiums that may have been paid upon the policy shall be forfeited to the insurer, so that the policy may be avoided, and the premiums forfeited, by an innocent and unintentional misstatement (*o*). But Lord St. Leonards drew a distinction between that portion of the proviso which is framed as a protection to the insurer by making his liability for the payment of the amount insured dependent upon a true and accurate statement of every material circumstance, and the penal part of the proviso working a forfeiture of the premiums, and intimated that such a construction should be adopted as will afford a fair security to the insurer from misrepresentation and misstatement, on the one hand, and a just protection to the insured against the forfeiture, on the other, where there has been no wilful misstatement, or misconduct, on his part (*p*).

Waiver of forfeiture.—If, after the policy has been forfeited by non-observance of a condition annexed to it, the insurers or their agent continue to receive the premiums with full knowledge of the breach of the condition, they will be deemed to have waived the forfeiture, and will not afterwards be permitted to avoid the policy (*q*).

(*k*) *Prince of Wales Life Assur. Co.* v. *Harding*, 27 L.J. Q.B. 301; E. B. & E. 183.

(*l*) *Acey* v. *Fernie*, 7 M. & W. 151; 10 L.J. Ex. 9; *London & Lanc. Life Assur. Co.* v. *Fleming*, (1897) A.C. 499; 66 L.J. P.C. 116.

(*m*) *Albert Assur. Co., In re, Cook's Policy*, L.R. 9 Eq. 703; 39 L.J. Ch. 257.

(*n*) *Duffell* v. *Wilson*, 1 Campb. 401.

(*o*) *Duckett* v. *Williams*, 2 Cr. & M. 348; 3 L.J. Ex. 141.

(*p*) *Anderson* v. *Fitzgerald*, 4 H.L.C. 484; *Jones* v. *Provinc. Ins. Co.*, 3 C.B. N.S. 65; 26 L.J. C.P. 272; *Cazenove* v. *Brit. Eq. Assur. Co.*, 29 L.J. C.P. 160.

(*q*) *Wing* v. *Harvey*, 23 L.J. Ch. 511;

Assignment of life policies.—Policies of life insurance, being *choses in action*, could not formerly be assigned, so as to give the assignee a right to maintain an action upon them in his own name. But the assignment vested the equitable interest in the contract in the assignee, and entitled the latter to sue upon the policy, in the name of the party who was clothed with the legal interest, and who had the right of action thereon at common law (*r*).

Now, however, by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), any person or corporation now being or hereafter becoming entitled, by assignment, or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and give an effectual discharge for the moneys thereby assured, may sue at law in the name of such person or corporation to recover such moneys. By sect. 3, no assignment made after the passing of the Act is to confer on the assignee any right to sue, until a written notice of the date and purport of the assignment has been given to the assurance company at their principal place of business, which is to be specified in the policy (sect. 4); and the date on which the notice is received is to regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which the notice is received is to be as valid as if the Act had not been passed. By sect. 5, the assignment may be made either by indorsement on the policy or by a separate instrument in the form given in the Act. By sect. 6, every assurance company to whom notice of assignment shall have been given are, at the request in writing of the person giving the notice, and upon payment of a fee not exceeding five shillings, to deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and such acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal officer of the assurance company, will be conclusive evidence as against the company of their having duly received the notice to which the acknowledgment relates. By sect. 7, the expression "policy of life assurance" or "policy" is to mean an instrument by which the payment of moneys, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured; and the expression "assurance company" is to mean and include every corporation, association, society, or

5 De G. M. & G. 265; *Armstrong* v. *Turquand*, 9 Ir. Com. Law R. 32.

(*r*) *Ashley* v. *Ashley*, 3 Sim. 151. See now, as to assignment of a *chose in action*, Jud. Act, 1873, s. 25 (6), *ante*, p. 203. As to assignment of policy issued by friendly society, see *Redman, In re*, (1901) 2 Ch. 471; 70 L.J. Ch. 669.

company carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object. By sect. 8, the Act is not to apply to any policy of assurance granted or to be granted, or to any contract for a payment on death entered into, in pursuance of the provisions of 16 & 17 Vict. c. 45, or 27 & 28 Vict. c. 43, or to any engagement for payment on death by any friendly society (*s*).

Notice of the assignment should be given to the insurance company, for the purpose of securing a right to sue in the name of the assignee (*t*). An assignment of a life policy to secure a debt, with proviso for redemption, is an assignment by way of mortgage, and requires an *ad valorem* stamp as such (*u*).

Where a policy is to be void in case of suicide, unless it has been legally assigned, any circumstances constituting a valid, equitable assignment of the policy will satisfy the proviso (*x*); but an assignment by operation of law, such as an assignment by force of the Bankruptcy Acts, is not within the proviso, and will not keep the policy on foot for the benefit of creditors (*y*).

Right of the party interested in the policy to recover the insurance money.—The liability upon a life policy is not affected by the question whether the party claiming the benefit of the policy has, or has not, been damnified by the happening of the contingency upon which the money becomes payable. Thus, if a creditor insures the life of his debtor to the extent of the debt, and after the death of the debtor the executors of the debtor pay the debt to the creditor, the latter may nevertheless recover upon the policy the amount insured by him upon the life of such debtor (*z*).

Appropriation of funds of life insurance companies.—By sect. 4 of 33 & 34 Vict. c. 61, "in the case of a company established after the passing of this Act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund, to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance,

(*s*) These two statutes are partially repealed by 45 & 46 Vict. c. 51.

(*t*) *Ante*, p. 206; *Williams* v. *Thorp*, 2 Sim. 257; *Colvill*, *Ex parte*, 1 Mont. 110; 9 L.J. (O.S.) Ch. 56; *Tennyson*, *Ex parte*, 1 Mont. & Bl. 67; *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8; 31 L.J. Ch. 633; *Webb*, *In re*, 36 L.J. Ch. 341.

(*u*) *Caldwell* v. *Dawson*, 5 Exch. 6.

(*x*) *Jones* v. *Consol. Ins. Co.*, 28 L.J. Ch. 66; 26 Beav. 256; *White* v. *British Assur. Co.*, L.R. 7 Eq. 394; 38 L.J. Ch. 53; *ante*, p. 1099.

(*y*) *Jackson* v. *Forster*, 1 E. & E. 463; 29 L.J. Q.B. 8; *Moore* v. *Woolsey*, 4 E. & B. 243; 24 L.J. Q.B. 40.

(*z*) *Dalby* v. *Ind. & Lond. Life Ins. Co.*, 15 C. B. 390; 24 L.J. C.P. 8; *Law* v. *Lond. Indisp. Assur. Co.*, 24 L.J. Ch. 196; 1 Kay & J. 223; *ante*, p. 1095.

and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance (*a*); and, in respect to all existing companies, the exemption of the life assurance fund from liability for other obligations than to its life-policy holders shall have reference only to the contracts entered into after the passing of this Act, unless by the constitution of the company such exemption already exists; provided always, that this section shall not apply to any contracts made by any existing company by the terms of whose deed of settlement the whole of the profits of all the business are paid exclusively to the life policy-holders, and on the face of which contracts the liability of the assured distinctly appears."

Winding-up of insurance companies.—By sect. 21, "the court may order the winding-up of any company in accordance with the Companies Act, 1862, on the application of one or more policy-holders or shareholders, upon its being proved to the satisfaction of the court that the company is insolvent" (*b*); and by sect. 22, "the court, in the case of a company which has been proved to be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the court thinks just, in place of making a winding-up order" (*c*).

Under the articles of association of an insurance company it was held that the policy-holders, who participated in the profits to some degree, were members, and liable to be put on the list of contributories upon the winding-up of the company (*d*), but that they were not to be called on to contribute until the shareholders were exhausted (*e*). The court has jurisdiction to wind up an unregistered mutual insurance society; but it seems that the holders of policies in such a society are not liable to contribute to the payment of debts, and the funds of the society are distributable among them in proportion to their claims (*f*).

Novations by policy-holders.—By the 35 & 36 Vict. c. 41, s. 7, it is provided that "where a company, either before or after the passing of this Act, has transferred its business to or been amal-

(*a*) By 35 & 36 Vict. c. 41, s. 2, the foregoing part of the section is to apply to every company established before the passing of the 33 & 34 Vict. c. 61; but neither this nor that Act is to diminish the liability of the life assurance fund for any contracts entered into before the passing of 33 & 34 Vict. c. 61.

(*b*) And see 35 & 36 Vict. c. 41, s. 4, as to the winding-up of a subsidiary company. The mode of valuing the policies in the case of a winding-up is provided for by sect. 5 of the same Act.

(*c*) See *Gt. Britain Assur. Soc., In re*, 20 Ch. D. 351; 51 L.J. Ch. 506.

(*d*) *Winstone's case*, 12 Ch.D. 239; 48 L.J. Ch. 607; but not a policy holder who has assigned his policy: *Brown's case*, 18 Ch.D. 639; 50 L.J. Ch. 714. As to the liability of the assignee, see *Sanders' case*, 20 Ch.D. 403; 51 L.J. Ch. 579.

(*e*) *Albion Life Assur. Soc., In re*, 16 Ch.D. 83.

(*f*) *Great Britain Assur. Soc., In re*, 16 Ch.D. 246; 51 L.J. Ch. 7, 506.

gamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy shall by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized."

Insurance against injury by accident.—Where an insurance company granted policies of insurance against loss of life and personal injuries arising from "accidents at sea," it was held that death by sunstroke was not an "accident" within the meaning of the policy, and that death engendered by exposure to heat, cold, damp, and atmospheric influences, could not properly be said to be accidental (*g*); but death by drowning is a case of death by "accident" within the meaning of such a policy (*h*). And where a person, insured against death from the effects of injury caused by accident, fell and dislocated his shoulder, and died shortly afterwards from pneumonia, caused by cold but accelerated by the accident, it was held that the death was caused by accident within the terms of the policy (*i*). A shock to the nerves from fright has been held to be an accident (*k*). Where a policy for insuring the payment of money in case the insured should be injured by accidental violence, and die from the direct effect of such accidental injury, expressly excepts death or disability from any disease or cause arising within the system of the insured before, or at the time of, or following such accidental injury, death from disease within the system, which disease has been caused by accidental violence, is not within the exception (*l*). In consequence of the above case, the clause contained in the policies of the company was varied, and the policy does not now insure against "death from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before, or at the time of, or following such accidental injury (whether causing such death directly or jointly with such accidental injury)." Where erysipelas supervened upon, and in consequence of, an accidental cut, and the

(*g*) *Sinclair* v. *Maritime Passengers Assur. Co.*, 30 L.J. Q.B. 77; 3 E. & E. 478.

(*h*) *Trew* v. *Rail. Pass. Assur. Co.*, 6 H. & N. 839; 30 L.J. Ex. 317; *Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42; 50 L.J. Q.B. 292; *Lawrence* v. *Accident Ins. Co.*, 7 Q.B.D. 216; 50 L.J. Q.B. 522.

(*i*) *Isitt* v. *Rail. Pass. Assur. Co.*, 22 Q.B.D. 504; 58 L.J. Q.B. 191.

(*k*) *Pugh* v. *L. B. & S. C. Ry.*, (1896) 2 Q.B. 248; 65 L.J. Q.B. 521.

(*l*) *Fitton* v. *Accidental Death Ins. Co.*, 17 C.B. N.S. 122; 34 L.J. C.P. 29.

assured died of the erysipelas seven days after the accident, it was held that the insurers were protected by the above condition, and were not liable (*m*). Where a policy of insurance against accidental death or injury excepted accidents incurred through exposure to obvious risk, and the insured in broad daylight was killed in crossing a railway in front of an approaching train, it was held that this came within the exception (*n*). Where a tramcar company insured against claims in respect of accidents to the amount of 250*l.* in respect of any one accident, it was held that the word "accident" meant an injury for which a person claimed compensation, and was not limited to one accident out of which many such injuries arose (*o*). Where the accident policy was renewable each year, it was held that an entirely new contract arose for each year, and that the amount payable under it in one year was not affected by an assignment of the policy in a previous year (*p*).

Railway accidents—Damages.—Where a passenger by railway effected an insurance for 1,000*l.* with a company, to be paid to his personal representatives in the event of his death by a railway accident, and a proportionate part of the 1,000*l.* to be paid to the insured himself in case of any personal injury by reason of such accident, it was held that the damages recoverable in respect of personal injury to the insured, not attended with loss of life, were confined to compensation for bodily pain and suffering and the expenses of medical and surgical attendance, &c., and that loss of time or loss of profits resulting from the accident could not be taken into consideration by the jury; "otherwise one passenger, whose time is more valuable than another's, would, for precisely the same personal injury, receive a larger remuneration than another whose time would be of less value" (*q*).

Breach of covenants to insure.—Where a covenant was entered into with an insurance company to keep up a policy in their office as security for money lent by them, and the policy was dropped, and the company recovered judgment for the amount of the loan, with interest thereon, it was held that the measure of damages was not the amount of the premiums which would have been payable to the company if the policy had been kept up, but the amount of injury sustained, either through loss of the security, or through the expenses incurred in effecting another insurance (*r*). Where a

(*m*) *Smith* v. *Accident Ins. Co.*, L.R. 5 Ex. 302; 39 L.J. Ex. 211.

(*n*) *Cornish* v. *Accident Ins. Co.*, 23 Q.B.D. 453; 58 L.J. Q.B. 591.

(*o*) *South Staffordshire Tram. Co.* v. *Accident Assur. Assoc.*, (1891) 1 Q.B. 402; 60 L.J. Q.B. 260. As to "injury caused by external means," see *Hamlyn* v. *Crown Accidental Ins. Co.*, (1893) 1 Q.B. 750; 62 L.J. Q.B. 409.

(*p*) *Stokell* v. *Heywood*, (1897) 1 Ch. 459; 65 L.J. Ch. 721.

(*q*) *Theobald* v. *Railw. Pass. Assur. Co.*, 23 L.J. Ex. 249; 10 Exch. 45.

(*r*) *National Assur. Co.* v. *Best*, 27 L.J. Ex. 19; 2 H. & N. 605; *Brown* v. *Price*, 4 C.B. N.S. 598; 27 L.J. C.P. 290.

deed by which a debtor assigned a policy of insurance on his life for 1,000*l.* to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited, and the policy was subject to a condition that, if the insured should go beyond the limits of Europe without licence from the directors, the policy should be void, and the debtor went beyond the limits of Europe without licence from the directors, it was held that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the debtor had covenanted to pay, and would have to pay, the premiums on the policy (*s*).

SECTION V.

INSURANCE AGAINST BURGLARY.

Burglary.—Goods in a shop were insured against "theft following upon actual forcible and violent entry upon the premises;" early in the morning, during the temporary absence of the shopman, a thief gained access to the shop by turning the door-handle and walking in, and stole the goods; it was held that under the special circumstances of the case the loss was covered by the policy (*t*).

(*s*) *Hawkins* v. *Coulthurst*, 5 B. & S. 343; 33 L.J. Q.B. 192.

(*t*) *George* v. *Goldsmiths', &c. Ins. Assoc.*, (1898) 2 Q.B. 136; 67 L.J. Q.B. 807. As to waiver of payment of premium, see *Roberts* v. *Security Co.*, (1897) 1 Q.B. 111; 66 L.J. Q.B. 119.

CHAPTER VI.

MERCANTILE INSTRUMENTS.

BILLS, NOTES, AND CHEQUES.

Negotiable instruments.—When an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt, and though the transferor had no title to it (*a*). But if either of the above requisites is wanting, that is, if it is either not accustomably transferable, or, though it be accustomably transferable, yet if its nature is such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property in it to a vendee, however *bonâ fide*, if the transferor himself has not a good title to it, and the transfer is made out of market overt (*b*). Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word.

Bills of exchange—Definition.—It should be borne in mind that the Bills of Exchange Act, 1882 (*c*), is, generally speaking, declaratory of the law, and may be regarded as a consolidation and re-enactment of it (*d*).

By the Bills of Exchange Act, 1882 (*c*), sect. 3, "(1.) A bill of

(*a*) *London Jt. Stk. Bk.* v. *Simmons*, (1892) A.C. 201; 61 L.J. Ch. 723; *Thomson* v. *Clydesdale Bk.*, (1893) A.C. 282; 62 L.J. P.C. 91.

(*b*) *Miller* v. *Race*, 1 Smith, L.C. 447 (ed. 10).

(*c*) 45 & 46 Vict. c. 61.

(*d*) *M'Lean* v. *Clydesdale Banking Co.*, 9 App.Cas. 105; *Boyse, In re*, 33 Ch.D. 612; 56 L.J. Ch. 135.

(*e*) The following are the principal saving clauses to the Act:—

By sect. 96, "The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

"Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest."

By sect. 97, "(1) The rules in bankruptcy relating to bills of exchange,

exchange is an unconditional order in writing (*f*), addressed by one person to another, signed (*g*) by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person (*h*), or to bearer (*i*).

"(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

"(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill (*k*), is unconditional.

"(4.) A bill is not invalid by reason—(a) That it is not dated; (b) that it does not specify the value given, or that any value has been given therefor; (c) that it does not specify the place where it is drawn or the place where it is payable" (*l*).

promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

"(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

"(3) Nothing in this Act or in any repeal effected thereby shall affect—

"(a) The provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue:

"(b) The provisions of the Companies Act, 1862, or Acts amending it or any Act relating to joint stock banks or companies:

"(c) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:

"(d) The validity of any usage relating to dividend warrants, or the indorsements thereof."

(*f*) "Writing" includes print: sect. 2.

(*g*) Sect. 91. "(1) Where by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority. (2) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal. But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal." This section effects an alteration in the law.

(*h*) *Chamberlain* v. *Young*, (1893) 2 Q.B. 206; 63 L.J. Q.B. 28.

(*i*) "Bearer" means the person in possession of a bill or note which is payable to bearer. See sect. 2.

(*k*) "Bill" means "Bill of Exchange" by sect. 2. By sect. 4, (1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

"For the purposes of this Act 'British Islands' mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of her Majesty.

"(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill."

The definition of a bill of exchange in sect. 3 embraces a cheque: see *M'Lean* v. *Clydesdale*, *ante*, p. 1107.

(*l*) By sect. 53, "(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

"(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for

By sect. 13 (2), *post*, p. 1110, "A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday."

A bill of exchange containing the words "which sum is on account of the dividends and interest due on the capital and deeds registered in the books of the bank in the names of C. and B. which you will please charge to my account and credit according to a registered letter I have addressed to you" was held to be negotiable, the registered letter containing nothing further of importance (*m*).

By the Bills of Exchange Act, 1882, sect. 5, "(1.) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee. (2.) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person (*n*) or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note."

By sect. 6, "(1.) The drawee must be named or otherwise indicated in a bill with reasonable certainty. (2.) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange."

By sect. 7, "(1.) Where a bill is not payable to bearer (*o*), the payee must be named or otherwise indicated therein with reasonable certainty (*p*). (2.) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being. (3.) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer" (*q*).

V., a foreign correspondent of the plaintiff, was in the habit of drawing upon him to the order of C. P. & Co.; a clerk in the plaintiff's service forged V.'s signature, and also letters of advice with respect to the bills in question, and thus procured the genuine acceptance of the plaintiff; the clerk next forged indorsements of C. P. & Co., and presented the bills to the defendants, the Bank of England, who paid them, the plaintiff having advised them in the ordinary course that the bills were coming forward for payment; it was held by the House of Lords that C. P. & Co. were "fictitious

which it is drawn in favour of the holder, from the time when the bill is presented to the drawee."

(*m*) *Boyse, In re*, 33 Ch.D. 612; 56 L.J. Ch. 135.

(*n*) As to the meaning of fictitious person, see *Vagliano* v. *Bank of England*, (1891) A.C. 107; 61 L.J. Q.B. 145.

(*o*) "Bearer" means the person in possession of a bill or note which is payable to bearer. See sect. 1.

(*p*) *Chamberlain* v. *Young*, *ante*, p. 1108.

(*q*) Sub-sections (2) and (3) were not the law before the Act. See *Yates* v. *Nash*, 29 L.J. C.P. 306; 8 C.B. N.S. 581; *M'Call* v. *Taylor*, 34 L.J. C.P. 365; 19 C.B. N.S. 301.

or non-existing" payees within the meaning of sect. 7, sub-sect. (3), and that the Bank of England were liable (*r*). A cheque drawn to the order of a fictitious or non-existing person is to be treated as a cheque payable to bearer although the drawer believes and intends the cheque to be payable to the order of a real person (*s*).

Bills, when payable.—By sect. 10, "(1.) A bill is payable on demand—(a) Which is expressed to be payable on demand, or at sight, or on presentation; or (b) in which no time for payment is expressed. (2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand."

By sect. 11, "A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—(1.) At a fixed period after date or sight. (2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain. An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect."

Dating of bills.—By sect. 12, "Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance (*t*) of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly. Provided that (1) where the holder in good faith (*u*) and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date" (*x*).

By sect. 13, "(1.) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement (*y*), as the case may be. (2.) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday." A post-dated cheque bearing a penny stamp, though taken by a holder before its date, is a valid cheque and can be sued on by the holder after its date (*z*).

Sum payable.—By the Bills of Exchange Act, 1882, s. 9,

(*r*) *Vagliano* v. *Bank of England*, (1891) A.C. 107; 61 L.J. Q.B. 145. The Court also held that the plaintiff had been guilty of negligence.

(*s*) *Clutton* v. *Attenborough*, (1897) A.C. 90; 65 L.J. Q.B. 122.

(*t*) "Acceptance" means an acceptance completed by delivery or notification. See sect. 1.

(*u*) By sect. 90, "A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not."

(*x*) Sect. 12 effects an alteration in the law.

(*y*) "Indorsement" means an indorsement completed by delivery; sect. 1.

(*z*) *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q. B. 715; 64 L.J. Q.B. 99.

"(1.) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—(a) With interest; (b) by stated instalments; (c) by stated instalments, with a proviso that upon default in payment of any instalment the whole shall become due; (d) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill. (2.) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. (3.) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue (*a*) thereof."

Negotiability and transfer of bills.—By the Bills of Exchange Act, 1882, s. 8, "(1.) Where a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable (*b*). (2.) A negotiable bill may be payable either to order or to bearer. (3.) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank (*b*). (4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. (5.) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option."

If the acceptor of a bill of exchange desires to qualify his acceptance he must do so on the face of the bill, in clear and unequivocal terms and so that any person taking the bill could not if he acted reasonably fail to understand that it was accepted subject to an express qualification (*c*). Where a bill of exchange was drawn by L. Flipo payable "to order L. Flipo," and the drawees struck through the word "order," and accepted the bill "in favour of L. Flipo only, payable at the Alliance Bank," it was held that this striking out of the word "order" and putting in the words as above stated did not vary the effect of the bill, and that it was still a negotiable bill payable to order and accepted generally by the joint effect of sections 8 (*d*), 19 (*e*), and 36 (*f*). The defendant drew a cheque payable to the

(*a*) "Issue" means the first delivery of a bill or note complete in form to a person who takes it as a holder; sect. 2.

(*b*) This was not so before the Act.

(*c*) *Meyer* v. *Decroix* (1891) A.C. 520; 61 L.J. Q.B. 205.

(*d*) *Supra.*

(*e*) P. 1126.

(*f*) P. 1124. *Meyer* v. *Decroix, supra.*

order of M. and crossed it "account of M., National Bank;" M. endorsed it to the plaintiffs; it was held that the plaintiffs were entitled to recover on the cheque as it contained no words prohibiting transfer (*g*). It would seem doubtful whether a cheque made payable to order, can be made not transferable under sect. 8 (*h*); and whether a cheque, payable to order or bearer, can be made "not negotiable" except by crossing it in manner provided by sect. 76 (*i*).

By sect. 31, "(1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder (*k*) of the bill. (2.) A bill payable to bearer is negotiated by delivery. (3.) A bill payable to order is negotiated by the indorsement of the holder completed by delivery. (4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor (*l*). (5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability."

By sect. 32, "An indorsement (*m*), in order to operate as a negotiation, must comply with the following conditions, namely:—(1.) It must be written on the bill itself, and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient. An indorsement written on an allonge, or on a 'copy' of a bill issued or negotiated in a country where 'copies' are recognized, is deemed to be written on the bill itself. (2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill. (3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others. (4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature. (5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the

(*g*) *National Bank* v. *Silke*, (1891) 1 Q.B. 435; 60 L.J. Q.B. 199.

(*h*) Per Fry, L.J., *National Bank* v. *Silke*, *supra*.

(*i*) *Post*, p. 1155. See per Lindley, L.J., *National Bank* v. *Silke*, *supra*.

(*k*) "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof; sect. 2.

(*l*) *Good* v. *Walker*, 61 L.J. Q.B. 736.

(*m*) "Indorsement" means an indorsement completed by delivery; sect. 2.

contrary is proved. (6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive."

If the written order duly stamped is made payable to "bearer," it is transferable by mere delivery (*n*); so that any *bonâ fide* holder or bearer of the instrument is entitled to maintain an action upon it in his own name as soon as it becomes payable. If, on the other hand, it is drawn "payable to order," it can only be assigned by indorsement from the payee (*o*). The indorsement may be written either on the back or the face of the bill (*p*), and is sometimes an indorsement in full, so called, because the indorser not only writes his own name on the bill, but expresses therein in whose favour the indorsement is made, as "pay the contents to Mr. A. B.," and sometimes an indorsement in blank, when the name of the indorser himself alone appears upon the instrument, no mention being made of the indorsee. In the first case the indorsee can only transfer his interest in the bill by his own indorsement in writing; but, in the second, he can transfer it by delivery only, so that any subsequent *bonâ fide* holder may treat the first indorsement in blank as a direct indorsement to himself, and bring an action in his own name upon the instrument; and this he might formerly do notwithstanding subsequent indorsements in full had been made thereon (*q*); but this appears to have been altered, for by sect. 8 (3) (*r*) of the Bills of Exchange Act, 1882, a bill is payable to "bearer" which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. Any number of persons, too, whether partners or not, may, it seems, join in suing upon a bill indorsed in blank (*s*).

The bill may be indorsed before the day that it bears date (*t*) and before acceptance, and whilst the date and the amount for which it is drawn are left in blank (*u*); and the acceptance and indorsement may be made before the bill is drawn; and a bill drawn and issued in blank for the name of the payee may, under certain circumstances, be filled up by a *bonâ fide* holder with his own name, and will bind the drawer (*x*). So it has been held that where a bill is accepted in blank, and is afterwards filled in with the name of a drawer and indorser by a forgery, still the acceptor is liable to a *bonâ fide* holder for value without notice of any

(*n*) *Gibson* v. *Minet*, 1 H. Bl. 606. As to completion by delivery, see sect. 21, *post*, p. 1117.

(*o*) See Bills of Exchange Act, 1882, s. 31, *post*; *Edge* v. *Bumford*, 31 Beav. 247; 31 L.J. Ch. 805.

(*p*) *Young* v. *Glover*, 3 Jur. N.S. 637.

(*q*) *Fairclough* v. *Pavia*, 9 Exch. 695; 23 L.J. Ex. 215; *Wookey* v. *Pole*, 4 B. & Ald. 1, 9.

(*r*) *Ante*, p. 1111.

(*s*) *Attwood* v. *Rattenbury*, 6 Moore, 579; *Ord* v. *Portal*, 3 Campb. 239; *Lowe* v. *Copestake*, 3 C. & P. 300.

(*t*) *Pasmore* v. *North*, 13 East, 517.

(*u*) *Snaith* v. *Mingay*, 1 M. & S. 87.

(*x*) *Schultz* v. *Astley*, 2 Bing. N.C. 544; 5 L.J. C.P. 130; *Cruchley* v. *Clarance*, 2 M. & S. 90; *Crutchley* v. *Mann*, 5 Taunt. 529.

irregularity (*y*). If the bill be made payable by the fraud of the acceptor to a fictitious payee, a *bonâ fide* holder may recover upon the instrument as a bill payable to bearer (*z*). If the indorsement is made before the bill has been filled up for any specific sum, the indorser may become liable to subsequent indorsees or holders to any amount warranted by the stamp. The indorsement is a letter of credit for an indefinite sum (*a*). If the payee of a bill or money order, not negotiable, indorses it, he is liable on his indorsement to his indorsee (*b*). The indorsee may treat the indorser as the drawer of a new bill, or as the indorser of the old bill; but he cannot treat him as both (*c*).

Inchoate bills.—By the Bills of Exchange Act, 1882, s. 20, "(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit. (2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given" (*d*). The proviso seems to have no application as between the immediate parties to a note, as the note is not "negotiated" to them; nor, it seems, can the payee be a "holder in due course" (*e*).

A bill of exchange accepted for valuable consideration with the drawer's name left blank may be completed by the drawer's name being added after the death of the acceptor (*f*).

Negotiation of bill to party already liable thereon.—By the Bills of Exchange Act, 1882, s. 37, "Where a bill is negotiated back

(*y*) *London and S. W. Bank* v. *Wentworth*, 5 Ex.D. 96; 49 L.J. Ex. 657; and see *Hogarth* v. *Latham*, 3 Q.B.D. 643; 47 L.J. Q.B. 339, *post*, p. 1169; *contra*, where notice of irregularity.

(*z*) *Minet* v. *Gibson*, 3 T. R. 481; 1 H. Bl. 569; cited 1 Campb. 130. See now s. 7, *ante*, p. 1109.

(*a*) *Russell* v. *Langstaffe*, 2 Doug. 515, *a.*; *Hatch* v. *Searles*, 2 Sm. & Giff. 147; 24 L.J. Ch. 22. See sect. 20, *infra*.

(*b*) *Hill* v. *Lewis*, 1 Salk. 132.

(*c*) *Burmester* v. *Hogarth*, 11 M. & W. 101; 12 L.J. Ex. 178.

(*d*) See also sect. 36, *post*, p. 1124.

(*e*) *Heardman* v. *Wheeler*, (1902) 1 K.B. 361; 71 L.J. K.B. 270.

(*f*) *Carter* v. *White*, 25 Ch.D. 666; 54 L.J. Ch. 138.

to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable" (*g*).

Payment in due course.—By the Bills of Exchange Act, 1882, s. 59, "(1.) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. 'Payment in due course' means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective. (2.) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but (a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill. (b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill. (3.) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged" (*h*).

Restrictive indorsements.—The negotiability of the bill may be limited and restrained by the express terms of the indorsement.

By the Bills of Exchange Act, 1882, s. 15, "The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit" (*i*).

By sect. 16, "The drawer of a bill, and any indorser, may insert therein an express stipulation—(1.) Negativing or limiting his own liability to the holder: (2.) Waiving as regards himself some or all of the holder's duties."

By sect. 33, "Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not" (*k*).

By sect. 34, "(1.) An indorsement in blank specifies no indorsee,

(*g*) As to negotiation of overdue bills, see *post*, p. 1124.

(*h*) See *Lazarus* v. *Cowie*, 3 Q.B. 465; 11 L.J. Q.B. 310; *Burbridge* v. *Manners*, 3 Campb. 193; *Attenborough* v. *Mackenzie*, 25 L.J. Ex. 244; *Morley* v. *Culverwell*, 7 M. & W. 182; 10 L.J. Ex. 35.

(*i*) This provision is new.

(*k*) This effects an alteration in the law.

and a bill so indorsed becomes payable to bearer. (2.) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable. (3.) The provisions of this Act relating to a payee (*l*) apply with the necessary modifications to an indorsee under a special indorsement. (4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person."

By sect. 35, "(1.) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'pay D. only,' or 'pay D. for the account of X.,' or 'pay D. or order for collection.' (2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill, and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so. (3.) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement."

If the indorsement is accompanied by a notification that "the within must be credited to A.," or a direction "to pay A. for my use," every indorsee and subsequent holder has notice of the direction, and holds the bill, or the money he receives upon it, as the trustee of the restraining party (*m*). But an indorsement, "Pay J. S., or order, value in account with H. C. D.," was held not restrictive (*n*).

It was formerly held that a bill indorsed in blank, which would therefore be payable to bearer, could not have its negotiability restrained by subsequent restrictive indorsements (*o*); but by sect. 8 (3) of the Bills of Exchange Act, 1882, a bill on which the only or *last* indorsement is an indorsement in blank is a bill payable to bearer, so that if a bill had two indorsements on it, the first being in blank, but the second to a named indorsee, it would not be payable to bearer.

By sect. 32 (2) a partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the

(*l*) See sect. 7, *ante*, p. 1109.

(*m*) *Lloyd* v. *Sigourney*, 5 Bing. 525; 3 M. & P. 239; *Sigourney* v. *Lloyd*, 8 B. & C. 622; 7 L.J. (O.S.) K.B. 73.

(*n*) *Buckley* v. *Jackson*, L.R. 3 Ex. 135.

(*o*) *Walker* v. *Macdonald*, 2 Exch. 527; 17 L.J. Ex. 377.

bill (*p*). And, if the bill be indorsed for part only of the amount, and the limitation do not appear upon the face of the indorsement, the indorsee may sue for the whole sum due upon the bill, and will be a trustee of the surplus for the indorser (*q*).

Completion of contract by delivery.—By the Bills of Exchange Act, 1882, s. 21, "(1.) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery (*r*) of the instrument in order to give effect thereto. Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

"(2.) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—(a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be: (b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill. But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

"(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

The first transfer, by indorsement, of a bill of exchange is not effected by the mere act of the payee's writing his name on the back of the bill. There must be, as against the acceptor, a handing of the bill over, and a delivery of it to the transferee or his agent, with intent to make the person to whom it is delivered the holder of the bill, and to pass the property in it to him; and, as between the indorser and the indorsee, there must be an additional element of an intent to stand in the ordinary relation of indorser, that is, to guarantee the payment if the acceptor makes default (*s*). There is no indorsement if the holder merely writes on the bill a direction to pay it to another person, and the other person gets possession of the bill without the holder's consent. Nor is there any indorsement, as between the indorser and his immediate indorsee, though the holder gives that person possession of the bill, if the delivery be merely for a collateral purpose, and without the intention to

(*p*) *Hawkins* v. *Cardy*, 1 Ld. Raym. 360.

(*q*) *Reid* v. *Furnival*, 1 Cr. & M. 538; 2 L.J. (O.S.) Ex. 199; *Newton, Ex parte*, 16 Ch.D. 330; 50 L.J. Ch. 484.

(*r*) "Delivery" means transfer of possession, actual or constructive, from one person to another. See sect. 2, and *Clutton* v. *Attenborough*, (1897) A.C. 90; 66 L.J. Q.B. 221.

(*s*) *Denton* v. *Peters*, L.R. 5 Q.B. 475.

make him the transferee of the property in the bill (*t*), or with the intention only of making him indorsee and owner of the bill on the performance of certain terms and conditions (*u*). Where a testator wrote his name on the back of a bill payable to his order, and kept the bill in his possession, and his executrix after his death delivered the instrument to the plaintiffs without indorsing it, it was held that the writing of his name by the deceased, and the delivery by the executrix, would not together constitute an indorsement of the note, and that the party to whom it was delivered had consequently no right to sue upon it (*x*). If the indorsement is intended to constitute a testamentary gift, it must be authenticated as such (*y*).

But if the party to whose order the bill is payable writes his name on the back of the bill, and hands it over to another, who delivers it to a third person for value, that is an indorsement from the holder to such third person, and constitutes the latter the absolute owner of the bill. Where the drawer of a bill wrote his name on the back of it, and delivered it to a party to get it discounted, and the latter pledged the bill with a pawnbroker, and appropriated the money he received on the deposit of the bill to his own use, it was held that there was a valid indorsement of the bill from the drawer to the pawnbroker (*z*). One who receives a bill of exchange (payable to order) unindorsed, acquires no better title under it than that which the person from whom he receives it had. Therefore, where A. had fraudulently obtained a bill from B. and handed it to C., in satisfaction of a *bonâ fide* debt, but without indorsing it, it was held that C. could not acquire a legal title to sue by obtaining A.'s indorsement after he had received notice of the fraud (*a*). But a transferee of an indorsed bill of exchange has all the rights of a holder for value, if it has been handed to him on account of a pre-existing debt, and is not affected by any infirmity of title in the transferor (*b*). When the drawer or party to whose order the bill is payable has written his name on the back of the bill, and handed the bill over in the ordinary course of transfer, it is afterwards transferable, as previously mentioned, from hand to hand, by mere delivery; and the consideration for each successive transfer cannot be inquired into, unless the bill has been stolen or obtained by misrepresentation or fraud. Any holder, therefore, who does not wish to sue in his

(*t*) *Lloyd* v. *Howard*, 15 Q.B. 997; 20 L.J. Q.B. 1; *Attenborough* v. *Clarke*, 27 L.J. Ex. 138.

(*u*) *Bell* v. *Ingestre* (*Lord*), 12 Q.B. 317; 19 L.J. Q.B. 71; *Castrique* v. *Buttigieg*, 10 Moore, P. C. 109.

(*x*) *Bromage* v. *Lloyd*, 1 Exch. 32; 16 L.J. Ex. 257.

(*y*) *Mitchell* v. *Smith*, 33 L.J. Ch. 596.

(*z*) *Barber* v. *Richards*, 6 Exch. 63; 20 L.J. Ex. 135.

(*a*) *Whistler* v. *Forster*, 14 C.B. N.S. 248; 32 L.J. Ch. 161. See sect. 31 (4) of the Act, *ante*, p. 1112.

(*b*) *Belshaw* v. *Bush*, 11 C.B. 191; 24 L.J. C.P. 81; *Misa* v. *Currie*, 1 App.Cas. 554; 45 L.J. Ex. 852. See sect. 27 of the Act, *post*, p. 1121.

own name on the bill may hand the bill over to another party, in order that the latter may sue upon it for him as his trustee (*c*). But the bill must be handed over prior to the commencement of the action; for, where the holder of a bill indorsed in blank, being unwilling to sue upon it himself, procured the plaintiff, who had no interest in the bill, to sue upon it, and handed the bill to the plaintiff after the commencement of the action, that the latter might produce it in court, it was held that the plaintiff was not entitled to recover upon it, as he was not the holder of the bill at the time he brought his action (*d*). If, however, the bill has been indorsed and delivered to some person professing to act as the plaintiff's agent, although without his knowledge, and the plaintiff adopts the acts of the assumed agent, that is sufficient to entitle him to recover, although the action has been commenced in the plaintiff's name without his knowledge, and before the adoption (*e*).

Holder in due course.—By the Bills of Exchange Act, 1882, s. 29 (*f*), "(1.) A holder in due course is a holder (*g*) who has taken a bill, complete and regular on the face of it, under the following conditions; namely, (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact: (b) That he took the bill in good faith (*h*) and for value (*i*), and that at the time the bill was negotiated to him (*k*) he had no notice of any defect in the title of the person who negotiated it.

"(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

"(3.) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder" (*l*).

(*c*) *Oulds* v. *Harrison*, 10 Exch. 579; 24 L.J. Ex. 69; *Law* v. *Parnell*, 7 C.B. N.S. 282; 29 L.J. C.P. 17.

(*d*) *Emmett* v. *Tottenham*, 8 Exch. 884; 22 L.J. Ex. 281. By sect. 2 of the Act, the word "holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

(*e*) *Ancona* v. *Marks*, 7 H. & N. 686; 31 L.J. Ex. 163.

(*f*) See this section in Addison on Torts, 539 (ed. 7).

(*g*) For definition of "holder," see sect. 2.

(*h*) See *ante*, note (*u*), p. 1110.

(*i*) See *post*, s. 27, p. 1121.

(*k*) *Lewis* v. *Clay*, 67 L.J. Q.B. 224.

(*l*) By sect. 30, every signing party is presumed to have given value, and every holder a holder in due course until the contrary is shown, when the burden of proof is shifted, unless the holder

Intermediate infirmities of title.—A *bonâ fide* holder for value is not affected by an intermediate fraud or infirmity of title of which he had no knowledge or notice at the time he advanced his money on the credit and security of the bill of which he is the holder. Therefore, if a bill of exchange, indorsed generally, and handed over by a person competent to indorse it, is afterwards stolen, and the thief delivers it for value to a party who receives it without notice of the theft, the latter has full authority to negotiate the bill or sue upon it (*m*). Every person having possession of a bill of exchange has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer such bill, but with this limitation, that to make such transfer valid there must be a delivery, either by him or some subsequent holder of the bill, to some one who receives such bill *bonâ fide* and for value, and who is either himself the holder of it or a person through whom the holder claims (*n*).

Rights of holder.—By the Bills of Exchange Act, 1882, s. 38 (*o*), "The rights and powers of the holder of a bill are as follows:—(1.) He may sue on the bill in his own name: (2.) Where he is a holder in due course (*p*), he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill: (3.) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill."

When holder bound to prove he gave value for bill.—When a bill of exchange is made payable to order, and is indorsed generally by the drawer, the indorsement is, as we have seen, tantamount to an order to pay the bill to the bearer or holder, so that the mere production of such a bill by a party in possession of it is *primâ facie* evidence that he is a *bonâ fide* indorsee and holder of the bill; but this presumption of ownership and title arising from possession may be rebutted by proof that the bill had been lost by, or improperly obtained from, the owner (*q*), or that the acceptance is a forgery (*r*); and such evidence, if given, throws upon the holder the *onus* of proving that he gave value for the bill.

proves that subsequently to the alleged defect value has in good faith been given for the bill.

(*m*) *Peacock* v. *Rhodes*, 2 Doug. 634; *Raphael* v. *Bank of England*, 17 C.B. 173; 25 L.J. C.P. 33.

(*n*) Alderson, B., *Marston* v. *Allen*, 8 M. & W. 494; 11 L.J. Ex. 126; *Watson* v. *Russell*, 3 B. & S. 34; 31 L.J. Q.B. 304. See sect. 29 of the Act, *ante*, p. 1119.

(*o*) See this sect. in Addison on Torts, 540 (ed. 7).

(*p*) This section must be read in connection with sect. 29, *ante*, p. 1119.

(*q*) *Bulkeley* v. *Butler*, 2 B. & C. 446.

(*r*) *Mather* v. *Maidstone* (*Ld.*), 26 L.J. C.P. 58; 1 C.B. N.S. 273.

By the Bills of Exchange Act, 1882, s. 30 (*s*), "(1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value. (2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill" (*t*).

Negotiable securities were stolen from the defendants; the plaintiffs, without notice of the fraud, gave value for them; the thief subsequently got the securities from the plaintiffs, and gave them back to the defendants without their knowledge; it was held to be presumable that the defendants accepted the securities in discharge of the thief's obligation to return them, and were therefore *bonâ fide* holders for value (*u*). The words "if it is admitted or proved" in sub-s. 2 mean no more than that some evidence of circumstances in the nature of fraud must be given sufficient to be left to the jury, the onus then lies upon the plaintiff not only to prove that he gave value, but also that he had no notice of the fraud; that is to say, that he acted in good faith, which by sect. 90 (*x*) is interpreted to mean that the thing done was in fact done honestly, whether negligently or not (*y*).

Wherever the bill is proved to have been illegal or fraudulent in its inception, or where the immediate indorser to the plaintiff is shown to have obtained possession of it by fraud, the plaintiff may be called upon for proof that he gave value for the bill, and took it without notice of the illegality or fraud; and, if such proof is not forthcoming, the plaintiff may be prevented from recovering upon the instrument (*z*). Where one partner has accepted a bill in fraud of the other partners, and has applied the proceeds therefrom to his own use, the holder must show that he gave value for the bill (*a*). But, if it is not distinctly proved that the note is tainted with illegality or fraud, the holder cannot be called upon to show that he gave value for the bill (*b*).

What is valuable consideration.—By the Bills of Exchange Act, 1882, sect. 27, "(1.) Valuable consideration for a bill may be con-

(*s*) See this section in Addison on Torts, 540 (ed. 7).

(*t*) As to forgery of signature, see sect. 24, *infra*, p. 1123.

(*u*) *London & County Bank* v. *London & River Plate Bank*, 21 Q.B.D. 535; 57 L.J. Q.B. 601.

(*x*) See *ante*, p. 1110.

(*y*) *Tatham* v. *Haslar*, 23 Q.B.D. 345; 58 L.J. Q.B. 432.

(*z*) *Hall* v. *Featherstone*, 3 H. & N. 284; 27 L.J. Ex. 308; *Mather* v. *Maidstone* (*Ld.*), 1 C.B. N.S. 273; 26 L.J. C.P. 58; *Smith* v. *Braine*, 16 Q.B. 244; 20 L.J. Q.B. 201; *Berry* v. *Alderman*, 14 C.B. 95; 23 L.J. C.P. 34; *Harvey* v. *Towers*, 6 Exch. 656; 20 L.J. Ex. 318; *Paterson* v. *Hardacre*, 4 Taunt. 114.

(*a*) *Hogg* v. *Skeen*, 18 C.B. N.S. 426; 34 L.J. C.P. 153.

(*b*) *Fitch* v. *Jones*, 5 E. & B. 245; 24 L.J. Q.B. 293.

stituted by,—(a) Any consideration sufficient to support a simple contract (*c*); (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

"(2.) Where value (*d*) has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

"(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien."

Proof of want of consideration.—A bill or note, given in consideration of what is supposed to be a debt, is without consideration, if it appears that there was either a mistake in law (*e*) or in fact (*f*) as to the existence of the debt, and there has been no indorsement or transfer of the instrument for value. But, where there is no mistake either in law or in fact, but a claim has been made by the plaintiff on the defendant, to which the defendant thinks he is not liable, but which claim the plaintiff is about to enforce by action, and the parties agree to a compromise, and the defendant gives his promissory note to the plaintiff for the payment of a certain sum, there is a good consideration for the note, and the instrument cannot afterwards be avoided on the ground that there was no valid claim against the defendant, and no cause of action against him at the time of the compromise (*g*).

Fraudulent transfers and indorsements.—If the acceptance or indorsement has been fraudulently made, and the plaintiff is a party to the fraud, or takes the bill with full knowledge of the fraud and of the infirmity of the title of his assignor, he cannot, as we have seen (*h*), sue upon the bill, although he has given full value for it; but an innocent indorsee, who has received the bill, and given value for it, without notice of the fraud, may, it seems, transfer his title and right of action to a person who has knowledge of the original fraud, but is no party thereto. The latter may purchase the title and interest of the innocent indorsee, and so obtain a right of action upon the instrument (*i*). If a person holds the bill for a specific purpose, as for the benefit of the drawer or acceptor, and indorses the bill over in breach of the trust reposed in him, the indorsee cannot, if he has notice

(*c*) *Richdale, Ex parte*, 19 Ch. D. 409; 51 L.J. Ch. 462; *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B. 715; 64 L.J. Q.B. 99.

(*d*) "Value" means "valuable consideration": sect. 2.

(*e*) *Smithall* v. *Rigg*, 11 C.B. 481; 20 L.J. C.P. 145.

(*f*) *Bell* v. *Gardiner*, 4 M. & Gr. 11; 11 L.J. C.P. 195.

(*g*) *Cook* v. *Wright*, 30 L.J. Q.B. 321; 1 B. & S. 559, *ante*, p. 11.

(*h*) Sects. 29, 30, *ante*, pp. 1119, 1121.

(*i*) *May* v. *Chapman*, 16 M. & W. 355, 360.

of the trust at the time of the indorsement, acquire any better right or title to the bill than the indorser had; for by taking the bill under such circumstances he makes himself a party to a fraud (*k*). If the holder is a mere agent, he will be affected with the infirmity of the title of his principal, and cannot have a better right upon the bill than his principal has (*l*). If a bill obtained by fraud is handed over, without indorsement, to an innocent holder for value, and the indorsement is not made until after the holder becomes cognizant of the fraud, he cannot sue upon the bill (*m*). If the party at the time of signing the bill is, without negligence on his part, misled as to the nature and contents of the document which he is signing, his signature will be of no force; for his mind does not go with the signature, and it is in the view of the law no signature at all, and a *bonâ fide* holder for value cannot recover against a person who has signed under such circumstances (*n*).

Forged indorsement.—By sect. 60, "When a bill payable to order on demand is drawn on a banker (*o*), and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority" (*p*); and by sect. 24, "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority; provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery."

Accommodation bills.—By the Bills of Exchange Act, 1882, sect. 28, "(1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving

(*k*) *Evans* v. *Kymer*, 1 B. & Ad. 528; 9 L.J. (O.S.) K.B. 92.

(*l*) *Solomons* v. *Bank of England*, 13 East, 136.

(*m*) *Whistler* v. *Forster*, 14 C.B. N.S. 248; 32 L.J. C.P. 161.

(*n*) *Foster* v. *Mackinnon*, L.R. 4 C.P. 704; 38 L.J. C.P. 310; *Lewis* v. *Clay*, 67 L.J. Q.B. 224.

(*o*) "Banker" includes a body of persons, whether incorporated or not, who carry on the business of banking: sect. 2.

(*p*) A banker's draft by one branch of a bank on another is not within this section: *Gordon* v. *London, City and Midland Bank*, (1902) 1 K.B. 243; 71 L.J. K.B. 215.

value therefor, and for the purpose of lending his name to some other person. (2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not" (*q*).

Where the bill has been accepted for the accommodation of the drawer without any consideration or value for the acceptance, and that was known to the indorsee at the time he took the bill, and the indorsee paid only part of the amount for which the bill was drawn, he can only recover the sum he actually paid for the bill (*r*). So, if part of the money due on the bill has been paid by the drawer, the holder can only recover the balance from the acceptor (*s*).

Indorsement of bills overdue.—By sect. 36, "(1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed (*t*) or (b) discharged by payment or otherwise. (2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had (*u*). (3.) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact (*x*). (4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue. (5.) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course" (*y*).

Whenever the bill is due at the time of the indorsement, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the infirmities with which it may be incumbered in his hands (*z*). But the indorsee does not take it subject to claims arising out of

(*q*) As to accommodation bills, see further, sect. 46, *post*, p. 1134, sect. 50 (d).

(*r*) *Wiffen* v. *Roberts*, 1 Esp. 259. See sect. 38 of the Act, p. 1120.

(*s*) *Cook* v. *Lister*, 13 C.B. N.S. 543; 32 L.J. C.P. 121.

(*t*) See sect. 35, *ante*, p. 1116.

(*u*) See *Alcock* v. *Smith*, (1892) 1 Ch. 238; 61 L.J. Ch. 161.

(*x*) Sub-sect. (3) effects an alteration in the law.

(*y*) See sect. 29, *ante*, p. 1119.

(*z*) *Crossley* v. *Ham*, 13 East, 503; *Burrough* v. *Moss*, 10 B. & C. 558; *Lloyd* v. *Howard*, 15 Q.B. 995; 20 L.J. Q.B. 1; *Holmes* v. *Kidd*, 3 H. & N. 891; 28 L.J. Ex. 112; *Goggerley* v. *Cuthbert*, 2 B. & P. N.R. 170.

collateral matters, such as the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties (*a*). An original absence of consideration, the acceptance being an accommodation acceptance, will not defeat the claim of an indorsee for value of an overdue bill, unless there was an express or implied agreement restraining the negotiation of the bill after it should become due (*b*). It was held in one case that even if there was an agreement that the bill should not be negotiated after it was due, this would not affect a *bonâ fide* indorsee for value, who took the overdue bill without notice of the agreement (*c*). If, pending an action on a bill of exchange, the bill is transferred to an indorsee, with notice, who brings a second action on the bill, that may be ground for the equitable interference of the court, but does not take away the negotiability of the instrument (*d*).

By the Bills of Exchange Act, 1882, sect. 10, "(2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand."

Presentment for acceptance.—By the Bills of Exchange Act, 1882, sect. 17, "(1.) The acceptance (*e*) of a bill is the signification by the drawee of his assent to the order of the drawer. (2.) An acceptance is invalid unless it complies with the following conditions, namely: (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money."

By sect. 18, "A bill may be accepted—(1.) Before it has been signed by the drawer, or while otherwise incomplete: (2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment: (3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance" (*f*).

A document which is a complete bill of exchange in all respects

(*a*) *Oulds* v. *Harrison*, 10 Exch. 579; 24 L.J. Ex. 69; *Overend, Gurney & Co., In re, Swan, Ex parte*, L.R. 6 Eq. 358.

(*b*) *Charles* v. *Marsden*, 1 Taunt. 224; *Sturtevant* v. *Ford*, 4 M. & Gr. 101; 11 L.J. C.P. 245; *Lazarus* v. *Cowie*, 3 Q.B. 459; 11 L.J. Q.B. 310; *Parr* v. *Jewell*, 16 C.B. 684.

(*c*) *Carruthers* v. *West*, 17 L.J. Q.B. 4; 11 Q.B. 143. But see *Parr* v. *Jewell*, 16 C.B. 684, and sects. 29 (2) and 36 of the Act, pp. 1119, 1124, *ante*.

(*d*) *Deuters* v. *Townsend*, 5 B. & S. 613; 33 L.J. Q.B. 301.

(*e*) "Acceptance" means an acceptance completed by delivery or notification: sect. 2.

(*f*) Sub-sect. (3) effects an alteration in the law.

except that of the signature of the drawer, is, when in the hands of the intended drawer, a bill of exchange (*g*).

By sect. 19, "(1.) An acceptance is either (a) general or (b) qualified. (2.) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. In particular an acceptance is qualified which is—(a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated: (b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn: (c) local, that is to say, an acceptance to pay only at a particular specified place: An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere: (d) qualified as to time: (e) the acceptance of some one or more of the drawees, but not of all."

By sect. 39, "(1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument. (2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee it must be presented for acceptance before it can be presented for payment. (3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill. (4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers" (*h*).

By sect. 40, "(1.) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time. (2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged. (3.) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usages of trade with respect to similar bills, and the facts of the particular case."

By sect. 41, "(1.) A bill is duly presented for acceptance which is presented in accordance with the following rules:—(a) The presentment must be made by or on behalf of the holder to the drawee

(*g*) *Reg.* v. *Bowerman*, (1891) 1 Q.B. 112; 60 L.J. M.C. 13.

(*h*) Sub-sect. (4) effects an alteration in the law.

or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue: (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only: (c) Where the drawee is dead presentment may be made to his personal representative: (d) Where the drawee is bankrupt, presentment may be made to him or to his trustee: (e) Where authorized by agreement or usage, a presentment through the post office is sufficient.

"(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—(a) Where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill: (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected: (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground (*i*).

"(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment."

By sect. 42, "(1.) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers."

By sect. 43, "(1.) A bill is dishonoured by non-acceptance—(a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or (b) when presentment for acceptance is excused and the bill is not accepted. (2.) Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary."

By sect. 44, "(1.) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

"(2.) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

"The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign

(*i*) Sub-sect. (2) effects an alteration in the law.

bill has been accepted as to part, it must be protested as to the balance (*k*).

"(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto."

The holder of an unaccepted bill should present it for acceptance without delay, in order that he may obtain the security of the acceptor. If acceptance is refused, the antecedent parties become liable immediately. Twenty-four hours at least ought to be allowed to the drawee to determine whether he will accept or not, if he requires time for consideration; but, if he avows his determination not to accept, the holder may forthwith proceed against the antecedent parties; and, if the acceptor clogs his acceptance with conditions and qualifications, the holder may treat his qualified acceptance as a refusal to accept, and give notice of dishonour (*l*). If he accepts the qualified acceptance, he must give notice of the nature of the acceptance to the prior parties (*m*). When the bill is payable a certain number of days after sight, it is to be accounted so many days after the bill shall be accepted or protested for non-acceptance (*n*). If no time at all is stated upon the face of the bill (*o*), or if it is payable at sight or on presentation, the instrument will be payable on demand (*p*).

The acceptance is usually made by the drawee's writing across the bill the word "accepted," and signing his name thereto. Formerly, if the drawee merely wrote his name upon the face of the bill, without the word "accepted," or if he wrote "accepted," "presented," or any direction to pay addressed to a third party, or merely put his mark upon the bill, or promised in writing to accept or pay the bill, this was evidence for a jury of an acceptance of the instrument by him (*q*); and so was a letter from his solicitor after action, admitting the signature to be in his handwriting (*r*). So it was held that if the name of the acceptor was written upon the bill by a third party, and the latter placed his mark against the name as adopting such signature, there was a sufficient acceptance of the instrument (*s*). If the drawee, after he has put his name to the bill, and before he has parted with the possession of it or notified

(*k*) Sub-sect. (2) effects an alteration in the law.

(*l*) See sects. 42 and 43, *ante*, p. 1127, "Dishonour."

(*m*) *Rowe* v. *Young*, 2 B. & B. 165, 240. See now sect. 44, *ante*, p. 1127, "Dishonour."

(*n*) *Campbell* v. *French*, 6 T. R. 212. See sect. 14, *post*, p. 1135.

(*o*) *Abbott* v. *Douglas*, 1 C.B. 491; 14 L.J. C.P. 202.

(*p*) Sect. 10, *ante*, p. 1110.

(*q*) *Powell* v. *Monnier*, 1 Atk. 612; Bull. N. P. 270; *Wynne* v. *Raikes*, 5 East, 514; *Grant* v. *Hunt*, 1 C.B. 59; 14 L.J. C.P. 106.

(*r*) *Chaplin* v. *Levy*, 9 Exch. 531; 23 L.J. Ex. 117.

(*s*) *George* v. *Surrey*, 1 M. & M. 516.

his acceptance, changes his mind, and runs his pen through the signature, the acceptance is cancelled, and he cannot be made liable upon the bill (*t*).

Liability of the acceptor—Failure of consideration.—By the Bills of Exchange Act, 1882, s. 54, "The acceptor of a bill, by accepting it—(1.) Engages that he will pay it according to the tenor of his acceptance: (2.) Is precluded from denying to a holder in due course: (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement."

As between the acceptor and the drawer of a bill, failure of consideration is an answer to an action for the amount of the bill, so that, if a person purchases a bill payable at the end of three months for goods or money to be delivered to the acceptor at the end of one month, and the goods or the money are not delivered, the acceptor is not liable upon the bill, unless it was indorsed before it became due to a *bonâ fide* holder for value (*u*). When the bill has been negotiated the acceptor, except in case of a qualified acceptance (*x*), is bound to pay the bill at maturity, and to find out the holder for that purpose. He is not entitled to any presentment or formal demand of payment; and a request in the shape of the issue of a writ is the only request that need be made to him by the indorsee, although the bill be made payable on demand (*y*). A person who has accepted a bill of exchange cannot escape from liability to a *bonâ fide* indorsee by setting up a forgery of the name of the drawer (*z*). "The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge, *pro tanto*, in his account with the drawer, and to one who should refuse or be unable to deliver up the bill, the acceptor is not bound," without an indemnity, "to pay the sum therein specified" (*a*).

An acceptance of a bill of exchange can only be made by the party to whom the bill is addressed, or for his honour. An acceptance by any other person is not an acceptance within the

(*t*) *Cox* v. *Troy*, 5 B. & Ald. 474. Sect. 21, *ante*, p. 1117.

(*u*) *Astley* v. *Johnson*, 5 H. & N. 137; 29 L.J. Ex. 161; *Puget de Bras* v. *Forbes*, 1 Esp. 117.

(*x*) Sect. 52 (2), *post*, p. 1134.

(*y*) *Rumball* v. *Ball*, 10 Mod. 38. Sect. 52 (1), *post*, p. 1134.

(*z*) *Mather* v. *Maidstone* (*Lord*), 18 C.B. 295; 25 L.J. C.P. 311. Sect. 54 (2) (a), *supra*.

(*a*) *Ramuz* v. *Crowe*, 1 Exch. 173; 16 L.J. Ex. 280. See s. 52 (4), *post*, p. 1134.

usage and custom of merchants. Thus, where one John Hart drew a bill payable to himself or order, and addressed it to himself "John Hart," and across the face of the instrument was written, "Accepted, H. J. Clarke," it was held that Clarke could not be sued as acceptor of a bill of exchange directed to him. Such a bill so accepted would appear to be a promissory note, made by the acceptor, to pay the sum mentioned therein to the drawer or his order (*b*). But, if the party to whom the bill is addressed writes his acceptance upon it in a name totally different from his own name, he will be liable upon the instrument, as he may accept it in any name he thinks fit to adopt (*c*). Persons may, as we have before seen, draw, accept, or indorse bills in assumed or adopted names, and render themselves responsible upon the instrument by so doing (*d*); but, if the name of a party appearing on the face of a bill as drawer or indorser has been placed there without his authority, he cannot, of course, be made responsible upon the instrument, but the indorsee or holder must proceed against his own immediate indorsee, or the party from whom he got the bill. If the name of a party is misspelled, oral evidence is admissible to show who was intended (*e*). The acceptor cannot set up, as a defence to an action by an indorsee, that the drawer and first indorser was an uncertificated bankrupt at the time the acceptance was given. If he accepts the bill of a bankrupt, he is responsible to every *bonâ fide* holder (*f*). The acceptor is liable to indemnify any indorser who may pay the bill (*g*).

Liability of drawer and indorser.—By the Bills of Exchange Act, 1882, s. 55, "(1.) The drawer of a bill by drawing it—(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken; (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. (2.) The indorser of a bill by indorsing it—(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (*h*); (b) is pre-

(*b*) *Davis* v. *Clarke*, 6 Q.B. 19; 13 L.J. Q.B. 305; *Fielder* v. *Marshall*, 30 L.J. C.P. 158; 9 C.B. N.S. 606.

(*c*) *Lindus* v. *Bradwell*, 5 C.B. 583; 17 L.J. C.P. 123. See s. 23 (1), *post*, p. 1165.

(*d*) *Jenkins* v. *Morris*, 16 M. & W. 881.

(*e*) *Willis* v. *Barrett*, 2 Stark. 29. Sect. 32 (4), *ante*, p. 1112.

(*f*) *Braithwaite* v. *Gardiner*, 8 Q.B. 473; 15 L.J. Q.B. 187; *Halifax* v. *Lyle*, 3 Exch. 453; 18 L.J. Ex. 197. Sect. 54 (2), *ante*, p. 1129.

(*g*) *Duncan, Fox & Co.* v. *North & South Wales Bank*, 6 App.Cas. 1; 50 L.J. Ch. 355. Sect. 57 (1), *post*, p. 1162.

(*h*) *Jenkins* v. *Comber*, (1898) 2 Q.B. 168; 67 L.J. Q.B. 780.

cluded from denying to a holder in due course (*i*) the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; (c) is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."

Every person who draws or indorses a bill of exchange impliedly enters into a conditional contract to pay the amount of the bill to the payee or his assignee, if the acceptor does not pay the amount, unless he indorsed as agent for the plaintiff for the accommodation of the latter, and without value (*k*). When a bill is dishonoured, it is generally thrown back upon the first indorser, each indorser taking back from his immediate indorser what he has paid on account of the bill, and at the same time delivering up the bill to him, and the latter again throwing it back on his immediate indorser, till it at last arrives at the first indorser. They may arrange the matter amongst themselves; and any one indorser may sue the acceptor or drawer instead of any one of the preceding indorsers, striking out all the names upon the bill below his own (*l*). But, as the liability of the drawer and indorsers is a secondary and conditional liability, accruing only in default of payment by the acceptor, there must be proof of a regular presentment of the bill to the latter after it became due, and non-payment of the amount, termed a dishonour of the bill, and notice of such presentment and dishonour to the drawer or indorser, before the absolute liability of the latter upon the instrument can attach. Where the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and was guilty of no negligence in so signing it, it was held that he was not liable to a *bonâ fide* holder for value (*m*). The indorser is in a position of secondary liability or *quasi* suretyship for the payment of a bill; and when the indorser has paid the bill he is entitled to any securities which may have been deposited by the acceptor with the holder (*n*).

Giving time for payment.—The parties whose names appear upon the face of the bill are liable as principals and sureties, in the order in which they stand; and the rule that a release or discharge,

(*i*) See sect. 29, *ante*, p. 1119.

(*k*) *Castrique* v. *Buttigieg*, 10 Moore, P.C. 169.

(*l*) *Walwyn* v. *St. Quintin*, 1 Bos. & P. 658.

(*m*) *Foster* v. *Mackinnon*, L.R. 4 C.P. 704; 38 L.J. C.P. 310; *Lewis* v. *Clay*, 67 L.J. Q.B. 224.

(*n*) *Duncan, Fox & Co.* v. *North & South Wales Bank*, 6 App.Cas. 1; 50 L.J. Ch. 355.

or time given for payment to the principal, operates as a release or discharge to the surety, is applicable to such instruments. By giving time, therefore, to the acceptor, the drawer and indorsers will be discharged (*o*). But a binding agreement with a person who is no party to the bill, to give time to the acceptor, without the consent of the drawer, does not discharge the drawer (*p*). As between the holder and the acceptor, the acceptor is the principal debtor, and the drawer and indorsers are his sureties; but, as between the holder and the drawer, the drawer is the principal debtor, and the indorsers are his sureties; and, as between the holder and second indorser, the second indorser is the principal, and the subsequent or third indorser is his surety. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties; but a discharge to the subsequent parties, the sureties, is not a discharge to the prior parties, the principals (*q*).

Presentment for payment.—By the Bills of Exchange Act, 1882, s. 45, "Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented, the drawer and indorsers shall be discharged.

"A bill is duly presented for payment which is presented in accordance with the following rules:—

"(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due.

"(2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable. In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

"(3.) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found.

"(4.) A bill is presented at the proper place:—(a) Where a

(*o*) *English* v. *Darley*, 2 Bos. & P. 61; *Moss* v. *Hall*, 5 Exch. 49; 19 L.J. Ex. 205; *Davies* v. *Stainbank*, 6 De G. M. & G. 679; *Greenough* v. *McClelland*, 2 E. & E. 429; 30 L.J. Q.B. 15; *Lawrence* v. *Walmsley*, 12 C.B. N.S. 799; 31 L.J. C.P. 143; *ante*, pp. 1014, 1015.

(*p*) *Frazer* v. *Jordan*, 8 E. & B. 308; 26 L.J. Q.B. 288.

(*q*) Byles, 325 (ed. 17); *ante*, pp. 1014, 1015.

place of payment is specified in the bill and the bill is there presented; (b) where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented; (c) where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known; (d) in any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

"(5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

"(6.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

"(7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

"(8.) When authorized by agreement or usage, a presentment through the post office is sufficient."

The holder is to present promptly, and to communicate without delay notice of non-payment or of the insolvency of the acceptor; for a party is not only entitled to knowledge of insolvency, but to notice that, in consequence of such insolvency, he will be called upon to pay the amount of the bill (*r*). If the acceptance is a conditional acceptance, the condition must be strictly accomplished; but the holder is not bound to present the bill the very day that it becomes due, unless the condition is express to that effect (*s*). If the acceptor accepts, payable at a banker's, he undertakes (*t*) to pay the bill at maturity, when presented for payment either to himself or at the banker's; if he accepts payable at a banker's, and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise (*u*). If the banker at whose bank the bill is payable is the holder of the bill at the time of its maturity, there is a sufficient presentment. If the bill is made payable at a particular town, and the holder goes there with the bill, and makes inquiry for the party to whom it is to be presented, and the latter is not to be found, this is a sufficient

(*r*) *Camidge* v. *Allenby*, 6 B. & C. 383; 5 L.J. (O.S.) K.B. 95.

(*s*) *Smith* v. *Vertue*, 30 L.J. C.P. 56; 9 C.B. N.S. 214. Sect. 52 (2), *post*, p. 1134.

(*t*) Sect. 19 (2), *ante*, p. 1126.

(*u*) *Halstead* v. *Skelton*, 5 Q.B. 93; 13 L.J. Q.B. 177.

presentment at the place indicated (*x*). If the bill is made payable at a particular house, presentment to an inmate may suffice (*y*); or, if the house be shut up, at the house door (*z*); and, if two places be named, the holder has the option to present it at either (*a*). "A presentment according to the directions of a forged acceptance cannot be a good presentment as against the drawer" (*b*). The mention of the names and address of the London agents in a memorandum at the foot of a country banker's cheque does not make the cheque payable at the place so indicated; and non-payment there on presentment is not necessarily a dishonour (*c*).

Non-presentment when excused.—By the Bills of Exchange Act, 1882, s. 46, "(1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

"(2.) Presentment for payment is dispensed with,—(a) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment (*d*); (b) where the drawee is a fictitious person (*e*); (c) as regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented; (d) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented; (e) by waiver of presentment, express or implied."

By sect. 52, "(1.) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable. (2.) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures. (3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour shall be given to him. (4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands pay-

(*x*) *Hardy* v. *Woodroffe*, 2 Stark. 319. Sect. 46 (2), *post*.

(*y*) *Buxton* v. *Jones*, 1 M. & Gr. 83.

(*z*) *Hine* v. *Allely*, 4 B. & Ad. 624; 2 L.J. K.B. 105.

(*a*) *Beeching* v. *Gower*, Holt, N.P. 314.

(*b*) *Wetton* v. *Hodd*, 18 Jur. 630.

(*c*) *Bailey* v. *Bodenham*, 16 C.B. N.S. 288; 33 L.J. C.P. 252.

(*d*) *Boyse, In re*, 33 Ch. D. 612, 623; 56 L.J. Ch. 135.

(*e*) As to a "fictitious person," see *Vagliano* v. *Bank of England*, *ante*, p. 1110.

ment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it."

If the acceptor absconds, or shuts up his house and cannot be found, presentment is excused, because it cannot be made, and the bill may be treated as a dishonoured bill; but, if the acceptor has merely removed to a different residence, and can be discovered, the bill must be presented in the regular way (*f*). Neither the bankruptcy of the drawee or acceptor, nor a declaration by him that he will not pay the bill, is of itself an excuse for an omission to present for payment (*g*); but, it was held that if a banking firm in partnership had notoriously stopped payment and shut up its ordinary place of business, and immediate notice of the insolvency of the firm was given by the holder to the other parties, he would be entitled to recover upon the bill, although there had been no formal presentment (*h*). If the bill is a mere accommodation bill, and the acceptor had no effects of the drawer's in his hands during any portion of the period that the bill had to run, and the drawer could have had no reasonable expectation that the bill would be honoured by the acceptor, presentment to the latter is excused as against the drawer, as the latter cannot have been prejudiced by the want of presentment; for, "if the bill was presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill" (*i*). "But the case of an indorser of a bill of exchange stands upon a different footing from that of a drawer. He (the indorser) is in the nature of a surety or guarantee of its payment on due presentment, and is presumed to know nothing about the arrangement between the drawer and drawee" (*k*). His liability, therefore, upon the bill does not arise until presentment has been duly made, and he has received notice of dishonour.

Days of grace are so called because they were formerly allowed the drawee as a favour; but the laws of commercial countries have long since recognised them as a right.

By the Bills of Exchange Act, 1882, s. 14, "Where a bill is not payable on demand the day on which it falls due is determined as follows:

"(1.) Three days (*l*), called days of grace, are, in every case

(*f*) *Collins* v. *Butler*, 2 Str. 1087.

(*g*) *Sands* v. *Clarke*, 8 C.B. 759; 19 L.J. C.P. 87.

(*h*) *Turner* v. *Stones*, 12 L.J. Q.B. 303; 1 D. & L. 122; *Robson* v. *Oliver*, 16 L.J. Q.B. 437; 10 Q.B. 704; but see *East of England Banking Co., In re*, L.R. 4 Ch. 18; 38 L.J. Ch. 121; and s. 46 (2) (a), *ante*, p. 1134.

(*i*) *Terry* v. *Parker*, 6 Ad. & E. 507; 6 L.J. Q.B. 249. See *Bethell, In re*, 34 Ch.D. 561; 56 L.J. Ch. 334; and s. 46 (2) (c), *supra*, p. 1134.

(*k*) *Carter* v. *Flower*, 16 L J. Ex. 202; 16 M. & W. 743.

(*l*) By s. 92, where the time limited for doing any act or thing is less than three days, in reckoning time, the following days are excluded:—Sunday, Good Friday, Christmas Day, bank

where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace (*m*): Provided that—(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day; (b) when the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day (*n*).

"(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

"(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

"(4.) The term 'month' in a bill means calendar month."

Presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties (*o*).

Notice of dishonour.—By the Bills of Exchange Act, 1882, s. 47, "(1.) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid. (2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder" (*p*).

By sect. 48, "Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; provided that—"(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced

holidays, days appointed by royal proclamation as public fast or thanksgiving days.

(*m*) *Kennedy* v. *Thomas*, (1894) 2 Q.B. 759; 63 L.J. Q.B. 761.

(*n*) The above provision effects some alteration in the law.

(*o*) Byles, 283 (ed. 17); *Tassell* v. *Lewis*, 1 Ld. Raym. 743. Sect. 14 (1), *supra*, p. 1135.

(*p*) *Kennedy* v. *Thomas*, *supra*.

by the omission. (2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted."

By sect. 49, "Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

"(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

"(2.) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice, whether that party be his principal or not.

"(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

"(4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

"(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

"(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour (*q*).

"(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

"(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

"(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

"(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

"(11.) Where there are two or more drawers or indorsers who

(*q*) Sub-sect. (6) effects an alteration in the law.

are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

"(12.) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter (*r*). In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—(a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill; (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter (*s*).

"(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

"(14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

"(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office."

If the bill has been duly presented to the acceptor, and the days of grace have elapsed, and the bill remains unpaid, the holder should give prompt notice of the dishonour of the bill to all the other parties to the instrument against whom he intends to proceed (*t*). A plaintiff in an action on the bill need not himself have given all the notices; he may avail himself of a notice duly given by any other party to the bill (*u*). When the bill becomes payable on a Sunday, Good Friday, or Christmas Day, the notice need not be given until the day after (*x*). Where a bill of exchange was indorsed to a branch bank of a London banking-house who sent it to another branch of the same bank, who indorsed it to the head establishment in London, it was held that each of the

(*r*) *London & River Plate Bank* v. *Bank of Liverpool*, (1896) 1 Q.B. 7; 65 L.J. Q.B. 80.

(*s*) *Fielding* v. *Corry*, 67 L.J. Q.B. 7.

(*t*) *Maltass* v. *Siddle*, 6 C.B. N.S. 501; 28 L.J. C.P. 257.

(*u*) Jervis, C.J., *Rowe* v. *Tipper*, 13 C.B. 256; 22 L.J. C.P. 135.

(*x*) Sect. 92, *ante*, p. 1135.

branch banks was to be considered an independent indorsee or holder, and each entitled to the usual notice of dishonour (*y*). Any agent in possession of the bill may give the notice; and it need not state at whose request it was given, nor who was the owner of the bill. Any persons also who pay the bill for the honour of a party thereto become, on payment, holders as upon a transfer from the person for whom they made the payment, and are entitled to avail themselves of a notice of dishonour given by any of the parties to the bill (*z*).

What amounts to notice of dishonour.—A mere demand of payment of a bill was always held not to amount to notice of dishonour (*a*); but an intimation that the bill has not been paid by the acceptor, or that it has not been paid in regular course, accompanied or unaccompanied by a demand of payment, was held to be sufficient (*b*). A mistake in the name of the person on whose behalf the notice is given will not avoid the notice, but will place the party giving it in the same situation as to the party to whom it is given as if the representation had been true, so that the defendant will have every defence against the plaintiff that he would have had if the notice had been really given by the party named (*c*). A misdescription, also, of the bill, not misleading the party receiving the notice, will not vitiate such notice (*d*). If the bill has really been dishonoured at the time the notice is given, but the party giving the notice was not himself certain of the fact at the time he gave the notice, it is no objection to the notice (*e*). The notice may be either written or verbal (*f*). Any form of words conveying information to the mind of the party to whom it is addressed, that the bill has been presented and dishonoured, given to the party, or left at his usual place of business during business hours, or at his private residence, is sufficient (*g*). If the house is shut up, and the party sent to give notice puts a written notice through or under the door, that will suffice (*h*). It

(*y*) *Clode* v. *Bayley*, 12 M. & W. 51; 13 L.J. Ex. 17.

(*z*) *Goodall* v. *Polhill*, 1 C.B. 242; 14 L.J. C.P. 146. See s. 68, *post*, p. 1146.

(*a*) *Solarte* v. *Palmer*, 7 Bing. 530; 2 Cl. & F. 97.

(*b*) *Bailey* v. *Porter*, 14 M. & W. 44; 14 L.J. Ex. 244; *Paul* v. *Joel*, 4 H. & N. 355; 28 L.J. Ex. 143. See now s. 49 (5), p. 1137.

(*c*) Parke, B., *Harrison* v. *Ruscoe*, 15 M. & W. 236; 15 L.J. Ex. 110.

(*d*) *Bromage* v. *Vaughan*, 16 L.J. Q.B. 10; 9 Q.B. 608; *Rowlands* v. *Springett*, 14 M. & W. 7; 14 L.J. Ex. 227; *Mellersh* v. *Rippen*, 21 L.J. Ex. 221; 7 Exch. 578. Sect. 49 (7), p. 1137.

(*e*) *Jennings* v. *Roberts*, 24 L.J. Q.B. 102; 4 E. & B. 615.

(*f*) Sect. 49 (5), (7), p. 1137.

(*g*) Sect. 49 (5), p. 1137. *Phillips* v. *Gould*, 8 C. & P. 355; *Hartley* v. *Case*, 4 B. & C. 339; 3 L.J. (O.S.) K.B. 262; *Lewis* v. *Gompertz*, 6 M. & W. 403; 9 L.J. Ex. 182; *East* v. *Smith*, 16 L.J. Q.B. 295; *Carter* v. *Flower*, 16 M. & W. 743; 16 L.J. Ex. 201; *Chard* v. *Fox*, 14 Q.B. 201; *Everard* v. *Watson*, 22 L.J. Q.B. 222; 1 E. & B. 801; *Caunt* v. *Thompson*, 7 C.B. 411; 18 L.J. C.P. 128; *Metcalfe* v. *Richardson*, 11 C.B. 1011; *Maxwell* v. *Brain*, 10 Jur. N.S. 777.

(*h*) *Allen* v. *Edmundson*, 2 Exch. 723; 17 L.J. Ex. 291; *Housego* v. *Cowne*, 2 M. & W. 348; 6 L.J. Ex. 110.

was held sufficient, if the notice was sent to a place which the indorser held out as a place where he was likely to be found for the purpose of receiving notice, although it was neither his place of business, nor his residence (*i*).

Posting the notice.—The notice of dishonour should, if possible, be communicated by the next post, if a post leaves within a few hours after information of the dishonour of the bill (*k*). The letter, when sent by post, must of course be properly directed (*l*); and, when it is sent to a large town, the street and number of the house in which the party to whom the notice is given resides should be stated (*m*), unless the latter is the drawer of the bill, and states his address in an equally general manner (*n*). Where the address is the only one known to the senders it has been held to be sufficient (*o*). An action is maintainable immediately after the notice has been received by the party to whom it is addressed; and it is sufficient for the plaintiff to show that the defendant must have received it according to the usual routine of the post-office delivery prior to the issuing of the writ (*p*).

Foreign bill—Protest—Noting—Damages—Re-exchange.—By the Bills of Exchange Act, 1882, s. 51, "(1.) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

"(2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary (*q*).

"(3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

"(4.) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When

(*i*) *Berridge* v. *Fitzgerald*, L.R. 4 Q.B. 639; 38 L.J. Q.B. 335.

(*k*) *Darbishire* v. *Parker*, 6 East, 3. Sect. 49 (12), (15), p. 1138.

(*l*) When duly addressed, the party is not answerable for miscarriage by the Post Office. Sect. 49 (15), p. 1138.

(*m*) Parke, B., *Woodcock* v. *Houldsworth*, 16 L.J. Ex. 49; 16 M. & W. 124; *Walter* v. *Haynes*, R. & M. 149.

(*n*) *Clarke* v. *Sharpe*, 3 M. & W. 166; *Burmester* v. *Barron*, 17 Q.B. 828; 21 L.J. Ex. 135.

(*o*) *Baker, Ex parte*, 4 Ch.D. 795; 46 L.J. Bankr. 60.

(*p*) *Castrique* v. *Bernabo*, 6 Q.B. 498; 14 L.J. Q.B. 3.

(*q*) Sub-sect. (2) effects an alteration in the law. See *English Bank of River Plate, In re*, (1893) 2 Ch. 438: 62 L.J. Ch. 578.

a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

"(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

"(6.) A bill must be protested at the place where it is dishonoured: Provided that—(a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day; (b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

"(7.) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—(a) The person at whose request the bill is protested; (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

"(8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

"(9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence."

By sect. 93, "For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting."

By sect. 94, "Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour

of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

"The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient" (*r*).

The protest simply announces the presentment and non-acceptance or non-payment of the bill. Noting is a minute made on the bill by the officer at the time of the refusal to accept, and is the preparatory step to protest. Notice of protest and of the dishonour of a foreign bill should always be sent by the first available opportunity (*s*). A bill of exchange payable in France, though drawn in England, is a foreign bill; and notice of dishonour according to French law is sufficient in an action against an indorser in England (*t*). By the Bills of Exchange Act, 1882, s. 57 (2), in case of a bill which has been dishonoured abroad, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment (*u*).

Proof of notice of dishonour.—A promise by the defendant, after the bill becomes due, to pay the amount thereof, or a part payment, or the offer of it, or an admission by the defendant of his liability upon the bill, is evidence that notice of dishonour was duly given (*x*), or that without such notice the defendant is the proper person to pay the bill (*y*). A promise, after the bill is due, to pay the holder the amount of the bill, operates as "an admission on the part of the defendant that the holder had a right to resort to him upon the bill;" and, "if, when payment is demanded, the party omits to avail himself of the preliminary objection of want of protest or of want of notice, it is a question for the jury whether he does not thereby admit that all the steps that are essential to create liability in him have been duly taken" (*z*). If the defendant has suffered judgment by default in a prior action against him on the same bill, this is an admission by him of his

(*r*) The form is as follows:—Know all men that I, A.B. (householder), of , in the county of , in the United Kingdom, at the request of C.D., there being no notary public available, did on the day of 19 , at , demand payment [*or* acceptance] of the bill of exchange hereunder written, from E.F., to which demand he made answer (*state answer, if any*), wherefore I now, in the presence of G.H. and J.K., do protest the said bill of exchange.—Signed A.B. G.H. and J.K., witnesses. N.B.—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

(*s*) *Muilman* v. *D'Eguino*, 2 H.Bl. 565. See s. 51, p. 1140.

(*t*) *Hirschfield* v. *Smith*, L.R. 1 C.P. 340; 35 L.J. C.P. 177; *Horne* v. *Rouquette*, 3 Q.B.D. 514. Sect. 72 (3), *post*.

(*u*) See the sect., *post*, p. 1162.

(*x*) *Hicks* v. *Beaufort* (*Duke*), 4 Bing. N.C. 229; 7 L.J. C.P. 131; *Brownell* v. *Bonney*, 1 Q.B. 39; 10 L.J. Q.B. 71; *Jackson* v. *Collins*, 17 L.J. Q.B. 142.

(*y*) *Potter* v. *Rayworth*, 13 East, 418.

(*z*) *Campbell* v. *Webster*, 2 C.B. 258; 15 L.J. C.P. 4.

liability upon the instrument, so as to dispense with proof of notice of dishonour (*a*).

Dispensation of notice—Excuses for delay.—By the Bills of Exchange Act, 1882, s. 50, "(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

"(2.) Notice of dishonour is dispensed with—(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged; (b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice; (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person (*b*) or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment; (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person (*b*) or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation."

If the party to whom the notice is to be given absents himself from his place of business, and the holder goes or sends there, and finds no one to receive the notice, this is equivalent to a dispensation of notice, since, according to the usage of merchants, a man who puts his name to a bill ought to be ready at his place of business to receive notice of dishonour (*c*). Where the drawer stated to the holder of the bill, a few days before the bill became due, that he had no regular residence to which notice could be sent, and that he would himself call upon the acceptor and see if the bill was paid, it was held that he had thereby expressly dispensed with notice of dishonour from the holder (*d*). It has been also held that notice of dishonour to the drawer had been dispensed with or waived in the following cases:—where the drawer had

(*a*) *Rabey* v. *Gilbert*, 6 H. & N. 536; 30 L.J. Ex. 170.

(*b*) See *Vagliano* v. *Bank of England*, p. 1110.

(*c*) *Allen* v. *Edmundson*, 17 L.J. Ex. 291; 2 Exch. 719.

(*d*) *Phipson* v. *Kneller*, 4 Campb. 285.

himself countermanded the payment of the bill (*e*); where he stated, the day before a bill became due, that it would not be paid, and that it was not worth while to trouble him with a post letter to give him notice (*f*); where his residence was unknown, and the holder could not, by the exercise of reasonable diligence and inquiry, discover it (*g*); where he had made the bill payable at his own house (*h*); where he had no effects at any time in the hands of the acceptor, and would have no remedy against the acceptor or any other person in consequence of his being obliged to pay the bill (*i*); where he had not sufficient effects in the hands of the acceptor at the time when he would reasonably expect the bill to be presented for payment, and no reasonable expectation that it would be paid (*k*); where, although goods had been sold by him to the drawee, yet a long period of credit had been given, and he had drawn the bill without any reasonable expectation that it would be accepted or paid (*l*). And a waiver of notice of dishonour may be inferred from a subsequent promise to pay, or any admission of liability on the bill, by the party entitled to notice (*m*).

If the drawer draws on a person who is not his debtor, nor has received any value for the bill, the bill must be considered *primâ facie* an accommodation bill. In such a case, the drawer is himself the person who ought to provide funds and pay the bill; and he is not, consequently, entitled to notice of dishonour (*n*). But the case is otherwise where the drawer has a fluctuating balance in the hands of the drawee (*o*); for the drawer has a right to notice of dishonour, if he has effects in the hands of the acceptor at any time from the drawing of the bill till it becomes due (*p*). Where the intention of all parties to an accommodation bill was that it should be met by the last indorser, the previous indorsers cannot be sued unless they have had notice of dishonour (*q*). The bankruptcy of the drawee or acceptor, however notorious, constitutes no excuse for an omission to give notice of dishonour (*r*); and the knowledge of the bankruptcy by the party entitled to notice is not equivalent to notice (*s*).

(*e*) *Hill* v. *Heap*, D. & R. N.P.C. 57.
(*f*) *Burgh* v. *Legge*, 5 M. & W. 421; 8 L.J. Ex. 258.
(*g*) *Bateman* v. *Joseph*, 2 Campb. 461.
(*h*) *Sharp* v. *Bailey*, 9 B. & C. 44; 7 L.J. (O.S.) K.B. 138.
(*i*) *Cory* v. *Scott*, 3 B. & Ald. 619; *Thomas* v. *Fenton*, 5 D. & L. 28; 16 L.J. Q.B. 362.
(*k*) *Carew* v. *Duckworth*, L.R. 4 Ex. 313; 38 L.J. Ex. 149.
(*l*) *Claridge* v. *Dalton*, 4 M. & S. 231.
(*m*) *Woods* v. *Dean*, 3 B. & S. 101; 32 L.J. Q.B. 1; *Cordery* v. *Colvills*, 14 C.B. N.S. 374; 32 L.J. C.P. 210; *Rabey* v. *Gilbert*, 6 H. & N. 536; 30 L.J. Ex. 170.
(*n*) *Bickerdyke* v. *Bollman*, 1 T.R. 405. Sect. 52 (2), p. 1134; sect. 50 (2) (c), p. 1143.
(*o*) *Blackhan* v. *Doren*, 2 Campb. 503.
(*p*) *Hammond* v. *Dufrene*, 3 Campb. 145.
(*q*) *Turner* v. *Samson*, 2 Q.B.D. 23; 46 L.J. Q.B. 167.
(*r*) *Thackray* v. *Blackett*, 3 Campb. 164.
(*s*) *Esdaile* v. *Sowerby*, 11 East, 114.

Transfer by delivery without indorsement.—A transfer by mere delivery without indorsement does not render the transferor liable to the transferee upon the bill itself, although he may, under certain circumstances, become liable to refund the money he received in exchange for the bill, if the bill is dishonoured at maturity and turns out to be a mere piece of waste paper.

By the Bills of Exchange Act, 1882, s. 58, "(1.) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a 'transferor by delivery' (*t*).

"(2.) A transferor by delivery is not liable on the instrument.

"(3.) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless."

If a man goes into the money market with a bill of exchange, and gets it discounted without putting his name upon the back of it, and, in effect, sells the bill for what he can get for it, he is not responsible for the repayment of the money he received in exchange for it, if the parties to the bill turn out to be insolvent and the bill becomes worthless, unless he knew of the insolvency and the consequent worthlessness of the bill at the time he offered it for sale in the market (*u*). But, if the bill is a forgery, and is not what it purports upon the face of it to be, the transferor is bound to refund the money he received by way of discount upon the bill, as the transferee has not got what was agreed to be transferred to him in exchange for his money, and there is consequently a total failure of the consideration for the money (*x*).

Bills taken up suprà protest.—By the Bills of Exchange Act, 1882, s. 65, "(1.) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *suprà protest*, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

"(2.) A bill may be accepted for honour for part only of the sum for which it is drawn.

"(3.) An acceptance for honour *suprà protest* in order to be valid must—(a) be written on the bill, and indicate that it is an acceptance for honour: (b) be signed by the acceptor for honour.

"(4.) Where an acceptance for honour does not expressly state

(*t*) "Delivery" means transfer of possession, actual or constructive, from one person to another: sect. 2.

(*u*) *Fenn* v. *Harrison*, 3 T.R. 579; *Shuttleworth*, *Ex parte*, 3 Ves. 368; *Fydell* v. *Clark*, 1 Esp. 447.

(*x*) *Gurney* v. *Womersley*, 4 E. & B. 131; 24 L.J. Q.B. 46.

for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

"(5.) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour."

By sect. 66, "(1.) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts. (2.) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted."

By sect. 67, "(1.) Where a dishonoured bill has been accepted for honour *suprà protest*, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

"(2.) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

"(3.) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

"(4.) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him."

By sect. 68, "(1.) Where a bill has been protested for non-payment, any person may intervene and pay it *suprà protest* for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

"(2.) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

"(3.) Payment for honour *suprà protest*, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it.

"(4.) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

"(5.) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

"(6.) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest (*y*). If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

"(7.) Where the holder of a bill refuses to receive payment *suprà protest*, he shall lose his right of recourse against any party who would have been discharged by such payment."

Retiring of bills by acceptors.—By the Bills of Exchange Act, 1882, s. 61, "When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right (*z*), the bill is discharged" (*a*).

Renunciation of bills—Express waiver.—By the Bills of Exchange Act, 1882, s. 62, "(1.) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

"The renunciation must be in writing, unless the bill is delivered up to the acceptor.

"(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation" (*b*).

It has been held that where the holder of a note on his deathbed wished to forgive the debt to the promisor, and his nurse, at his dictation, wrote a paper to that effect, and that the note should be destroyed as soon as found, such renunciation was not an absolute and unconditional renunciation. The question of the effect of want of signature was not decided (*c*). Where a person had given another a promissory note in 1865 promising to pay him on demand 200*l.*, and after the death of the promisor the promisee had given the note to a daughter of the promisor (who was also a devisee but not the executrix of the promisor), it was held that the note was mature as soon as it was given to the promisee, but that as there was no renunciation in writing, nor had the note been delivered

(*y*) This means the necessary protest for non-payment: *English Bank of River Plate, In re*, (1893) 2 Ch. 438; 62 L.J. Ch. 578.

(*z*) *Nash* v. *De Freville*, (1900) 2 Q.B. 72; 69 L.J. Q.B. 484.

(*a*) See sect. 37, *ante*, p. 1114. Sect. 61 effects an alteration in the law. As to the discharge of bills by indorsers, see sect. 59.

(*b*) This section effects an alteration in the law.

(*c*) *Francis* v. *Bruce*, 44 Ch. D. 627; 59 L.J. Ch. 709.

either to the maker or his personal representatives, the note was not discharged under s. 62, sub-s. 1, and s. 89 (*infra*) (*d*).

Rules as to sets.—By the Bills of Exchange Act, 1882, s. 71, "(1.) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

"(2.) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

"(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

"(4.) The acceptance may be written on any part, and it must be written on one part only.

"If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

"(5.) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

"(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged."

Promissory notes.—By the Bills of Exchange Act, 1882, Part IV., s. 89, "(1.) Subject to the provisions in this part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. (2.) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. (3.) The following provisions as to bills do not apply to notes; namely, provisions relating to—(a) Presentment for acceptance; (b) Acceptance; (c) Acceptance *supra protest;* (d) Bills in a set. (4.) Where a foreign note is dishonoured, protest thereof is unnecessary."

By sect. 83, "(1.) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a speci-

(*d*) *Edwards* v. *Walters*, (1896) 2 Ch. 157; 65 L.J. Ch. 557.

fied person or to bearer. (2.) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker. (3.) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof (*e*). (4.) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note."

By sect. 84, "A promissory note is inchoate and incomplete until delivery (*f*) thereof to the payee or bearer."

By sect. 85, "(1.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenour. (2.) Where a note runs 'I promise to pay' and is signed by two or more persons it is deemed to be their joint and several note."

Liability of maker.—By the Bills of Exchange Act, 1882, s. 88, "The maker of a promissory note by making it—(1) Engages that he will pay it according to its tenour; (2) Is precluded from denying to a holder in due course (*g*) the existence of the payee and his then capacity to indorse."

A promise also in writing to pay a sum of money to bearer, without mentioning any particular person by name, or a promise to pay to a fictitious person or bearer, was a negotiable note within the statute 3 & 4 Anne, c. 8 (*h*), now repealed, and re-enacted by the statute of 1882. A promise to pay "to A., B., and C., or to their order, or the major part of them, 100*l*.," is a promissory note (*i*). If it appears doubtful whether the instrument was intended to be a bill or a note, it may be treated either as the one or the other, at the election of the payee (*k*). An instrument in the form of a bill of exchange addressed to no one, but accepted by the defendant, may be treated as a promissory note (*l*). But if it is a mere inchoate instrument, having neither the name of a drawer nor of a payee upon it, it is not a note (*m*). A promissory note need not contain an express promise in terms upon the face of it; it is sufficient if the promise appears by necessary inference from the words used (*n*). A note in writing, for example, to the following effect, "I promise to account with A. B.,

(*e*) But if it contains more than this it is invalid: *Kirkwood* v. *Smith*, (1896) 1 Q.B. 582; 65 L.J. Q.B. 408.

(*f*) "Delivery" means transfer of possession, actual or constructive, from one person to another: sect. 2.

(*g*) See s. 29, *ante*, p. 1119.

(*h*) *Grant* v. *Vaughan*, 3 Burr. 1527.

(*i*) *Watson* v. *Evans*, 1 H. & C. 662; 32 L.J. Ex. 137.

(*k*) *Edis* v. *Bury*, 6 B. & C. 435; 5 L.J. (O.S.) K.B. 179.

(*l*) *Peto* v. *Reynolds*, 9 Exch. 415; 23 L.J. Ex. 98; *Fielder* v. *Marshall*, 9 C.B. N.S. 606; 30 L.J. C.P. 158.

(*m*) *M'Call* v. *Taylor*, 19 C.B. N.S. 301; 34 L.J. C.P. 365; *ante*, p. 1109.

(*n*) *Miller* v. *Thomson*, 3 M. & Gr. 576; 11 L.J. C.P. 21.

or order, for 50*l.* value received by me," has been held a promissory note negotiable within the statute of Anne (*o*). And its negotiability is not destroyed by an acknowledgment upon the face of it of a deposit of title deeds as a collateral security for the payment of the money (*p*). But it must in all cases, like bills of exchange, be drawn or made for the payment of money by some certain person absolutely and unconditionally. If the promise is in the alternative to pay if somebody else does not (*q*), or if the payment is to depend upon a contingency or the happening of any uncertain event, or if it is to be made out of a particular fund which may or may not be available, the instrument is not negotiable, and cannot be transferred by indorsement or in any other manner (*r*). Any words, indeed, upon the face of the note qualifying the promise, and rendering the ultimate liability to pay the money uncertain, will deprive the note of negotiability, and render it a mere agreement (*s*).

A promise to pay is none the less an unconditional promise because it refers to an agreement, if such agreement does not qualify the promise (*t*); nor is a promissory note payable by instalments, subject to a condition that, on default being made in payment of the first instalment, the whole amount should become immediately payable, a note payable upon a contingency, but is, if made payable to order, assignable and indorsable under the statute (*u*). But it was formerly essential in all cases to the negotiability of a bill or note, that it be drawn payable "to bearer" or "to order" (*x*). If those words were omitted, the instrument was formerly not transferable, and the action upon it must have been brought in the name of the original promisee or payee. But, if the words "or order" or "or bearer" have been omitted by mistake, they may, after the bill or note has been signed, be inserted with the consent of all parties in pursuance of an original intention to make the instrument negotiable (*y*). If, also, the person to whom, or to whose order, the money is to be paid, is uncertain, the instrument is not a promissory note, unless it can be treated as payable to bearer. A promise "to pay the secretary for the time being" of an insurance company, being a "floating contingent promise" to pay some person to be ascertained

(*o*) *Morris* v. *Lee*, 2 Ld. Raym. 1396; 1 Str. 629; 8 Mod. 362.

(*p*) *Wise* v. *Charlton*, 4 Ad. & E. 786; 6 L.J. K.B. 80. Sect. 83 (3), *ante*, p. 1149.

(*q*) *Ferris* v. *Bond*, 4 B. & Ald. 679.

(*r*) *Blackenhagen* v. *Blundell*, 2 B. & Ald. 417; *Hill* v. *Halford*, 2 Bos. & P. 413.

(*s*) *Robins* v. *May*, 11 Ad. & E. 213; 9 L.J. Q.B. 22; *Clarke* v. *Percival*, 2 B. & Ad. 660; 9 L.J. (O.S.) K.B. 296.

(*t*) *Jury* v. *Baker*, E. B. & E. 459; 28 L.J. Q.B. 255.

(*u*) *Oridge* v. *Sherborne*, 11 M. & W. 380; 12 L.J. Ex. 313; *Carlon* v. *Kenealy*, 12 M. & W. 139; 13 L.J. Ex. 64. See s. 9 (c), *ante*, p. 1111.

(*x*) *Plumley* v. *Westley*, 2 Bing. N.C. 249; 5 L.J. C.P. 51; but see s. 8, *ante*, pp. 1111, 1116.

(*y*) *Kershaw* v. *Cox*, 3 Esp. 246.

ex post facto, was held not a negotiable promissory note payable to bearer (*z*). But this is no longer law (see *ante*, p. 1107). A promise to pay to "the trustees of Wesleyan Chapel, Harrogate, or their treasurer for the time being, 100*l*.," was held a good note; for there is no uncertainty as to the payee, as the trustees alone are to be taken as the payees, and the treasurer as their agent only to receive payment (*a*). A note made by several persons, "payable to our and each of our order," was held to be a good promissory note (*b*).

The maker of a promissory note stands in the same position as the acceptor of a bill of exchange (*ante*, p. 1148). He is the party primarily liable upon the instrument, and is bound, when the note falls due, to seek out and pay the holder. He is not entitled to presentment, unless the note is payable at or after sight, or is made payable at some particular place (*c*). A promissory note, payable on demand, need not be presented to the maker in order to charge him, the commencement of an action against him being a sufficient demand of the money. But, in order to charge the indorser, the instrument, whether payable on demand or not, must be duly presented to the maker, and notice of dishonour given (*ante*, p. 1136); and, if payable on demand, it must be presented within a reasonable time, that is, a period reasonable with respect to the circumstances connected with each particular case (*d*).

Transfer of promissory notes.—If the maker of the note promises to pay the amount of the note to his own order, the note is not a promissory note within the statute until it has been indorsed by the maker; and then it becomes, in legal effect, a note payable to bearer, and so falls within the statute (*e*). The first transfer of a note payable to order must, as in the case of bills, be made by indorsement and delivery. If such a note is delivered in the first instance without indorsement, the equitable interest only is transferred to the holder; and, if the note is indorsed by the maker, and not delivered, no right to sue upon the instrument is transferred; and a subsequent delivery by the executor of the maker will not complete the informal transfer, and enable the holder to sue upon the instrument (*f*).

(*z*) *Storm* v. *Stirling*, 3 E. & B. 832; 23 L.J. Q.B. 298; *Cowie* v. *Stirling*, 6 E. & B. 633; 25 L.J. Q.B. 335; *Enthoven* v. *Hoyle*, 13 C.B. 394; 21 L.J. C.P. 100; *Yates* v. *Nash*, 8 C.B. N.S. 581; 29 L.J. C.P. 306.

(*a*) *Holmes* v. *Jaques*, L.R. 1 Q.B. 376; 35 L.J. Q.B. 130.

(*b*) *Absolon* v. *Marks*, 11 Q.B. 19; 17 L.J. Q.B. 7.

(*c*) Sect. 87, *post*, p. 1152.

(*d*) *Chartered Mercantile Bank of India* v. *Dickson*, L.R. 3 P.C. 574. Sect. 86, *post*, p. 1152.

(*e*) Sect. 83 (2), *ante*, p. 1149; *Brown* v. *De Winton*, 17 L.J. C.P. 285; 6 C.B. 336; *Masters* v. *Baretto*, 8 C.B. 433; 19 L.J. C.P. 50; *Hooper* v. *Williams*, 2 Exch. 20; 17 L.J. Ex. 315; *Gay* v. *Lander*, 17 L.J. C.P. 287; 6 C.B. 336; *Flight* v. *Maclean*, 16 M. & W. 51; 16 L.J. Ex. 23; *Wood* v. *Mytton*, 10 Q.B. 805; 16 L.J. Q.B. 446.

(*f*) *Bromage* v. *Lloyd*, 1 Exch. 32; 16 L.J. Ex. 257. See s. 84, *ante*, p. 1149.

Note payable on demand.—By the Bills of Exchange Act, 1882, s. 86, "(1.) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged. (2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case. (3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue."

Presentment of note for payment.—By the Bills of Exchange Act, 1882, s. 87, "(1.) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable. (2.) Presentment for payment is necessary in order to render the indorser of a note liable. (3.) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice."

Indorsement of notes and bills overdue.—As a rule of law the indorsee of a bill or note which is overdue must take it on the credit of the indorser, and can stand in no better position (*g*). He takes it subject to all its equities (*h*). But an original absence of consideration in an accommodation bill does not, it seems, attach to the document, so as to defeat the title of a *bonâ fide* indorsee for value (*i*). In the case of a note payable on demand the same rule will not hold, at all events where the note or cheque has not been made a very long time, for they are not overdue at any particular date. The question for the jury is whether under all the circumstances the indorsee ought to have been led to inquire into the title of the indorser (*k*). A promissory note payable on demand cannot be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest has been paid on it for several

(*g*) *Brown* v. *Davis*, 3 T.R. 80; *Barough* v. *White*, 4 B. & C. 325; 3 L.J. (O.S.) K.B. 227.

(*h*) *Sturtevant* v. *Ford*, 4 M. & Gr. 101; 11 L.J. C.P. 245. Sect. 36, *ante*, p. 1124, and sect. 89, p. 1148.

(*i*) *Carruthers* v. *West*, 17 L.J. Q.B. 4; 11 Q.B. 143; *Swan, Ex parte*, L.R. 6 Eq. 345; *Sturtevant* v. *Ford*, *supra*.

(*k*) *London & County Banking Co.* v. *Groome*, 8 Q.B.D. 288; 51 L.J. Q.B. 224. See s. 86, *supra*.

years before such indorsement (*l*). Notes payable at and after sight must be presented to the maker before an action can be maintained against him for non-payment. "He is to see the note before he is to be called upon to pay it" (*m*). When a note is made payable a certain time after sight, the time does not begin to run from the day of the date, but from the day of the note being presented for sight (*n*).

Days of grace are allowed on promissory notes (*o*), as well as on bills of exchange (*ante*, p. 1135).

Bills and notes for payment of sums under 1*l.*—Sect. 1 of 26 & 27 Vict. c. 105, repeals 17 Geo. 3, c. 30, and so much of any other Act as prohibits or restrains, or imposes any penalty for, the uttering or negotiating any promissory note (not being a note payable to bearer on demand), bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for the payment of 20*s.*, or above that sum and less than 5*l.*, or on which 20*s.* or above that sum and less than 5*l.*, shall remain undischarged, made, drawn, or indorsed in any other manner than as directed by the said Act. By 7 Geo. 4, c. 6 (s. 3) (*p*), heavy penalties are imposed upon all persons issuing or negotiating promissory notes payable to the bearer on demand for any sum of money less than 5*l.* The issue of bank notes has been subjected to various prohibitions and restrictions by the legislature (*q*).

Dividend warrants (*r*), issued by the Bank of England for the payment of dividends on stock in the public funds, are not negotiable, so as to entitle the holder to demand the dividend; but, as there is in general an acknowledgment at the foot of the warrant by the payee of his having received the dividend therein mentioned, it is the custom of the bank to pay the amount to the holder of the warrant and receipt; and these documents are accordingly transferred from hand to hand, and are generally considered to be negotiable (*s*).

Foreign scrip.—Scrip issued in England by a foreign government entitling the holder to delivery of definitive bonds of the foreign government, which by the usage of trade is transferred by mere delivery, passes by such delivery to a *bonâ fide* holder for value without notice that the vendor had no title (*t*). But the

(*l*) *Brooks* v. *Mitchell*, 9 M. & W. 15; 11 L.J. Ex. 51.

(*m*) *Dixon* v. *Nuttall*, 1 Cr. M. & R. 307; 3 L.J. Ex. 290.

(*n*) *Sturdy* v. *Henderson*, 4 B. & Ald. 592.

(*o*) *Brown* v. *Harraden*, 4 T.R. 153.

(*p*) This section is partially repealed; see St. L. Rev. Acts, 1873.

(*q*) 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32. These statutes are partially repealed; see St. L. Rev. Acts, 1861, 1874.

(*r*) As to crossed dividend warrants, see s. 95, *post*, p. 1157; and see saving clauses, sect. 97 (3) (c), (d), *ante*, p. 1108.

(*s*) *Partridge* v. *Bank of England*, 9 Q.B. 424—427.

(*t*) *Goodwin* v. *Robarts*, 1 App.Cas. 476; 45 L.J. Q.B. 478; see also *Rumball* v. *Met. Bank*, 2 Q.B.D. 194; 46 L.J. Q.B.

mere fact that an instrument is negotiable in a foreign country is not sufficient to make it so by English law (*u*).

Bankers' cheques.—By the Bills of Exchange Act, 1882, s. 73, "A cheque is a bill of exchange drawn on a banker payable on demand (*x*). Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

Presentment of cheque for payment.—By the Bills of Exchange Act, 1882, s. 74, "Subject to the provisions of this Act—(1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. (2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. (3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him" (*y*).

It has been held that the holder of a cheque does not lose his remedy against the drawer by reason of non-presentment within any period short of six years after taking it, unless the insolvency of the banker on whom it is drawn has taken place in the interval, or unless there is an actual loss to the drawer by the delay (*z*). If the cheque is presented in due time and refused payment, the loss will fall on the drawer (*a*). Sending a cheque by post to the banker on whom it is drawn is generally a good presentment (*b*). If the holder of a cheque sends it to his agent for presentment by the post on the day after that on which he has received it, the agent has the following day to present it for payment (*c*). If the

346; *Fine Art Society* v. *Union Bank*, 17 Q.B.D. 705; 56 L.J. Q.B. 70; *London Joint Stock Bank* v. *Simmons*, (1892) A.C. 201; 61 L.J. Ch. 723; *Edelstein* v. *Schuler*, (1902) 2 K.B. 144; 71 L.J. K.B. 572. As to what amounts to notice of the vendor's lack of title, see *Sheffield (Earl)* v. *London Joint Stock Bank*, 13 App. Cas. 333; 57 L.J. Ch. 986; *Venables* v. *Baring*, (1892) 3 Ch. 527; 61 L.J. Ch. 609.

(*u*) *Picker* v. *London & County Bank*, 18 Q.B.D. 515; 56 L.J. Q.B. 299; *Williams* v. *Colonial Bank*, 15 App.Cas. 267; 60 L.J. Ch. 131.

(*x*) See *National Bank* v. *Silke*, (1891) 1 Q.B. 435; 60 L.J. Q.B. 199, *ante*, p. 1112.

(*y*) This section effects some alteration in the law.

(*z*) *Robinson* v. *Hawksford*, 9 Q.B. 52; 15 L.J. Q.B. 377.

(*a*) *Laws* v. *Rand*, 3 C.B. N.S. 442; 27 L.J. C.P. 76; *Bailey* v. *Bodenham*, 16 C.B. N.S. 288; 33 L.J. C.P. 252.

(*b*) *Heywood* v. *Pickering*, L.R. 9 Q.B. 428; 43 L.J. Q.B. 145. Sect. 45 (8), *ante*, p. 1133.

(*c*) *Rickford* v. *Ridge*, 2 Campb. 537; *Hare* v. *Henty*, 10 C.B. N.S. 65; 30 L.J. C.P. 302; *Prideaux* v. *Criddle*, L.R. 4 Q.B. 455; 38 L.J. Q.B. 232.

cheque is delivered to the holder by the drawer after banking hours, and after it has become impossible to pay the cheque to a banker on that day, the delivery will count from the succeeding day; and, if the cheque is drawn upon a country bank situate at a distance, such distance must be taken into consideration in determining whether the cheque has been presented within a reasonable time (*d*). Presentment through the post office is generally a proper mode of presentment (*e*).

Garnishees had given a judgment debtor a cheque, but upon service of the order immediately stopped the cheque at the bank; it was held that the giving of the cheque had not extinguished the debt, which was therefore still capable of being attached (*f*).

A creditor who takes his debtor's agent's cheque on account of the debt is bound to present it in a reasonable time; and, if by his delay he alters the position of the debtor for the worse, the debtor is discharged, notwithstanding he was not a party to the cheque (*g*).

Revocation of banker's authority.—By the Bills of Exchange Act, 1882, s. 75, "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—(1). Countermand of payment: (2.) Notice of the customer's death."

Crossed cheques (*h*).—By the Bills of Exchange Act, 1882, s. 76, "(1.) Where a cheque bears across its face an addition of—(a) The words 'and company' or any abbreviation thereof between two parallel transverse lines, either with or without the words 'not negotiable'; or (b) Two parallel transverse lines simply, either with or without the words 'not negotiable'; that addition constitutes a crossing, and the cheque is crossed generally.

"(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition constitutes a crossing, and the cheque is crossed specially and to that banker" (*i*).

By sect. 77, "(1.) A cheque may be crossed generally or specially by the drawer. (2.) Where a cheque is uncrossed, the holder may cross it generally or specially. (3.) Where a cheque is crossed generally the holder may cross it specially. (4.) Where a cheque is crossed generally or specially, the holder may add the

(*d*) *Bond* v. *Warden*, 1 Coll. Ch. C. 583.

(*e*) *Prideaux* v. *Criddle*, *supra*. Sect. 45 (8), *ante*, p. 1133.

(*f*) *Cohen* v. *Hale*, 3 Q.B.D. 371; 47 L.J. Q.B. 496.

(*g*) *Hopkins* v. *Ware*, L.R. 4 Ex. 268; 38 L.J. Ex. 147.

(*h*) Sects. 76—82 are extended by 46 & 47 Vict. c. 55, s. 17, to any document issued by a customer of any banker and intended to enable any person to obtain payment from the banker of the sum mentioned in the document, just as if the document were a cheque.

(*i*) See *National Bank* v. *Silke*, (1891) 1 Q.B. 435; 60 L.J. Q.B. 199.

words 'not negotiable.' (5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. (6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself."

By sect. 78, "A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing."

By sect. 79, "(1.) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

"(2.) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

"Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be." But where cheques were drawn on a branch of the defendant's bank payable to the plaintiff's order and crossed, and they were stolen from the plaintiff by a clerk who had an account at another branch of the same bank to which, having forged the indorsements, he paid in the cheques, and the bank in good faith collected the cheques and credited the proceeds to the clerk, it was held, notwithstanding sect. 79, sub-s. 2, that the bank were protected from liability to the plaintiff by sect. 60. (See *ante*, p. 1123) (*k*).

By sect. 80, "Where the banker on whom a crossed cheque is drawn in good faith and without negligence pays it, if crossed

(*k*) *Gordon* v. *London City & Midland Bank*, (1902) 1 K.B. 242; 71 L.J. K.B. 215.

generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

By sect. 81, "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

By sect. 82, "Where a banker in good faith and without negligence receives payment for a customer (*l*) of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The word "customer" involves something of use and habit (*m*). This section, which affords protection to a banker who in good faith and without negligence receives payment for a customer of a crossed cheque to which the customer has no title, relieves the collecting banker from liability although the customer's account is overdrawn, and the effect of the transaction is to pay off the overdraft (*n*). The section only applies where bankers receive payment of a cheque crossed before it came into their possession, as agents for collection of a customer. If the bankers credit the customer with such a cheque before it is cleared, they are not within the section; nor can they bring themselves within it by crossing an open cheque paid in to them (*o*). A banker's draft addressed by one branch of a bank to another is not a cheque within the meaning of the section (*p*).

By sect. 95, "The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend" (*q*).

When a cheque is drawn payable to bearer, it is treated as money or cash, and is transferable from hand to hand, like a bill of exchange, but does not require any acceptance by the banker on whom it is drawn to establish its validity. A person therefore who receives a cheque payable to bearer *bonâ fide* for value, relying on the order of the party making it, is entitled to recover the amount from him, although the cheque has been lost or stolen (*r*).

(*l*) As to who is a "customer," see *La Cave* v. *Credit Lyonnais*, (1897) 1 Q.B. 148; 66 L.J. Q.B. 226; *G. W. Ry.* v. *London & County Banking Co.*, (1901) A.C. 414; 70 L.J. Q.B. 915.

(*m*) *Matthews* v. *Williams, Brown & Co.*, 63 L.J. Q.B. 494.

(*n*) *Clarke* v. *London & County Banking Co.*, (1897) 1 Q.B. 552; 66 L.J. Q.B. 354.

(*o*) *Gordon* v. *London City & Midland Bank*, (1902) 1 K.B. 242; 71 L.J. K.B. 215.

(*p*) *Ibid.*

(*q*) See as to saving clauses, sect. 97 (3) (d), *ante*, p. 1108.

(*r*) *Watson* v. *Russell*, 5 B. & S. 968; 34 L.J. Q.B. 93.

A banker's cheque payable to bearer on demand, given on account of a pre-existing debt, and received by the bearer *bonâ fide*, is indefeasible, although it may have been obtained from the drawer by fraud (*s*). In this respect it does not differ from a bill. When it is drawn payable to order, it is a bill of exchange, and negotiable as such when indorsed (*t*). The holder cannot sue the banker upon whom it has been drawn, unless the banker has accepted the cheque, or promised to pay it to the holder. The post-dating of a cheque, whether it is payable to order or bearer, does not invalidate the instrument in the hands of a *bonâ fide* holder for value with notice that it was post-dated (*u*).

Cancellation of bills and notes.—By the Bills of Exchange Act, 1882, s. 63, "(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged. (2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged. (3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority."

If the drawer of a cheque or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces are pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a holder for value who has taken it without having any just cause for supposing that it had been cancelled. This has been held to be the case where the appearance of the instrument was consistent with its having been divided into two parts for the purpose of safe transmission through the post, and where it was believed to have been so divided by the plaintiff who received it (*x*).

Alterations in bill or note avoiding the contract.—By the Bills of Exchange Act, 1882, s. 64, "(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent

(*s*) *Misa* v. *Currie*, 1 App.Cas. 554; 45 L.J. Ex. 852.

(*t*) *Keene* v. *Beard*, 8 C.B. N.S. 372; 29 L.J. C.P. 287; as to presentment of cheques, see *ante*, p. 1154.

(*u*) *Whistler* v. *Foster*, 14 C.B. N.S. 248; 32 L.J. C.P. 161; *Austin* v. *Bunyard*, 6 B. & S. 687; 34 L.J. Q.B. 217; *Bull* v. *O'Sullivan*, L.R. 6 Q.B. 209; 40 L.J. Q.B. 141; *Gatty* v. *Fry*, 2 Ex.D. 265; 46 L.J. Ex. 605; see sect. 13, *ante*, p. 1110.

(*x*) *Ingham* v. *Primrose*, 7 C.B. N.S. 82; 28 L.J. C.P. 295.

indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour. (2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent" (*y*).

An alteration of a bill or note in a material particular, after it has been negotiated, will avoid the contract, such as the addition to a promissory note for the payment of money with lawful interest, of the words "Interest at £6 per cent." written in the corner of the note, without the assent of the maker, after the note had been signed by him (*z*); the cutting off the signature of one of several joint promisors who have united together in undertaking a joint liability by their joint note of hand (*a*); the addition to the note of the name of a new promisor without the consent of the defendant (*b*); the acceleration of the time of payment of a bill of exchange by an alteration in the date of the bill and the time that it has to run (*c*), or the postponement of the date of payment of a cheque (*d*); an insertion of an incorrect date, where the bill bore no date upon the face of it (*e*); an alteration in the place of payment; or an insertion of some particular place of payment, without the privity and assent of the acceptor (*f*). The acceptor of a bill of exchange, however, is not under a duty to take precautions against fraudulent alterations in the bill after acceptance (*g*).

Immaterial alterations.—Whenever the alteration is immaterial, the substance of the contract remaining the same, the contract is not vitiated, although the alteration has been made by the plaintiff himself (*h*). Where, therefore, the date of a bill, payable three months after date, was altered from the 2nd to the 22nd of March, it was held, as between the indorsee and the acceptor, that the alteration was an immaterial alteration, the

(*y*) This section effects an alteration in the law.

(*z*) *Warrington* v. *Early*, 2 E. & B. 763; 23 L.J. Q.B. 47; and see *Hirschfield* v. *Smith*, L.R. 1 C.P. 340; 35 L.J. C.P. 177.

(*a*) *Mason* v. *Bradley*, 11 M. & W. 590; 12 L.J. Ex. 425.

(*b*) *Gardner* v. *Walsh*, 5 E. & B. 91; 24 L.J. Q.B. 285.

(*c*) *Master* v. *Miller*, 4 T.R. 320; 5 T.R. 367; 1 Smith's L.C. 747 (ed. 10); *Hirschman* v. *Budd*, L.R. 8 Ex. 171; 42 L.J. Ex. 113. See s. 64, *supra*.

(*d*) *Vance* v. *Lowther*, 1 Ex.D. 176; 45 L.J. Ex. 200.

(*e*) *Harrison* v. *Cotgreave*, 4 C.B. 562; 16 L.J. C.P. 198.

(*f*) See now sect. 64 (2) of the Act, *supra*; *Calvert* v. *Baker*, 4 M. & W. 417; 8 L.J. Ex. 40; *Tidmarsh* v. *Grover*, 1 M. & S. 735; *Desbrow* v. *Wetherby*, 1 Mood. & R. 438; *Crotty* v. *Hodges*, 4 M. & Gr. 561; 11 L.J. C.P. 289; *Burchfield* v. *Moore*, 23 L.J. Q.B. 261; 3 E. & B. 683.

(*g*) *Scholfield* v. *Londesborough* (*Earl*), (1896) A.C. 514; 65 L.J. Q.B. 593.

(*h*) *Aldous* v. *Cornwell*, *post*, p. 1160.

time of payment not being accelerated (*i*). Where a promissory note expressed no time for payment, and, while it was in the possession of the payee, the words "on demand" were added without the assent of the maker, it was held, in an action by the payee against the maker, that, as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument (*j*). An alteration or addition, moreover, to the contract, before it has been finally completed, made with the assent of the parties to be affected thereby, will not avoid the instrument, or render a fresh stamp necessary (*k*). Where a joint and several promissory note was altered after the two first makers had signed the instrument, but before the defendant had affixed his signature, it was held that the note was not vitiated as regarded the defendant, and that no fresh stamp was requisite (*l*). Where a bill was made payable on the 1st of January, and the person to whom it was directed struck out the word January, and inserted March, and then accepted the bill, and sent it to the drawer, who, perceiving the enlarged acceptance, struck out March and again inserted January, and at that time sent the bill for payment, which the acceptor refused, whereupon the holder of the bill again struck out January, and left the bill payable in March, as the acceptor had accepted it, it was held that the acceptor was responsible for the non-payment of the bill on the 1st of March, pursuant to his original accept ance (*m*). Where the holder of a bill for value agreed to take a new bill, and a bill at three months was sent him, to which he objected, requiring a bill at two months, and the three was accordingly altered to two, and the bill made payable at two instead of three months, it was held that the alteration did not invalidate the bill (*n*). Where the defendant signed an acceptance, leaving the amount in the body of the bill blank, but put the sum for which he desired to accept in the margin, and handed it to the drawee, who filled it up for a larger amount, and altered the figures in the margin accordingly; it was held that the defendant was liable to *bonâ fide* holders for value for the larger amount, because the marginal figures were no essential part of the bill (*o*).

Whenever the plaintiff has altered a bill or note so as to vitiate the security, and deprive the defendant of a remedy which he would otherwise have had upon the instrument against the

(*i*) *Parry* v. *Nicholson*, 13 M. & W. 778; 14 L.J. Ex. 119.
(*j*) *Aldous* v. *Cornwell*, L.R. 3 Q.B. 573; 37 L.J. Q.B. 201.
(*k*) *Fitch* v. *Jones*, 5 E. & B. 238; 24 L.J. Q.B. 293.
(*l*) *Wright* v. *Inshaw*, 1 Dowl. N.S. 802.
(*m*) *Price* v. *Shute*, cited 4 T.R. 336.
(*n*) *Tarleton* v. *Shingler*, 7 C.B. 812.
(*o*) *Garrard* v. *Lewis*, 10 Q.B.D. 30.

parties whose names are upon the face of it, the plaintiff will not only be deprived of all right of action upon the bill, but he will also lose all remedy for the recovery of the debt for which the bill was given (*p*). But, if the defendant has assented to the alteration, and the security is vitiated for want of a new stamp, or the bill has been accidentally or ignorantly altered by the plaintiff, without any fraudulent intent, and the defendant's remedy against any other parties is not affected by the alteration, the plaintiff's right of action for the recovery of the debt on account of which the bill was given is not discharged (*q*). Where a sum of 250*l.* had been advanced to a banker upon the security of a promissory note, and the note was subsequently altered by the parties, and vitiated by reason of there being no fresh stamp, it was held that the 250*l.* might be recovered independently of the note, upon a common count for money lent (*r*). And, where the names of prior indorsers of a bill had been struck out by mistake, it was held that the erasure might be corrected (*s*). It lies upon the party suing upon a bill or note to account for any material alteration appearing upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument, or render a fresh stamp necessary (*t*), unless the making of the bill, as set out by the plaintiff, is admitted on the record, the defendant merely denying the indorsement to the plaintiff (*u*), or the alteration is immaterial, and does not affect the plaintiff's right of action (*x*).

If a bill of exchange or note is altered in any material particular, and the alteration is apparent (see sect. 64, p. 1158), the remedy of the *bonâ fide* holder for value is confined to a right to recover the consideration for the bill as between himself and the party from whom he received it. A similar remedy may be resorted to by each indorsee against his immediate indorser, till the party is reached through whose fraud or laches the alteration was made; and the loss must rest with him, as it was his duty to have preserved the instrument in its original state (*y*). A Bank

(*p*) *Alderson* v. *Langdale*, 3 B. & Ad. 660; 1 L.J. K.B. 273.

(*q*) *Atkinson* v. *Hawdon*, 2 Ad. & E. 628; 4 L.J. K.B. 85; *Sloman* v. *Cox*, 1 C. M. & R. 471; 4 L.J. Ex. 7.

(*r*) *Sutton* v. *Toomer*, 7 B. & C. 416; 6 L.J. (O.S.) K.B. 49.

(*s*) *Wilkinson* v. *Johnston*, 3 L.J. (O.S.) K.B. 58; 3 B. & C. 428.

(*t*) *Knight* v. *Clements*, 8 Ad. & E. 215; 7 L.J. Q.B. 144; *Henman* v. *Dickinson*, 5 Bing. 183; 7 L.J. (O.S.) C.P. 68; *Clifford* v. *Parker*, 3 Sc. N.R. 233; 10 L.J. C.P. 227; *Cariss* v. *Tattersall*, 3 Sc. N.R. 257; 10 L.J. C.P. 187.

(*u*) *Sibley* v. *Fisher*, 7 Ad. & E. 444; 7 L.J. Q.B. 2.

(*x*) *Falmouth* (*Earl*) v. *Roberts*, 9 M. & W. 469; 11 L.J. Ex. 180; and even where the alteration is material, a written contract may be looked at to see the terms of a parol contract: *Pattinson* v. *Luckley*, L.R. 10 Ex. 330; 44 L.J. Ex. 180, *ante*, p. 174.

(*y*) *Burchfield* v. *Moore*, 3 E. & B. 687; 23 L.J. Q.B. 263. See sect. 64, p. 1158.

of England note which had been materially altered was paid by the defendant to the plaintiffs, both parties believing the note to be good; the plaintiffs, who were bankers, paid away the note, which was afterwards presented to the Bank of England; there was some delay in tracing the note to the defendant; it was held that the doctrine of notice of infirmity did not apply to a Bank of England note, that before the Bills of Exchange Act, 1882, the Bank was not liable on the altered note (*z*), that sect. 64 (p. 1158), was not retrospective, and that, even if it were so, the "necessary modifications" referred to (*a*), would exclude Bank of England notes, and that, even if the proviso in sect. 64 would otherwise have affected the altered bank note, the alteration was "apparent," as the Bank of England could at once perceive it though others might not, and, consequently, the plaintiffs, having received a worthless note, were entitled to recover against the defendant in an action for money had and received (*b*).

Lost instruments.—By the Bills of Exchange Act, 1882, s. 69, "Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so."

By sect. 70, "In any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question."

If the bill or note was not originally negotiable, that is, payable to bearer or to order, the loss of it is no defence to an action upon the instrument (*c*). But, if a negotiable bill or note has been lost, the loss, if permitted to be set up, is an answer as well to an action upon the instrument as for the recovery of the debt for which it was given (*d*).

Damages recoverable on the dishonour of bills.—By the Bills of Exchange Act, 1882, s. 57, "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

"(1) The holder may recover from any party liable on the

(*z*) *Suffell* v. *Bank of England*, 9 Q.B.D. 555; 51 L.J. Q.B. 401.
(*a*) Sect. 89, *ante*, p. 1148.
(*b*) *Leeds & County Bank* v. *Walker*, 11 Q.B.D. 84; 52 L.J. Q.B. 90.
(*c*) *Charnley* v. *Grundy*, 14 C.B. 614; 23 L.J. C.P. 121.
(*d*) *Hansard* v. *Robinson*, 7 B. & C. 90; 5 L.J. (O.S.) K.B. 242; *Crowe* v. *Clay*, 9 Exch. 608; 23 L.J. Ex. 150.

bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—(a) The amount of the bill; (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case (*e*); (c) The expenses of noting (*f*), or, when protest is necessary (*g*), and the protest has been extended, the expenses of protest.

"(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

"(3) Where by this Act interest may be recovered as damages such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper."

Notwithstanding the provisions of sub-s. (1), the drawer of a foreign bill is entitled, upon its being dishonoured and protested here, to recover from the acceptor damages in the nature of re-exchange which the drawer is by the foreign law liable to pay to the holder of the bill (*h*). But protest for better security where the acceptor becomes insolvent before maturity is not necessary, and the expenses of such a protest are not recoverable by the drawer from the acceptor (*i*). When a bill has been dishonoured abroad the only damages are the amount of re-exchange with interest thereon, under sub-s. (2), and not the amount of the bill and interest under sub-s. (1) (*k*).

Damages for not meeting bills at maturity.—Where the defendants, a banking company, had, under a special agreement, accepted the plaintiffs' bills, but their bank stopped before the bills arrived at maturity, and the plaintiffs arranged with another house to take up the bills, and paid commission, and also paid the expenses of protesting the bills and of telegraphing, it was held that, although as a general rule in an action on a bill of

(*e*) *London & Universal Bank* v. *Clancarty*, (1892) 1 Q.B. 689; 61 L.J. Q.B. 225; *Lawrence* v. *Willcocks*, (1892) 1 Q.B. 696; 61 L.J. Q.B. 519.

(*f*) *Dando* v. *Boden*, (1893) 1 Q.B. 318; 62 L.J. Q.B. 339.

(*g*) As to what protest is necessary, see *English Bank of River Plate, In re*, (1893) 2 Ch. 438; 62 L.J. Ch. 578.

(*h*) *Gillespie, In re*, 18 Q.B.D. 286; 56 L.J. Q.B. 74.

(*i*) *English Bank of River Plate, In re*, *supra*.

(*k*) *Commercial Bank of Australia, In re*, 36 Ch.D. 522; 57 L.J. Ch. 131.

exchange by an indorsee against the acceptor neither general nor special damages can be recovered, yet, under the above circumstances, the commission and other expenses were recoverable, as the reasonable and natural consequences of the defendants' breach of contract (*l*).

Specific appropriation of securities.—Securities held by an acceptor against his acceptances are available to the billholders if both drawer and acceptor become insolvent, on the ground that the equity of the drawer to the surplus produce of the securities after answering the demand upon them can only be accomplished by first satisfying the amount due on the bills (*m*). There must not only be an insolvency, but both estates must be in a course of judicial administration (*n*), and the mere fact that the acceptor or drawer, a joint-stock company, has been ordered to be wound up, is not sufficient proof of insolvency (*o*).

Where only one of the parties is within the jurisdiction of the court, and the other is not, the latter is still free to dispose of his property as he sees fit, and he may object to his property being appropriated in a particular manner, and may recall a previous direction respecting it (*p*).

In a transaction between principal and agent a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods is binding on the agent, and he cannot set up a general lien against such direction (*q*). But as between vendor and purchaser where bills are drawn by the vendor upon the purchaser, with directions to place them to the account of the shipment of goods, and the bills of lading are handed to the purchaser, there is no specific appropriation, but the goods pass by the bills of lading (*r*).

If the securities are not realized until after the billholder has proved against the estate, his proof must be reduced by the amount received from the securities, and any dividend received on the excess of the original over the reduced proof must be refunded (*s*).

Merchants frequently give directions that a bill given by them

(*l*) *Prehn* v. *Royal Bank of Liverpool*, L.R. 5 Ex. 92; 39 L.J. Ex. 41.

(*m*) *Waring, Ex parte*, 19 Ves. 345; see *Banner* v. *Johnson*, L.R. 5 H.L. 157; 40 L.J. Ch. 730; *Mann, Ex parte*, 5 Ch. D. 367; 46 L.J. Bankr. 107; *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 App.Cas. 366; *Dever, Ex parte* (No. 2), 14 Q.B.D. 611; 54 L.J. Q.B. 390. As to what amounts to a specific appropriation, see *Banner, Ex parte*, 2 Ch.D. 278; 45 L.J. Bankr. 93.

(*n*) *General South American Co., Ex parte*, L.R. 10 Ch. 635.

(*o*) *Hickie & Co.'s Case*, L.R. 4 Eq. 226; 36 L.J. Ch. 809.

(*p*) *General South American Co., Ex parte, supra.*

(*q*) *Frith* v. *Forbes*, 4 De G. F. & J. 409; 32 L.J. Ch. 10. See *Dever, Ex parte*, 13 Q.B.D. 766.

(*r*) *Entwistle, In re*, 3 Ch.D. 477.

(*s*) *Barned's Banking Co., In re, Joint Stock Discount Co., Ex parte*, L.R. 10 Ch. 198; 44 L.J. Ch. 494.

shall be provided for by a certain specified cargo by a certain ship, an agreement which is not in itself an equitable lien, but may be part of the evidence tending to show an intention to create one. So where the consignor had drawn bills in favour of Frith & Co., and wrote to the consignees about these bills in a manner showing an intention to give Frith & Co. an equitable interest in the cargo referred to, it was held that the cargo was effectually appropriated to meet the bills, and that Frith & Co. had a lien upon it in priority to the consignees' claim for the balance due to their general account as consignees (*t*).

But where the consignor and consignee were part owners of a cargo, and the consignor drew bills to his own order against the cargo, and indorsed them to the plaintiffs, who knew nothing about any letters giving them any lien, and the plaintiffs claimed a lien; it was held that they had no lien in priority to the consignee's general account. The mere fact that there appear upon a bill the words "which please place to cargo per A.," does not give the billholder a lien upon that cargo (*u*).

Parties to bills and notes—Agents—Partners—Capacity and authority of parties—Signature.—By the Bills of Exchange Act, 1882, s. 22: "(1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations (*x*).

"(2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

By sect. 23, "No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that (1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name; (2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm."

By sect. 24 (*y*), "Subject to the provisions of this Act, where a

(*t*) *Frith* v. *Forbes*, 4 De G. F. & J. 409; 32 L.J. Ch. 10. This case appears to rest upon its own peculiar facts. See *Dever, Ex parte*, 13 Q.B.D. 766, and the other cases cited. *Ranken* v. *Alfaro*, 5 Ch.D. 786; 46 L.J. Ch. 832.

(*u*) *Robey & Co.* v. *Ollier*, L.R. 7 Ch. 695; *Dever, Ex parte, supra; Phelps & Co.* v. *Comber*, 29 Ch.D. 813; 54 L.J. Ch. 1017; *Brown & Co.* v. *Kough*, 29 Ch.D. 848; 54 L.J. Ch. 1024.

(*x*) As to signing by corporations, see *ante*, p. 1108, note (*g*).

(*y*) As to this section, see Addison on Torts, 538 (ed. 7).

signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

"Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery."

By sect. 25, "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."

By sect. 26, "(1.) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. (2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

By sect. 56, "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course" (*z*).

The liabilities *inter se* of successive indorsers of a bill must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law merchant, whereby a prior indorser must indemnify a subsequent one; but this may be qualified or even inverted by considering the true relations between the parties (*a*).

When the drawee is requested to pay a certain sum of money "on behalf," or "on account," of a named third party, and the drawee accepts in his own name on behalf of such third party, and the surrounding circumstances show that he had authority so to accept, and that he has bound such third party by his acceptance, he will not himself be personally liable upon his acceptance (*b*); but, if the bill is drawn upon him without qualification, and he accepts in his own name, he cannot exempt himself from the

(*z*) See *Steele* v. *McKinley*, 5 App.Cas. 574; *Edwards* v. *Barnard*, 32 Ch.D. 447; 55 L.J. Ch. 935; *Jenkins* v. *Comber*, (1898) 2 Q.B. 168; 67 L.J. Q.B. 780.

(*a*) *Macdonald* v. *Whitfield*, 8 App.Cas. 733; 52 L.J. P.C. 70.

(*b*) *Leadbitter* v. *Farrow*, 5 M. & S. 345, *ante*, p. 325.

ordinary liability of an acceptor by saying that he accepts on behalf of some third party on whom the bill is not drawn (*c*). If a bill of exchange is addressed to several persons, and one of them alone accepts it, he is personally responsible upon the bill (*d*). Where a bill upon the face of it purports to be accepted "per procuration," that circumstance is a notice to whoever takes the bill that it has been accepted by an agent acting under an authority given to him by a principal; and the holder cannot maintain an action against the principal, if the authority has been exceeded (*e*).

If a party signs a promissory note whereby he promises in his own name to pay a sum of money on behalf of a third party, he will himself be personally responsible for the payment of the money (*f*), unless it plainly appears from the surrounding circumstances that he contracted as agent, and bound his principal by the contract (*g*). Parties who promise in their own names to pay money cannot exonerate themselves from personal liability by describing themselves as "trustees," "treasurers," "directors," or "secretaries" of a named charity, company, or association (*h*), or as "executors" (*i*). But, if the promise is, on the face of the note, expressed to be made by a principal, and the party whose signature is attached to it signs the name of the principal to the instrument, adding his own name only as agent, he will, as we have seen, incur no personal liability upon the note, provided he was duly authorized to act in the matter (*k*).

A partner in a mercantile or trading firm may draw, accept, or indorse bills of exchange and promissory notes in the trading name of the firm so as to bind the partnership, because the drawing, accepting, and negotiating bills and notes are usual and necessary for the purpose of carrying on the trade and business of a mercantile firm. But it is not every partnership which gives such an authority. Solicitors and professional men in partnership have no such power; nor have brokers who are in partnership for the mere purpose of obtaining orders on commission and dividing the expenses (*l*). Every one of the partners in a mercantile firm is liable upon such bills or notes, whether his individual name is or is not used in the

(*c*) *Mare* v. *Charles*, 5 E. & B. 981; 25 L.J. Q.B. 119; *Nicholls* v. *Diamond*, 9 Exch. 154; 23 L.J. Ex. 1; *ante*, p. 325.

(*d*) *Owen* v. *Van Uster*, 10 C.B. 318; 20 L.J. C.P. 61; but see *Edwards* v. *Barnard*, *ante*, p. 1166.

(*e*) *Stagg* v. *Elliott*, 12 C.B. N.S. 373; 31 L.J. C.P. 260; *Eyre* v. *M'Dowell*, 14 Ir. C.L.R. 314. Sect. 25, *ante*, p. 1166.

(*f*) *Healey* v. *Story*, 3 Exch. 3; 18 L.J. Ex. 8, *ante*, p. 325.

(*g*) *Agg* v. *Nicholson*, 1 H. & N. 165; 25 L.J. Ex. 348; *Lindus* v. *Melrose*, 3 H. & N. 137; 27 L.J. Ex. 327.

(*h*) *Price* v. *Taylor*, 5 H. & N. 540; 29 L.J. Ex. 331; *Bottomley* v. *Fisher*, 1 H. & C. 211; 31 L.J. Ex. 417; *Dutton* v. *Marsh*, L.R. 6 Q.B. 361; 40 L.J. Q.B. 175.

(*i*) *Childs* v. *Monins*, 5 Moo. 282.

(*k*) *Buckley*, *Ex parte*, 14 M. & W. 469; 14 L.J. Ex. 341; *Alexander* v. *Sizer*, L.R. 4 Ex. 102; 38 L.J. Ex. 59; *ante*, pp. 321—326.

(*l*) See sect. 23, *supra*; *Yates* v. *Dalton*, 28 L.J. Ex. 69; *Forster* v. *Mackreth*, L.R. 2 Ex. 163; 36 L.J. Ex. 94.

collective name of the firm, and whether it does or does not appear upon the face of the instrument, and whether such partner is dormant and secret, or a known and active member of the co-partnership, and whether the proceeds of such bill or note are dedicated and applied to partnership purposes, or to the private use of the individual partner (*m*). Where one of the acting partners of a firm accepted a bill in the name of the firm to obtain a loan, and then applied the money to his own private use, it was held that a secret partner, not known at the time of the acceptance to be a partner in the firm, might be sued upon the bill (*n*). And, where a bill was indorsed by a partner in the trading name of the firm, it was held that a person not known to be a partner at the time of the indorsement might be sued upon the instrument (*o*). "There may be partnerships," observes Lord Ellenborough, "where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name of the firm or partnership" (*p*). But, if the taker or holder thereof knew at the time he received the bill or note that the transaction was not a partnership transaction, but the private affair and dealing of the single partner, the other members of the firm will not be liable thereon. The bill or note must, in order to bind the partnership, be made, accepted, or indorsed in the trading name of the firm, or in some adopted name, recognised and used by the partnership in its ordinary course of business; or, if made, accepted, or indorsed by the one partner in his own name, the drawing, acceptance, or indorsement must be expressed to be made by him for, and as the act of, the firm at large (*q*). Where a signature to a bill is common to an individual partner and to the firm, a *bonâ fide* holder for value without notice has not the option to sue either the individual or the firm. The presumption is that the bill was given for the firm, but this may be rebutted, and if so it is immaterial that the holder took it as the bill of the firm (*r*). Where a member of a firm has no authority to bind his partners by drawing or accepting bills, he cannot bind them by giving a post-dated cheque (*s*).

Where a bill of exchange was drawn upon a firm, and accepted by one of the partners in his own name, it was held that he must be understood to exercise his power to bind his co-partners, and to

(*m*) *Lloyd* v. *Ashby*, 2 B. & Ad. 23; 9 L.J. (O.S.) K.B. 144; *Brown* v. *Kidger*, 3 H. & N. 853; 28 L.J. Ex. 66.

(*n*) *Wintle* v. *Crowther*, 1 Cr. & J. 316; 9 L.J. (O.S.) Ex. 65.

(*o*) *Vere* v. *Ashby*, 10 B. & C. 288; 8 L.J. (O.S.) K.B. 57.

(*p*) *Swan* v. *Steele*, 7 East, 210; *Thicknesse* v. *Bromilow*, 2 Cr. & J. 425.

(*q*) *Smith* v. *Jarves*, 2 Raym. 1484; *Galway* v. *Matthew*, 1 Camp. 403.

(*r*) *Yorks Banking Co.* v. *Beatson*, 5 C.P.D. 109; 49 L.J. C.P. 380.

(*s*) *Forster* v. *Mackreth*, L.R. 2 Ex. 163; 36 L.J. Ex. 94.

accept the bill according to the terms in which it is drawn (*t*). Thus, where a bill of exchange was addressed to "James Masterman & Co.," and was accepted by James Masterman only, without the words "and Co.," it was held that the acceptance was the acceptance of the firm, and that all the partners were liable upon it (*u*). If, however, the bill or note is drawn, or made, or accepted, or indorsed by the one partner in his own name only without mention of the partnership, and without its being expressed on the face of the instrument that the drawing or making, acceptance or indorsement, is made or done for the firm, the one partner whose name appears upon the instrument is the only person who can be sued thereon, although the proceeds thereof have been applied to the joint purposes of the firm, unless the partnership has been in the habit of paying bills and notes so made and negotiated, and has consequently adopted the name of the partner as the name of the firm in bill transactions (*x*). A bill of exchange was drawn against a firm of B. & Co. B., one of the partners, accepted the bill, signing the name of the firm and adding his own underneath: it was held that the acceptance was that of the firm, and that the addition of B.'s name did not make him separately liable (*y*). If the firm carries on business in the name of an individual partner, his acceptance or indorsement will be treated as the acceptance or indorsement of the firm; and all the partners, consequently, will be liable upon the instrument (*z*). The plaintiff pressed C., his partner, for payment of a debt, and C. gave him two bills purporting to be accepted by the defendant's firm, and the plaintiff at first believed they were so accepted; in fact, one partner had accepted without the authority of the other. There was no drawer's name, and the plaintiff subsequently, knowing something was wrong, and therefore knowing that he had no authority, filled in the name of his own firm. It was held he could not recover on the bills against the partner who had not authorised the acceptance (*a*).

A partnership may have divers trading names, and it may be bound by the use of any one of them by one of the partners. If a firm has been in the habit of paying bills and notes, made, accepted, or indorsed in a name which is not the ordinary trading name of the co-partnership, it will be deemed to have given an implied authority to such partner to use such name, as the name

(*t*) *Mason* v. *Rumsey*, 1 Camp. 384; but see sect. 23, *supra*, p. 1165.

(*u*) *Wells* v. *Masterman*, 2 Esp. 730. See sect. 23, *supra*, p. 1165.

(*x*) *Emly* v. *Lye*, 15 East, 7.

(*y*) *Edwards* v. *Barnard*, 32 Ch.D. 447; 55 L.J. Ch. 935.

(*z*) *South Carolina Bank* v. *Case*, 8 B. & C. 427; 5 L.J. (O.S.) K.B. 364; and see *Stephens* v. *Reynolds*, 5 H. & N. 513; 29 L.J. Ex. 278.

(*a*) *Hogarth* v. *Latham*, 3 Q.B.D. 643; 47 L.J. Q.B. 339.

of the firm, in bill transactions, and will be as much bound thereby as if the ordinary trading name of the firm had been made use of (*b*). If a dormant or secret partner has contracted in the name of the firm, or in an adopted name, he may be sued in his real name (*c*). When any one of the partners has accepted a bill of exchange, or endorsed a promissory note, in a name differing from the ordinary trading name of the firm, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the acceptor or indorser must be taken to have accepted or issued the bill or note on his own account, and not in the exercise of his general authority as a partner (*d*). Where the plaintiff sued as indorsee for value of a bill of exchange drawn on C. Brothers, accepted by an agent (appointed for the purpose of liquidating the affairs of C. Brothers) in his own name and that of the defendant, a former partner, but the defendant knew nothing about it, it was held that the agent had no authority to accept in defendant's name; and that, not being a partner, he had no authority to accept bills drawn on the firm (*e*).

Bills and notes by trustees or directors of co-partnerships.—In order to render the shareholders or co-partners liable upon bills of exchange or promissory notes, accepted, made, or indorsed by the trustees or directors in the trading name of the co-partnership, it must be made out affirmatively by the parties suing upon such bills or notes that the directors had either an express or an implied authority to bind the other members by drawing, accepting, or making, or indorsing bills and notes, either by showing that companies instituted for similar purposes have constantly been in the habit of vesting such a power in the hands of their directors, or that it was absolutely necessary for the purpose of carrying on the concern that such a power should be placed in their hands (*f*). If the directors are authorised to issue bills, they must be drawn in conformity with mercantile custom and usage (*g*).

Bills and notes by corporations.—When a corporation is established for trading purposes, it is from its nature capable of drawing a bill of exchange, and making the promise implied by law from making a bill, and is liable to be sued on the bill (*h*).

(*b*) *Williamson* v. *Johnson*, 1 B. & C. 146; 1 L.J. (O.S.) K.B. 65.

(*c*) *Ball* v. *Gordon*, 9 M. & W. 345; 11 L.J. Ex. 221.

(*d*) *Faith* v. *Richmond*, 11 Ad. & E. 339; 9 L.J. Q.B. 97; *Kirk* v. *Blurton*, 9 M. & W. 284; 12 L.J. Ex. 117; *Norton* v. *Seymour*, 3 C.B. 792; 16 L.J. C.P. 100; *Stephens* v. *Reynolds*, 5 H. & N. 517; 29 L.J. Ex. 278.

(*e*) *Odell* v. *Cormack Brothers*, 19 Q.B.D. 223.

(*f*) *Dickinson* v. *Valpy*, 10 B. & C. 137; 8 L.J. (O.S.) K.B. 51; *Steele* v. *Harmer*, 14 M. & W. 831; 15 L.J. Ex. 217.

(*g*) *State Fire Ins. Co., In re*, 32 L.J. Ch. 300.

(*h*) *Murray* v. *East India Co.*, 5 B. & Ald. 204. See sect. 22, *ante*, p. 1165, and sect. 91 (2), *ante*, p. 1108.

Bills of exchange and promissory notes by registered companies.—By sect. 47 of 25 & 26 Vict. c. 89, a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed, on behalf of the company if it has been made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under the express or implied authority of the company. This section does not confer on all companies registered under the Act the power of issuing bills of exchange, such a power only existing where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred (*i*). A promise by directors in their own names on behalf of the company will be binding on the company under this section, and will not, if the directors were duly authorised to make the promise, render them personally responsible (*k*). But, if any director, manager, or officer of any registered limited company, or any person on its behalf, signs, or authorises to be signed, on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, or order for money or goods, or issues, or authorises to be issued, any bill of parcels, invoice, receipt or letter of credit of the company, wherein the name of the company is not mentioned with the word "limited" after it, he is (s. 42) personally liable to the holder of the bill, &c., for the amount thereof, unless the same is duly paid by the company (*l*). If the directors are, by the deed of settlement or articles of association, absolutely prohibited from borrowing money or issuing bills of exchange or promissory notes, the company cannot be made responsible upon bills or notes issued in defiance of the prohibition (*m*), unless the shareholders acquiesce in the proceeding, and do not call the directors to account (*n*). If bills or notes issued by directors in their own names on behalf of the company are drawn or made without authority, or are informally drawn, and are not, consequently, binding upon the company, the parties who have signed them will themselves be responsible upon them (*o*). When the directors are expressly authorised to accept bills or issue promissory notes on behalf of the company, the company will be bound if the authority is substantially acted upon. It need not

(*i*) *Peruvian Ry. Co.* v. *Thames & Mersey Marine Ins. Co.*, L.R. 2 Ch. 617; 36 L.J. Ch. 864.

(*k*) *Lindus* v. *Melrose*, 3 H. & N. 177; 27 L.J. Ex. 327; *Aggs* v. *Nicholson*, 1 H. & N. 165; 25 L.J. Ex. 348; *Forbes* v. *Marshall*, 11 Exch. 166; 24 L.J. Ex. 305; *Halford* v. *Cameron's, &c. Co.*, 16 Q.B. 442; 20 L.J. Q.B. 160; *Edwards* v. *Cameron's, &c. Co.*, 6 Exch. 269; *Alexander* v. *Sizer*, L.R. 4 Ex. 102; 38 L.J. Ex. 59.

(*l*) *Penrose* v. *Martyn*, 28 L.J. Q.B. 28; E. B. & E. 499.

(*m*) *Balfour* v. *Ernest*, 5 C.B. N.S. 601; 28 L.J. C.P. 170.

(*n*) Martin, B., *Forbes* v. *Marshall*, 11 Exch. 179; 24 L.J. Ex. 305.

(*o*) *Penkivil* v. *Connell*, 5 Exch. 381; 19 L.J. Ex. 305; *Dutton* v. *Marsh*, L.R. 6 Q.B. 361; 40 L.J. Q.B. 175.

be exercised in the very terms in which it is given, or be strictly or technically accurate in point of form (*p*); and, if there has been a plain departure from the terms of the authority, and the shareholders have acquiesced in it, the company will be bound (*q*). A proviso in a bill of exchange drawn by a joint-stock company, limiting the liability thereunder, is repugnant and void (*r*). Where a company is being voluntarily wound up, and there are four liquidators, one of them cannot, in the absence of any authority from the company, and solely upon the strength of a general resolution of his co-liquidators, accept bills on behalf of the company (*s*).

Conversion of bills and notes.—A man who holds a bill of exchange for a particular purpose has no right, without authority, to go and receive money on the bill, and, if he does so, he is responsible for a conversion of the instrument (*t*). If, therefore, a bill of exchange or negotiable security is delivered into the hands of an agent or mandatory, that he may get it discounted, and he neglects to do so, and pays away the bill or note in furtherance of his own purposes, he is responsible for a conversion of the security (*u*); but if he pursues the authority given him, and gets the bill discounted, but misapplies the proceeds, he is not responsible for the conversion of the security, but for the misapplication of the money (*x*).

Conversion of lost or stolen bank-notes or negotiable securities.—If a bill of exchange, bank-note, or promissory note is lost, and the finder refuses to deliver the instrument to the owner on demand, he is guilty of a conversion of it, and is responsible in damages to the extent of the full value of the security. If the instrument is payable to bearer, and the finder, before any demand is made upon him, delivers the note to another, he is exempt from all further responsibility in respect of it (*y*). If the person to whom it is transferred took the note with knowledge of the infirmity of the title of the person from whom he received it (*z*), or if it is transferred to him for the mere purpose of enabling him to sue upon it, and he has given no value for the instrument, he will have no

(*p*) *Thompson* v. *Wesleyan Newspaper Assoc.*, 8 C.B. 861; 19 L.J. C.P. 114; *Land Credit Co. of Ireland, In re*, L.R. 4 Ch. 460; 40 L.J. Ch. 341.

(*q*) *Allen* v. *Sea, &c. Ins. Co.*, 9 C.B. 578; 19 L.J. C.P. 305.

(*r*) *State Fire Ins. Co., In re*, 32 L.J. Ch. 300; see sect. 3, *ante*, p. 1107.

(*s*) *London & Mediterranean Bank, In re*, L.R. 5 Ch. 567; 40 L.J. Ch. 26; *London & Mediterranean Bank, In re, Birmingham Banking Co., Ex parte*, L.R. 3 Ch. 651; 36 L.J. Ch. 807; *London & Mediterranean Bank, In re*, L.R. 6 Ch. 206; 40 L.J. Ch. 26.

(*t*) *Alsager* v. *Close*, 10 M. & W. 583; 12 L.J. Ex. 50.

(*u*) *Cranch* v. *White*, 1 Bing. N.C. 414; *Atkins* v. *Owen*, 4 Ad. & E. 819; 6 L.J. K.B. 267.

(*x*) *Palmer* v. *Jarmain*, 2 M. & W. 282.

(*y*) *Canot* v. *Hughes*, 2 Bing. N.C. 448; 5 L.J. C.P. 177. See Addison on Torts, 503 (ed. 7).

(*z*) *Burn* v. *Morris*, 2 Cr. & M. 579; 3 L.J. Ex. 193; *Rice* v. *Reed*, (1900) 1 Q.B. 54; 69 L.J. Q.B. 33.

better title than the person from whom he has received it (*a*), and will be responsible for a conversion if he fails to deliver it up to the owner on demand. But if he is a *bonâ fide* holder for value, and took and discounted the note without any knowledge that the person from whom he received it had no title to it, he becomes the lawful owner of the instrument, and may retain it or pay it away (*b*). If he has given full value for the instrument, that is in general conclusive evidence of *bona fides*. If, on the other hand, he has paid a small sum for a bank-note of large value, payable on demand, that would be evidence the other way (*c*). The whole burthen of impeaching the title of the holder of the instrument falls upon the plaintiff, who disputes that title (*d*). It is not enough for him to show that he lost the instrument, or that it has been stolen from him, and that immediately after the loss or the robbery it was found to be in possession of the defendant (*e*). The latter is not bound, from proof of those circumstances alone, to account for his possession of the security (*f*). But if the note is one of unusual value, and is found in the possession of the defendant immediately after the loss, and he declines to say from whom he received it, or to give reasonable information of the circumstances under which he became possessed of it, he would be required to prove that he gave value for the instrument (*g*); and if it was payable to bearer on demand, and he gave much less than its real value, and took it from a total stranger, without making any inquiry, and under circumstances which ought to have aroused suspicion in the mind of any prudent person, this will be evidence to show that he took it with knowledge of the infirmity of the title of the person from whom he received it, and to fix him with that infirmity of title. Gross negligence and want of caution are not in themselves sufficient to defeat the title of the holder, where he has given value for the security (*h*); but gross negligence may be evidence of *mala fides*, though it is not the same thing (*i*).

In the case of stolen notes, if the possession is recent, and the

(*a*) *Bailey* v. *Bidwell*, 13 M. & W. 73; 13 L.J. Ex. 264.

(*b*) *Miller* v. *Race*, 1 Burr. 452; 1 Smith's L.C. 747 (ed. 10); *Grant* v. *Vaughan*, 3 Burr. 1524; *Lawson* v. *Weston*, 4 Esp. 57; see sect. 29, p. 1119, and sect. 38.

(*c*) *Raphael* v. *Bank of England*, 17 C.B. 173; 25 L.J. C.P. 33.

(*d*) *Worc. Co. Bank* v. *Dorch. & Milt. Bank*, 10 Cush. 489; *Wyer* v. *Dorch. &c. Bank*, 11 Cush. 51; see sect. 30 of the Act, *ante*, p. 1121.

(*e*) *Miller* v. *Race*, *supra*. But see sect. 30, *ante*, p. 1121.

(*f*) *King* v. *Milsom*, 2 Camp. 5. But see sect. 30, *ante*, p. 1121.

(*g*) *Bailey* v. *Bidwell*, 13 M. & W. 76; 13 L.J. Ex. 264.

(*h*) Bayley, J., *Backhouse* v. *Harrison*, 5 B. & A. 1105; *Raphael* v. *Bank of England*, *supra*, overruling *Snow* v. *Leatham*, 2 C. & P. 317; *Snow* v. *Peacock*, 3 Bing. 406; 4 L.J. (O.S.) C.P. 120; and *Easley* v. *Crockford*, 10 Bing. 243; 3 L.J. C.P. 22.

(*i*) *Goodman* v. *Harvey*, 4 Ad. & E. 870; 6 L.J. K.B. 260; *Arbouin* v. *Anderson*, 1 Q.B. 498; 11 L.J. Q.B. 31.

surrounding circumstances such as to show that the defendant stole the note, or received it into his possession knowing it to have been stolen, the plaintiff cannot maintain his action unless he has prosecuted for the felony. In all cases he should use diligence to apprise the public of his loss (*k*).

(*k*) *Beckwith* v. *Corral*, 3 Bing. 444; 4 L.J. (O.S.) C.P. 139.

CHAPTER VII.

CONTRACTS OF ASSOCIATION.

THE subjects of partnership and joint stock companies have, because of their magnitude and perplexity, been omitted from the present edition, and the reader must be referred to those works which deal specially with these subjects, but the questions relating to contracts made by and with partnerships will be found in their proper places throughout the work.

OF MARRIAGE.

Contracts in restraint of marriage are void, as being contrary to the public policy of the law (*a*). A covenant or promise, therefore, which restrains a party from marrying AT ALL, unless he marries a particular person, is null and void (*b*). If the restraint is not to operate for an indefinite period, but only for six years, there must be reasonable grounds to restrain the party for that period (*c*). But the law recognizes in a husband a species of interest in the widowhood of his wife, which makes it lawful for him to grant an annuity to his widow, to continue so long only as she remains unmarried (*d*).

Marriage brokerage contracts, or contracts for the payment of money, or the conveyance of property, or the performance of some act or duty, on the condition of the procurement of a particular marriage, are void, as being contrary to public policy. If, therefore, a man binds himself to pay a sum of money to another, on condition that he will bring about a particular marriage, the

(*a*) *Baker* v. *White*, 2 Vern. 215; *Hartley* v. *Rice*, 10 East, 22; *Bonfield* v. *Hassell*, 32 L.J. Ch. 475; 32 Beav. 217; *Robinson* v. *Ommaney*, 23 Ch.D. 285; 52 L.J. Ch. 440.

(*b*) *Lowe* v. *Peers*, 4 Burr. 2230—2234.

(*c*) *Hartley* v. *Rice*, 10 East, 22. But a covenant to pay a woman a sum of money, so long as she continues sole and unmarried, is not illegal: *Gibson* v. *Dickie*, 3 M. & S. 463.

(*d*) *Lloyd* v. *Lloyd*, 21 L.J. Ch. 596; 2 Sim. N.S. 255; *Newton* v. *Marsden*, 2 Jo. & H. 356; 31 L.J. Ch. 690.

instrument is void (*e*), whether the condition, or cause, or consideration for the bond or covenant does or does not appear upon the face of it (*f*). A bond, given by the husband to the wife's father to induce the latter to give his consent to the marriage, has been held to be in the nature of a marriage brokerage contract, and contrary to public policy (*g*). And there is no difference between a bond to pay money, and a bond to forgive a debt due, or a covenant or agreement to release an obligation, duty, or liability, as an inducement for the consent of parents and guardians. Therefore, where a mother said, "You shall not have my daughter, unless you will agree to release all accounts respecting my expenditure of her money," and the agreement was given, it was held to be within the mischief of a marriage brokerage contract (*h*).

A lease granted in consideration of the procurement of a particular marriage will be set aside, and the estate discharged of the lease (*i*).

Bonds and unilateral covenants to marry.—If a man of full age binds himself by deed to marry a woman by a day named, he is responsible for the non-performance of his bond or covenant, although the woman may not be bound by a reciprocal contract to marry him (*k*). If the covenantee is ready and willing to receive the covenantor as a husband, and the latter neglects to fulfil his contract, he is liable to an action, for it is the duty of the man to go and offer himself to the woman, and not for the woman to go in search of the man (*l*). A woman is also as much bound by such a deed or covenant as a man, provided it has been obtained openly and fairly, and with perfect good faith; but, as women are in general peculiarly liable to be deceived and imposed upon in affairs in which their feelings are concerned, such a contract or engagement obtained from a woman is regarded with the greatest jealousy and suspicion, particularly where the man has entered into no corresponding engagement on his part (*m*). If such a bond is obtained by means of any misrepresentation or concealment of the circumstances and situation in life of the party to whom it is given, it is undoubtedly fraudulent, and may be set aside (*n*). Where a bond was given by the defendant, a single

(*e*) *Hall* v. *Potter*, 3 Lev. 411; Show. P.C. 76; 4 Br. P.C. 145, n.; 3 P.Wms. 76.

(*f*) *Collins* v. *Blantern*, 2 Wils. 347; *Arundel* v. *Trevillian*, 1 Ch. Rep. 47; *Drury* v. *Hooke*, 1 Vern. 411; *Debenham* v. *Ox*, 1 Ves. senr. 276; *Smith* v. *Aykwell*, 3 Atk. 566; *Cole* v. *Gibson*, 1 Ves. senr. 503; *Booth* v. *Warrington* (*Earl*), 4 Br. P.C. 163.

(*g*) *Keat* v. *Allen*, 2 Vern. [illegible]; Pre. Ch. 267.

(*h*) *Hamilton* v. *Mohun*, 1 P. Wms. 120; 2 Vern. 652; 1 Salk. 158.

(*i*) *Stribblehill* v. *Brett*, 2 Vern. 446; 4 Br. P.C. 145.

(*k*) *Atkins* v. *Farr*, 1 Atk. 287.

(*l*) *Holcroft* v. *Dickenson*, 1 Freem. 346; *Seymour* v. *Gartside*, 1 L.J. (O.S.) K.B. 12; 2 D. & R. 55.

(*m*) *Cock* v. *Richards*, 10 Ves. 437.

(*n*) *Key* v. *Bradshaw*, 2 Vern. 102.

lady, which recited that a marriage had been agreed upon between her and the plaintiff, but had been deferred at her request until after the death of her father, and as a provision for the plaintiff she bound herself to give him 1,200*l.*, and interest at 5*l.* per cent., in case she should refuse to marry him on her father's death, or should intermarry with anybody else, and the lady broke her engagement by marrying a third party, it was held that she and her husband were responsible for the payment of the money (*o*). But, if a bond of this description has been clandestinely obtained from a single lady having expectations from her parent, without the knowledge of such parent, it is a fraud upon the latter; and the court, if appealed to, will set it aside (*p*).

Contracts of betrothment are contracts between a man and a woman to marry at a future time. If a man makes an offer of marriage to a woman, the acceptance thereof by the latter may, so far as it is necessary to be proved in order to enable her to sustain an action against the man for a breach of his engagement, be established through the medium of her conduct and actions at the time, as well as by express words (*q*). If there be an express promise by the man, and it appears that the woman countenanced it, and by her actions at that time behaved herself as if she agreed to the matter, that is sufficient evidence of a promise on her side (*r*). Therefore, where a man asked for and obtained the consent of the parents to his marriage with their daughter, and she stood in the room within the hearing of the parties, and made no objection to the match, it was held that her silence afforded as cogent evidence of her assent as an express affirmative (*s*).

Authentication of contract.—Oral engagements and promises to marry will sustain an action, unless the marriage is limited to take place upwards of a year from the making of the contract (*ante*, p. 32). A man who was paying attentions to a girl was asked what his intentions were, and he replied, "I have pledged my honour to marry the girl in a month after Christmas;" and it was held that this declaration, taken in connection with his visits to the house and conduct towards the girl, was sufficient evidence of a promise of marriage (*t*). But a mere vague intimation by a party of his future intentions is no evidence of a promise of marriage (*u*). The statute 32 & 33 Vict. c. 68, which enables the parties to an action for breach of promise of marriage to be called as witnesses, also provides that the plaintiff's evidence must be

(*o*) *Box* v. *Day*, 1 Wils. 59.
(*p*) *Woodhouse* v. *Shepley*, 2 Atk. 539; *Drury* v. *Hooke*, 1 Vern. 411; *Hartley* v. *Rice*, 10 East, 22.
(*q*) *Harvey* v. *Johnston*, 17 L.J. C.P. 298; 6 C.B. 295.
(*r*) *Hutton* v. *Mansell*, 6 Mod. 172.
(*s*) *Daniel* v. *Bowles*, 2 C. & P. 553.
(*t*) *Potter* v. *Deboos*, 1 Stark. 82.
(*u*) *Cole* v. *Cottingham*, 8 C. & P. 75.

corroborated by some other material evidence in support of the promise (*x*).

Time of performance.—If the marriage is appointed to take place at a remote and unreasonably distant time, the contract would be voidable at the option of either of the parties, as being in restraint of matrimony (*ante*, p. 74). If no time is fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period after request; and either of the parties may call upon the other to fulfil the engagement, and, in case of default, may bring an action for damages. If both parties lie by for an unreasonable period, and do not treat the contract as a continuing contract, the engagement will be deemed to be abandoned by mutual consent. If the time of performance is fixed, and, by bodily disease, it becomes impossible for one party to go through the ceremony without danger to health, this is a valid ground for postponement of performance, on giving notice to the other party (*y*). If either of the parties puts it out of his or her power to fulfil the contract, by marrying somebody else, there is a breach of the engagement; and a right of action at once attaches. If in such a case the contract was a contract to marry on request, no request need be made, as the defendant by his conduct has dispensed with the necessity of it, and rendered it useless (*z*). So, if there is a promise to marry at a fixed time, and before the time arrives one of the parties absolutely refuses to fulfil the promise, there is a breach, for which an action will lie at once (*a*).

Excuses for non-performance.—If the party making the promise was married at the time it was made, and was consequently incapable of entering into the contract or of performing it, the incapacity constitutes no excuse for non-performance, unless it was known to the other contracting party at the time the promise was made and accepted (*b*). Previous insanity and confinement in a lunatic asylum constitute no excuse for non-performance of a promise of marriage (*c*). Notwithstanding a promise of marriage proved, if a man has conducted himself in a brutal or violent manner, and threatened to use a woman ill, she has a right to say she will not commit her happiness to such keeping (*d*).

Conditional promises of marriage.—If a man promises to marry

(*x*) As to what is "material evidence in support of the promise," see *Bessela* v. *Stern*, 2 C.P.D. 265; 46 L.J. C.P. 467; *Wiedemann* v. *Walpole*, (1891) 2 Q.B. 534; 60 L.J. Q.B. 762.

(*y*) *Hall* v. *Wright*, E. B. & E. 746; 29 L.J. Q.B. 43.

(*z*) *Short* v. *Stone*, 8 Q.B. 358; 15 L.J. Q.B. 143; *Lovelock* v. *Franklyn*, 8 Q.B. 378; 15 L.J. Q.B. 145.

(*a*) *Frost* v. *Knight*, L.R. 7 Ex. 111; 41 L.J. Ex. 78.

(*b*) *Wild* v. *Harris*, 7 C.B. 1004; 18 L.J. C.P. 297; *Millward* v. *Littlewood*, 20 L.J. Ex. 2; 5 Exch. 775.

(*c*) *Baker* v. *Cartwright*, 10 C.B. N.S. 124; 30 L.J. C.P. 364.

(*d*) *Leeds* v. *Cook*, 4 Esp. 257.

a woman if she will come from America to England and marry him, or will do any other particular act or thing, there is a sufficient consideration for the promise; and, if the condition precedent is accomplished,—if, for instance, the voyage is performed, or the act done, and the woman is ready, and willing and able to be married to the man,—he is responsible for the non-fulfilment of his promise. The validity of conditional promises of marriage will depend upon the reasonableness of the condition and the time limited for its accomplishment. If the marriage is to depend upon the happening of a distant and uncertain event, which may, in all probability, not take place during the lives of the parties, it would be a contract in restraint of marriage. If the condition is a lawful condition, the liability attaches as soon as the condition has been accomplished (*e*). If it is stipulated that the woman shall have a certain marriage portion, or that the man shall make a certain settlement, the liability upon the contract does not attach until the condition has been accomplished. And, if a reverse of fortune prevents one of the parties from fulfilling the engagement in respect of the portion or the settlement, the other is discharged.

Fraudulent concealment of material circumstances—Misrepresentation and deceit.—It is no answer to an action for a breach of promise of marriage to show that the plaintiff at the time of the making of the promise was engaged to marry someone else; and that the pre-engagement was concealed from the defendant. A party is not bound in all cases to disclose such a fact; but the concealment of it might, under certain circumstances, amount to a fraud (*f*). Neither is a party bound to disclose that at some previous period of his life he was of unsound mind, and had been confined in a lunatic asylum (*g*). If a woman at the time of the betrothment was a woman of loose and immodest character, and this was unknown at the time to the man who promised to marry her, the latter is entitled, as soon as he discovers her real character, to break off the engagement. General reputation of want of chastity must be established in such a case (*h*); or, if particular instances of misconduct are relied upon, they must be fully proved. If the circumstances, whatever they may be, were known to the other contracting party, there is then no fraud or deceit in the matter, and he has no ground for refusing to complete his engagement (*i*).

(*e*) *Harvey* v. *Johnston*, 17 L.J. C.P. 298; 6 C.B. 295.

(*f*) *Beachey* v. *Brown*, E. B. & E. 796; 29 L.J. Q.B. 105.

(*g*) *Baker* v. *Cartwright*, 10 C.B. N.S. 124; 30 L.J. C.P. 364.

(*h*) *Foulkes* v. *Sellway*, 3 Esp. 236.

(*i*) *Irving* v. *Greenwood*, 1 C. & P. 350; *Young* v. *Murphy*, 3 Bing. N.C. 54; 6 L.J. C.P. 180; *Bench* v. *Merrick*, 1 Car. & K. 467.

If false representations are made by a woman, or by her friends in collusion with her, as to her circumstances and situation in life, and the amount of her fortune and marriage portion, the fraud is an answer to any action that may be brought for a breach of the promise of marriage (*k*).

Accidents and mishaps altering condition of either of parties.—If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for if a man, by disease, accident, or mutilation, becomes impotent, he could never maintain an action against a woman for refusing to marry him (*l*).

Abandonment of contract.—Parties who have exchanged mutual promises of marriage may, of course, at any time before the contract is carried into effect by the performance of the marriage ceremony, dissolve the engagement by mutual consent (*m*).

Damages for breach of promise of marriage.—In an action for breach of promise of marriage, wherein it is laid as special damage that the defendant debauched the plaintiff and ruined her character, it would be misdirection to tell the jury that they might give her damages as a *solatium* for the injured feelings of her parents and family; but, where the defendant is a person of property, they may take into their consideration not only the plaintiff's pecuniary loss in not becoming his wife, but the injury done to her future prospects of marriage, her injured feelings and affections, and the mortification she must suffer in not being able to look her family in the face. In such an action the damages cannot be measured by a known standard, as in commercial cases, but the amount is peculiarly a question for the jury; and, where no witnesses were called for the defendant, and it appeared that imputations had been cast upon the plaintiff, a person in humble life, and her witnesses, which failed, and the jury gave 2,500*l.* damages against the defendant, who was a person of property, and a new trial was asked for simply upon the ground that the damages were excessive, the application was refused (*n*). An action for breach of promise of marriage, where no special damage is alleged, does not survive

(*k*) *Wharton* v. *Lewis*, 1 C. & P. 529.

(*l*) *Hall* v. *Wright*, E. B. & E. 763; 29 L.J. Q.B. 43.

(*m*) *King* v. *Gillett*, 7 M. & W. 55; 10 L.J. Ex. 164; as to evidence of exoneration and discharge from the contract, see *Davis* v. *Bomford*, 30 L.J. Ex. 139; 6 H. & N. 245.

(*n*) *Berry* v. *Da Costa*, L.R. 1 C.P. 331; 35 L.J. C.P. 191.

against the personal representatives of a deceased promisor (*o*). As to ratification of a promise by a minor, see *ante*, p. 374.

Promises of portions and settlements.—A promise to give a woman a specific sum on her marriage, or to pay money to either the intended husband or wife, or settle property upon them, or either of them, in the event of their marrying, creates a binding obligation in the eye of the law; for "marriage is one of the strongest considerations in the law to found a contract, gift, or grant" (*p*). But the promise must be made by a person of full age, and must not be the expression of a mere desire or wish to make a settlement (*q*). It must also be authenticated, as we have before seen, by a note in writing, signed by the promisor or his agent (*r*). If, therefore, the husband, prior to the marriage, gives a verbal promise to the wife that he will settle her property upon her, she has nothing to rely upon but his honour; and if, after the marriage, he breaks his word, she has no remedy against him (*s*). Subsequent marriage is not part performance of a parol contract in consideration of marriage; nor will acts of part performance by the party sought to be charged prevent the operation of the statute (*t*). But, if a husband writes a letter promising to make a settlement upon his intended wife, or a father, by a letter, promises "to give such a fortune with his daughter to one who shall marry her," this is a sufficient compliance with the requirements of the statute. But the promise must be an absolute promise, and not dependent upon conditions and contingencies remaining unaccomplished (*u*). Where a person by writing promised, as a mark of esteem and friendship to a young man, that he would allow him 500*l.* a year, and at his death bequeath him 10,000*l.*, and this writing was shown to the parent of a young woman, who thereupon gave consent to the marriage, it was held to be a mere *nudum pactum*, for that there was no connection between the promisor and the parent (*x*).

Contracts in fraud of settlements and promises of marriage portions.—Any private underhand agreement or treaty entered into for the purpose of infringing or defeating an open, public agreement, made in consideration of marriage, is fraudulent and void (*y*). A bond,

(*o*) *Finlay* v. *Chirney*, 20 Q.B.D. 494; 57 L.J. Q.B. 247.

(*p*) *Laver* v. *Fielder*, 32 Beav. 1; 32 L.J. Ch. 365.

(*q*) *Beaumont* v. *Carter*, 32 Beav. 586; *Moorhouse* v. *Colvin*, 15 Bea. 341; 21 L.J. Ch. 177, 782.

(*r*) *Ante*, p. 31; *Randall* v. *Morgan*, 12 Ves. 73; *Bawdes* v. *Amhurst*, Pr. Ch. 404; *Caton* v. *Caton*, L.R. 2 H.L. 127; 36 L.J. Ch. 886.

(*s*) *Montacute* v. *Maxwell*, 1 P. Wms. 620; *Caton* v. *Caton*, L.R. 1 Ch. 137; 35 L.J. Ch. 292; but see *Williams* v. *Williams*, 37 L.J. Ch. 854.

(*t*) *Caton* v. *Caton*, *supra*.

(*u*) *Bird* v. *Blosse*, 2 Ventr. 361; *Moore* v. *Hart*, 1 Vern. 110; *Alt* v. *Alt*, 4 Giff. 84; 32 L.J. Ch. 52.

(*x*) *Dashwood* v. *Jermyn*, 12 Ch.D. 776.

(*y*) *Kemp* v. *Coleman*, 1 Salk. 156;

for example, given by the husband to return part of his wife's marriage portion, without the privity of his own parents and guardians, and of all the parties to the treaty of marriage, is fraudulent and void, and cannot be enforced against him. If the father, or any other relation or friend of the husband or wife, who has agreed to make a settlement of property upon one or both of them on their marriage, or to give a marriage portion to the wife, takes a bond or covenant from either the husband or wife, or both of them, to repay the whole or any part of such marriage portion, or to re-convey an estate granted or intended to be granted, the contract is void, as being a fraud upon the parties to the treaty of marriage, and upon the parents and guardians who had a right to give or withhold their consent to the marriage (*z*).

If the relations of a woman furnish her with money, in order that she may appear to have a considerable marriage portion, and secretly take from her a bond or covenant to repay the money advanced after her marriage, the bond is void (*a*). So, if a relation or friend of the husband advances him money, or clothes him with the apparent possession of property, to enable him to make a show of wealth in order to obtain a corresponding portion with his wife, and takes from such husband a bond or covenant for the repayment of the money advanced, or the surrender of the property intrusted to him, the bond or covenant will be void, and the husband will be entitled to hold the property for his own use, notwithstanding that he was himself a party to the deceit (*b*). Where a widow, on the marriage of her son, agreed with the intended wife's relations to make a settlement on him and his wife and the children of the marriage, of certain lands which she had in jointure, but she, at the same time, obtained a secret agreement from her son to pay her an annuity, it was held that this agreement was fraudulent and void (*c*). If a man about to be married is largely indebted, and a relation comes forward and pays off his debts in order to enable him to gain the consent of the parents of the lady to the match, and at the same time takes a bond from the lady and her intended husband to pay him a certain sum within a specified period from the celebration of the nuptials, the bond is a fraud upon the parents, and the husband and wife are entitled, after the marriage, to set it aside, although they were both parties to the fraud (*d*).

Turton v. *Benson*, 2 Vern. 764; *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 380; 1 Ves. sen. 277.

(*z*) 1 Eq. Abr. 88, E. 3; *Peyton* v. *Bladwell*, 1 Vern. 240; *Scott* v. *Scott*, 1 Cox, 367; *Palmer* v. *Neave*, 11 Ves. 165; *Morrison* v. *Arbuthnot*, 8 Br. P.C. 247; 1 Br. Ch.C. 548, n.

(*a*) *Gale* v. *Lindo*, 1 Vern. 475.

(*b*) *Thompson* v. *Harrison*, 1 Cox, 346; *Webber* v. *Farmer*, 4 Br. P.C. 170.

(*c*) *Lamlee* v. *Hanman*, 2 Vern. 466, 499.

(*d*) *Redman* v. *Redman*, 1 Vern. 347; *Montefiori* v. *Montefiori*, 1 W. Bl. 363; *Money* v. *Jorden*, 21 L.J. Ch. 531; *Maunsell* v. *White*, 22 L.T. 293.

Upon the same principle, creditors, who conceal wholly, or in part, debts due to them from a man about to be married, and represent that he is not indebted, or is only indebted to them to a less amount, in order to serve the turn of their debtor, and get the parents of the woman to consent to the marriage, will be bound by such fraudulent representations, and will be barred from all remedy for obtaining payment of their debts, just as effectually as if they had executed a release under seal (*e*).

Marriage settlements.—In a former edition of this work the subject of the rights of husband and wife under settlements made upon the wife was partially and inadequately treated. It has here been entirely omitted, as being outside the scope of this work.

Marriage contract, its nature and requisites.—Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman, to the exclusion of all others (*f*). The marriage contract itself is founded on the consent of the parties, and ranges amongst that class of contracts called consensual contracts. Consent of parents and guardians was, by 26 Geo. 2, c. 33, and 4 Geo. 4, c. 17, made essential to the validity of all marriages of minors by licence (not being widowers or widows, who were deemed to be emancipated), so that, after a marriage had been actually celebrated and consummated, and followed by the procreation of children and a lengthened cohabitation, it might be annulled by the ecclesiastical court, and declared void *ab initio*, by reason of the want of such consent prior to the celebration of the nuptials (*g*). But this was found to be productive of so much mischief that these Acts were repealed; and it has now been enacted that, after the marriage has been actually solemnised, it shall not be necessary in support of such marriage to give any proof of the residence of the parties previous to the marriage within the district where the marriage was solemnised, or of the consent of any person whose consent to the marriage is required by law, and that no evidence shall be given to prove the non-residence or non-consent in any suit touching the validity of such marriage (*h*).

Age of consent.—The age of consent to marriage is fourteen in males and twelve in females. If, however, a boy under fourteen, or a girl under twelve, actually go through the form of marriage, such marriage is not absolutely void; it is inchoate and imperfect only. If, on arriving at the age of consent, they cohabit, or con-

(*e*) *Nevill* v. *Wilkinson*, 1 Br. Ch. 543; *Eastabrooke* v. *Scott*, 3 Ves. 460; 16 Ves. 125.

(*f*) *Hyde* v. *Hyde*, L.R. 1 P. & M. 130; 35 L.J. P. & M. 57; *Brinkley* v. *Att.-Gen.*, 17 P.D. 76; 59 L.J. P.D.A. 51; *Bethell, In re*, 38 Ch.D. 220; 57 L.J. Ch. 487.

(*g*) *Harrison* v. *Southampton*, 22 L.J. Ch. 722; 4 De G. M. & G. 137.

(*h*) 4 Geo. 4, c. 76, ss. 16, 26; *R.* v. *Birmingham*, 8 B. & C. 29; 7 & 8 Vict. c. 56, s. 3; 19 & 20 Vict. c. 119, s. 17.

tinue a cohabitation previously begun, the marriage is a good marriage, by reason of the subsequent ratification of the contract (*i*).

Presumption of marriage.—Where the form of marriage has been gone through, it will be presumed that all the requisites of a valid marriage have occurred until the contrary be shown; and, where there has been cohabitation as man and wife, the law presumes marriage until the contrary be proved (*k*).

Void marriages.—All marriages celebrated after the 31st of August, 1835, between persons within the prohibited degrees of affinity are absolutely void (*l*). And this rule applies to Jews who are domiciled British subjects as well as to Christians (*m*). If a widower, therefore, goes through the marriage ceremony with the sister of his deceased wife, or a widow with the brother of her deceased husband, the ceremony is a mere form, and will be productive of no legal marriage between the parties (*n*). It has been enacted that, if any persons knowingly and wilfully intermarry in any other place than a church or chapel, or registered building, or the registrar's office, without licence, or due publication of banns, or due notice to the superintendent-registrar, or without certificate of notice duly issued, the marriage of such persons shall be absolutely null and void (*o*). But it must be shown that *both* parties have knowingly and wilfully disregarded the provisions of the Marriage Acts. If the disobedience and misconduct are on one side only, the marriage is not invalid (*p*). And by 19 & 20 Vict. c. 119, s. 17, it is enacted that, after any marriage shall have been solemnised under the authority of 6 & 7 Will. 4, c. 85, of 1 Vict. c. 22, and of 3 & 4 Vict. c. 72, it shall not be necessary in support of such marriage to give any proof that the registered building in which any marriage may have been solemnised had been certified as a place of religious worship, or that it was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit touching the validity of the marriage.

Publication of banns and celebration of marriage in false name.—If banns have been published in a false name with the knowledge of both the parties to the marriage contract for purposes of fraudu-

(*i*) Co. Litt. 79 a, 79 b; 1 Rolle Abr. 341.

(*k*) *Sichel* v. *Lambert*, 33 L.J. C.P. 137; 15 C.B. N.S. 781.

(*l*) 5 & 6 Will. 4, c. 54.

(*m*) *De Wilton, In re*, (1900) 2 Ch. 481; 69 L.J. Ch. 717.

(*n*) *Reg.* v. *Chadwick*, 11 Q.B. 173, 205; 15 C.B. N.S. 781.

(*o*) 4 Geo. 4, c. 76, s. 22; 6 & 7 Will. 4, c. 85, s. 42; 61 & 62 Vict. c. 58, s. 15; *Reg.* v. *Millis*, 10 Cl. & Fin. 534; 7 Jur. 911; *Catherwood* v. *Caslon*, 13 M. & W. 261; 13 L.J. Ex. 334. Where during the publication of the banns one of the parties was resident in Scotland, see 49 & 50 Vict. c. 3; and where one party was resident in Ireland, see 62 & 63 Vict. c. 27; as to the invalidity of marriages in contravention of the Indian Divorce Act, see *Warter* v. *Warter*, 15 P.D. 152; 59 L.J. P. 45.

(*p*) *Wright* v. *Elwood*, 1 Curt. 49, 662; *Dormer* v. *Williams*, *ib.* 874.

lent concealment, the marriage will be invalid (*q*); but no court of justice, ecclesiastical or civil, will lend its aid to enable a man who has concealed his true name at the time of the publication of the banns, or has purposely procured the banns to be published in false names, without the knowledge of the woman he was about to marry, to turn round upon her and annul the marriage and bastardise his children on the ground that he had knowingly and wilfully evaded the provisions of the Marriage Acts (*r*). Where one of the parties to the marriage contract had assumed a false name, and procured the publication of the banns and the celebration of the marriage in such false name, for the purpose of concealing his or her real condition in life, the other party who had been deceived was entitled to a declaration of the nullity of the marriage from the ecclesiastical court (*s*). If the error is not a mere *error nominis*, or misnomer, but an error *de corpore*, or *de personâ*, the contract is voidable as to the party who has been deceived; but, if it is a mere misnomer, and the party has married the person that he or she intended to marry, the mere verbal mistake will not suffice to invalidate the marriage (*t*). Numerous cases have occurred where, in the publication of banns, there has been a partial departure from the true name, and the marriage has, notwithstanding, in the absence of fraud, been held to be valid on the ground that the name, though incorrect, designated the right person (*u*).

Marriage by licence in a false name is not of the same importance as marriage by banns in a false name. A mere misdescription or misnomer of the parties in the licence will not avoid the marriage, provided the incorrect name represents the right person (*x*). But, if any fraud or intentional deception has been practised with the knowledge and connivance of *both* parties upon the ordinary, "if, for instance, a licence were obtained for one person with the intention that it should be used for another, such a licence might not be valid" (*y*).

Fraudulent celebration of sham marriage.—A party cannot avail himself of his own fraud to annul an apparent marriage. If a man has imposed a pretended clergyman and a supposititious licence upon a young unmarried woman, the court will not at *his* instance annul the apparent marriage (*z*). If persons, professing to marry

(*q*) *Midgley* v. *Wood*, 30 L.J. P. 57; it must be shown that both parties knowingly and wilfully concurred: *Gompertz* v. *Kensit*, L.R. 13 Eq. 369; 41 L.J. Ch. 382.

(*r*) *Rex* v. *Wroxton*, 4 B. & Ad. 640; 2 L.J. M.C. 64; *Rex* v. *Billingshurst*, 3 M. & S. 257; *Pougett* v. *Tomkyns*, *ib.* 262, n.

(*s*) *Frankland* v. *Nicholson*, 3 M. & S. 261, n.; *Midgley* v. *Wood*, *supra*.

(*t*) *Clowes* v. *Clowes*, 3 Curt. 190; *Rex* v. *Burton-on-Trent*, 3 M. & S. 527.

(*u*) *Sullivan* v. *Sullivan*, cited *Bevan* v. *M'Mahon*, 30 L.J. P. 71; 2 Sw. & T. 230.

(*x*) *Bevan* v. *M'Mahon*, *ut sup.*

(*y*) *Lane* v. *Goodwin*, 4 Q.B. 366; 12 L.J. Q.B. 157.

(*z*) *Hawke* v. *Corri*, 2 Hag. Consist. 288.

according to the rites of the Church of England, knowingly or wilfully consent to, or acquiesce in, the solemnization of such marriage by any person not being in holy orders, the marriage is null and void (*a*).

The law of the country where a marriage is solemnized does not always determine the validity of the marriage. A union formed between a man and a woman in a foreign country, although in that foreign country it may bear the name of marriage, is not valid in England unless it is in its essence the voluntary union for life of one man and one woman to the exclusion of all others (*b*). If foreigners domiciled in France come to England and get married in conformity with English law, the marriage will be a valid marriage here, though it be null and void by the law of France (*c*). A marriage celebrated in France, on the other hand, may be valid in this country, though it is invalid according to French law (*d*).

Whenever any attempt is to be made to invalidate a marriage, parties must not slumber over their rights; for "everything," observes Sir William Scott, "is to be presumed in favour of a matrimonial union which has produced children, and united parties by a long cohabitation; such an union is not to be dissolved, unless by some pressing obligations of law" (*e*).

Release by marriage.—If a creditor marries his debtor, the debt is released and extinguished, but a contract not broken nor converted into a *chose in action* at the time of the marriage, or during the coverture, will not be released by the marriage. Consequently, if a man, in contemplation of marriage, enters into a contract in writing with his intended wife, to the effect that his heirs or executors shall, after his decease, pay her a certain sum of money in case she should survive him, this contract is not released and discharged by the marriage. Therefore a bond, the condition of which cannot be broken during coverture, is not extinguished by the marriage of the obligor and obligee (*f*). And such contract will be enforced when it would be in furtherance of the manifest intention of the parties to do so, as in the case of an agreement by persons about to marry for the mutual settlement of their estate, or of the estate of either of them on the other, on the marriage. If an executrix marries the debtor, it is no release in law, because

(*a*) 4 Geo. 4, c. 76, s. 22.

(*b*) *Bethell, In re*, 38 Ch.D. 220; 57 L.J. Ch. 487; *Brinkley* v. *Att.-Gen.*, 15 P.D. 76; 59 L.J. P. 51.

(*c*) *Simonin* v. *Mallac*, 29 L.J. P. & M. 97; *Hay* v. *Northcote*, (1900) 2 Ch. 262; 69 L.J. Ch. 586.

(*d*) *Este* v. *Smith*, 18 Beav. 112; 23 L.J. Ch. 705.

(*e*) *Diddear* v. *Faucit*, 3 Phil. 581; *Piers* v. *Piers*, 2 H.L.C. 367; *Field's Marriage Bill*, *ib.* 48.

(*f*) *Milbourn* v. *Ewart*, 5 T.R. 385; *Cage* v. *Acton*, 1 Ld. Raym. 515; 1 Salk. 325; *Dolling* v. *White*, 22 L.J. Q.B. 327.

she has the debt in another right (*g*). Therefore, if the executrix of the obligee of a bond marry the obligor, there is no release of the debt; and after the death of such executrix an action may be maintained in respect of it by the administrator *de bonis non* (*h*). Where a man covenanted to pay a woman an annuity for her separate use free from anticipation, and afterwards married her, it was held that the annuity was only suspended by the marriage, and that the widow was entitled to recover arrears accrued subsequent to the death of the husband (*i*). An obligation in which the husband is obligor and the wife is obligee is destroyed by the marriage, but this does not affect the rights of third parties. Where the wife is entitled to the bond as legal personal representative, and the extinguishment of the bond would prejudice creditors or legatees, such extinguishment will not take place; but where a wife besides being personal representative was also sole legatee, and all debts had been paid, it was held that a bond given by her husband to his mother-in-law, the testatrix, was extinguished (*k*).

Deeds of separation (*l*).—The husband and wife could not at common law by contract between themselves change their legal capacities or characters (*m*). Formerly, when by reason of matrimonial differences they wished to live separate upon certain terms, it was necessary that a trustee should be appointed to contract with the husband for that purpose (*n*); but this is not so where the contract is by way of compromise of legal proceedings (*o*). The husband may covenant with any third party to pay to him a certain sum of money for the separate use of the wife (*p*) either for a term of years or during her natural life, provided the covenant is absolute and unqualified, and the performance of it is not made to depend upon the contingency of a future separation, or made conditional upon the wife's consent to live separate (*q*). If it appears by the deed that the separation is

(*g*) *Needham's case*, 8 Co. 136, a.

(*h*) *Wankford* v. *Wankford*, 1 Salk. 306.

(*i*) *Fitzgerald* v. *Fitzgerald*, L.R. 2 P.C. 83; 37 L.J. P.C. 44.

(*k*) *Price, In re*, 11 Ch.D. 163; 48 L.J. Ch. 478.

(*l*) As to when the Court will insert a *dum sola et casta* clause, see *Wood* v. *Wood*, (1891) P. 272; 60 L.J. P. 66; *Lander* v. *Lander*, (1891) P. 161; 60 L.J. P. 65.

(*m*) Co. Litt. 112, a; *Ewers* v. *Hutton*, 3 Esp. 254; *Garth* v. *Earnshaw*, 3 Y. & C. 584; *St. John* (*Ld.*) v. *St. John* (*Ly.*), 11 Ves. 530.

(*n*) *Sanders* v. *Rodway*, 22 L.J. Ch. 230; 16 Beav. 207; *Hunt* v. *Hunt*, 31 L.J. Ch. 161; 31 Beav. 89.

(*o*) *McGregor* v. *McGregor*, 21 Q.B.D. 424; 57 L.J. Q.B. 59.

(*p*) As to power of Court to increase alimony, see *Gandy* v. *Gandy*, 30 Ch.D. 57; 54 L.J. Ch. 1154; *Bishop* v. *Bishop*, (1897) P. 138; 66 L.J. P. 69.

(*q*) *Clough* v. *Lambert*, 10 Sim. 174; *Bostock* v. *Hume*, 7 M. & Gr. 893; 13 L.J. C.P. 225; *Logan* v. *Birkett*, 1 Myl. & K. 225; 2 L.J. Ch. 52. As to what amounts to a breach of covenant not to molest, see *Fearon* v. *Aylesford*, 14 Q.B.D. 792; 54 L.J. Q.B. 33; *Sweet* v. *Sweet*, (1895) 1 Q.B. 12; 64 L.J. Q.B. 108; *Hunt* v. *Hunt*, (1897) 2 Q.B. 547; 67 L.J. Q.B. 18.

not a present, immediate, and actually accomplished separation, but is subsequently to be carried into effect, the contract will be void, as being contrary to the public policy of the law (*r*). A covenant by the trustee to indemnify the husband against debts and expenses contracted by him and his wife during the time they were cohabiting together, as well as against debts that may subsequently be contracted by her, is not, in contemplation of law, a covenant or engagement to pay money as an inducement for a separation, and is not consequently void (*s*). If the husband has been induced to execute the separation deed by fraudulent misrepresentation or fraudulent concealment on the part of the trustee, the deed will be invalid, and the husband cannot be sued upon it (*t*). All contracts for the prevention of cohabitation between husband and wife are null and void (*u*), unless it appears that the husband has by cruelty or misconduct forfeited his marital rights (*x*). An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, has been decreed to be specifically performed (*y*). The question whether a deed is a separation deed or a post-nuptial settlement depends on the intention of the parties, to be gathered from the terms of the deed (*z*).

Subsequent reconciliation puts an end to the husband's covenant to pay an annuity to the wife (*a*), unless it is provided that a subsequent cohabitation shall in no wise alter or affect such liability (*b*); but it does not, it seems, amount to an accord and satisfaction of her claims for arrears (*c*). If the husband has not forfeited his marital rights by his own misconduct, he may discharge himself from his liability thereon by offering to receive

(*r*) *Westmeath* v. *Salisbury*, 5 Bl. N.S. 393; *Hindley* v. *Westmeath*, 6 B. & C. 200; 5 L.J. (O.S.) K.B. 115.

(*s*) *Jones* v. *Waite*, 5 Sc. N.R. 951; 9 Cl. & F. 88; *Summers* v. *Ball*, 8 M. & W. 596; 10 L.J. Ex. 368.

(*t*) *Evans* v. *Edmonds*, 22 L.J. C.P. 211; 13 C.B. 777; *Evans* v. *Carrington*, 30 L.J. Ch. 364; 1 Jo. & H. 598; but see *Kendall* v. *Webster*, 1 H. & C. 440; 31 L.J. Ex. 492.

(*u*) *Wren* v. *Bradley*, 17 L.J. Ch. 172; 2 De G. & S. 49; *Cartwright* v. *Cartwright*, 22 L.J. Ch. 841; 3 De G. M. & G. 982.

(*x*) *Westmeath* v. *Westmeath*, 2 Hagg. Eccles. Sup. 115; *Swift* v. *Swift*, 34 L.J. Ch. 209, 394; 34 Beav. 266.

(*y*) *Gibbs* v. *Harding*, L.R. 5 Ch. 336; 39 L.J. Ch. 374; and see 36 Vict. c. 12, s. 2.

(*z*) *Rowell* v. *Rowell*, (1900) 1 Q.B. 9; 69 L.J. Q.B. 55.

(*a*) *St. John* (*Ld.*) v. *St. John* (*Ly.*), 11 Ves. 537; *Bateman* v. *Ross*, 1 Dow, 245; *Nicol* v. *Nicol*, 31 Ch.D. 524; 55 L.J. Ch. 437. As to the effect on a quasi-separation deed between persons who have been living in concubinage, see *Abdy*, *In re*, (1895) 1 Ch. 455; 64 L.J. Ch. 465.

(*b*) *Wilson* v. *Mushett*, 3 B. & Ad. 751; 1 L.J. K.B. 250; *Webster* v. *Webster*, 22 L.J. Ch. 837; 4 De G. M. & G. 437.

(*c*) *Macau* v. *Macau*, 70 L.J. K.B. 90.

back the wife (*d*), unless he has covenanted absolutely and unconditionally with the trustee to pay the annuity during the life of the wife (*e*), in which case his liability to pay the annuity is not discharged by the subsequent commission of adultery by the wife, or by a decree for a judicial separation pronounced in consequence of such adultery (*f*). When a separation has taken place, and property has been settled upon the wife and children of the marriage for their support, the settlement will be upheld against the future creditors of the husband, unless it appears that the separation was illusory and without adequate cause (*g*).

(*d*) *Whorewood* v. *Whorewood*, Ch. C. 250.

(*e*) *Seeling* v. *Crawley*, 2 Vern. 386.

(*f*) *Baynon* v. *Batley*, 1 L.J. C.P. 75; 8 Bing. 256; *Jee* v. *Thurlow*, 2 B. & C. 551; 2 L.J. (O.S.) K.B. 81; *Seagrave* v. *Seagrave*, 13 Ves. 439; *Fearon* v. *Aylesford* (*Earl*), 14 Q.B.D. 792; 54 L.J. Q.B. 33.

(*g*) *Hobbs* v. *Hull*, 1 Cox, 445; *Nunn* v. *Wilsmore*, 8 T.R. 529; *Stephens* v. *Olive*, 2 Br. C.C. 90.

APPENDIX ON STAMPS.

CHAPTER I.

GENERAL PRINCIPLES.

The Stamp Act, 1891.—The Stamp Act, 1891 (*a*), consolidated and amended the provisions theretofore contained in various Acts relating to stamp duties (*b*).

Interpretation of terms.—By sect. 122, it is enacted that in this Act unless the context otherwise requires "The Commissioners" means the Commissioners of Inland Revenue; "Material" includes every sort of material upon which words or figures can be expressed; "Instrument" includes every written document; "Stamp" means as well a stamp impressed by means of a die as an adhesive stamp; "Stamped," with reference to instruments and material, applies as well to instruments and material impressed with stamps by means of a die as to instruments and material having adhesive stamps affixed thereto; "Executed" and "Execution," with reference to instruments not under seal, mean signed and signature; "Money" includes all sums expressed in British or in any foreign or colonial currency; "Stock" includes any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any county council, company, corporation, or society in the United Kingdom, or of any foreign or colonial company, corporation, or society; "Marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom (*c*); "Steward" of a manor includes deputy steward.

Sect. 1 grants the duties specified in the schedule to the Act (*d*).

By sect. 120, any instrument which, by any Act passed before

(*a*) 54 & 55 Vict. c. 39.

(*b*) The Stamp Duties Management Act, 1891, contains provisions relating principally to offences, and to the sale of stamps.

(*c*) See *Texas Land Co.* v. *Inland Rev. Com.*, 26 Scot. L.R. 49.

(*d*) See *Onslow* v. *Inland Rev. Com.*, (1891) 1 Q.B. 239; 60 L.J. Q.B. 138.

1st January, 1871, and not relating to stamp duties, is specifically charged with the duty of 35*s*., shall be chargeable only with the duty of 10*s*. in lieu of the said duty of 35*s*.

Instruments relating to Crown property.—By sect. 119, except where express provision to the contrary is made by this or any other Act, an instrument relating to property belonging to the Crown, or being the private property of the Sovereign, is to be charged with the same duty as an instrument of the same kind relating to property belonging to a subject.

How instruments are to be written and stamped.—By sect. 2, all stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

By sect. 3 (1), every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped, is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material (*e*).

Stamping of instruments after execution.—By sect. 15 (1), save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

(2.) In the case of such instruments hereinafter mentioned as are chargeable with *ad valorem* duty, the following provisions shall have effect:—

(a) The instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper *ad valorem* duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom in case it is first executed at any place out of the United Kingdom, unless the opinion of the commissioners with respect to the amount of duty with which the instrument is chargeable has, before such expiration, been required under the provisions of this Act:

(*e*) As to instruments charged with more than one duty, see sect. 3 (2), *post*, p. 1194.

(b) If the opinion of the commissioners with respect to any such instrument has been required, the instrument shall be stamped in accordance with the assessment of the commissioners within fourteen days after notice of the assessment:

(c) If any such instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight has not been or is not duly stamped in conformity with the foregoing provisions of this sub-section, the person in that behalf hereinafter specified shall incur a fine of ten pounds, and in addition to the penalty payable on stamping the instrument there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the commissioners, or of the Court, judge, arbitrator, or referee before whom it is produced (*f*):

(d) The instruments and persons to which the provisions of this sub-section are to apply are as follows:—

Title of Instrument as described in the First Schedule to this Act.	Person liable to Penalty.
Bond, covenant, or instrument of any kind whatsoever.	The obligee, covenantee, or other person taking the security.
Conveyance on sale	The vendee or transferee.
Lease or tack	The lessee.
Mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment.	The mortgagee or obligee; in the case of a transfer or reconveyance, the transferee, assignee, or disponee, or the person redeeming the security.
Settlement	The settlor.

(3.) Provided that save where other express provision is made by this Act in relation to any particular instrument:

(a) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only: and

(b) The commissioners may, if they think fit, mitigate or remit any penalty payable on stamping (*g*).

(4.) The payment of any penalty payable on stamping is to be denoted on the instrument by a particular stamp.

(*f*) See sect. 14, *post*, p. 1197.

(*g*) By the Stamp Act, 1895 (58 Vict. c. 16), s. 15, the limit of time prescribed by this section was repealed.

Instruments to be charged with more than one duty.—By sect. 3 (2), if more than one instrument be written upon the same piece of material, every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable. By sect. 4, except where express provision to the contrary is made by this or any other Act: (a) an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters; (b) an instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged as if it were a separate instrument with duty in respect of each of the considerations.

Several deeds on one sheet of paper, vellum, &c., made to answer several unconnected purposes, must bear a distinct stamp in respect of each; but if the contract, though effecting several purposes, carries into effect only one entire transaction, one stamp only is required. Thus, if a lease (*h*) under seal also contains a covenant on the part of the lessor to sell the demised premises to the lessee, a deed stamp is not requisite in addition to the lease stamp, as the sale is ancillary to the lease (*i*); but, if the covenant embraces other and different premises, there must be a deed stamp in addition to the lease stamp. If a lease also contains a guarantee by a third party as surety for the payment of the rent, the guarantee is ancillary to the lease, and the lease stamp suffices (*k*); but if the lease be under seal, and the guarantee refers to the payment of the price of goods and chattels covenanted to be bought and sold, or any matter not ordinarily or necessarily incident to the lease, there must be a deed stamp as well as a lease stamp (*l*). If several leases are granted to different lessees (*m*), or several surrenders of leases (*n*), or several releases of separate causes of action, are made to different parties (*o*), or several annuities are granted by one deed, engrossed on one piece of parchment, separate stamps are required; but if there be several leases of different properties to one lessee (*p*), or a release of several causes of action against one releasee, or of one joint cause of action against several persons jointly liable (*q*), or the grant of one annuity only, payable in different proportions to different individuals (*r*), one stamp

(*h*) As to leases, see sect. 77 (2), *post*, p. 1216.
(*i*) *Worthington* v. *Warrington*, 5 C.B. 635; 17 L.J. C.P. 117.
(*k*) *Price* v. *Thomas*, 2 B. & Ad. 218; *Pratt* v. *Thomas*, 4 C. & P. 554.
(*l*) *Wharton* v. *Walton*, 7 Q.B. 474; 14 L.J. Q.B. 321; *Lovelock* v. *Franklyn*, 8 Q.B. 371; 15 L.J. Q.B. 146.
(*m*) *Doe* v. *Day*, 13 East, 241.
(*n*) *Reg.* v. *Everdon*, 16 L.J. Q.B. 18.
(*o*) *Rex* v. *Weeks*, 2 Ld. Raym. 1445.
(*p*) *Blount* v. *Pearman*, 1 Sc. 55; 4 L.J. C.P. 149.
(*q*) *Perry* v. *Bouchier*, 4 Campb. 80.
(*r*) *Cook* v. *Jones*, 15 East, 237.

suffices. And if there are two deeds on the same piece of parchment or paper, the circumstance of one of them being unstamped will not prevent the other from being given in evidence if duly stamped (*s*). An appointment of new trustees, which also vests the property in them, is chargeable in respect of each of such matters (*t*); and also a deed of transfer made between four residuary legatees for dividing amongst them parts of the testator's personal estate (*u*).

It has been held that several matters set forth and authenticated by one written document were so connected together as to form one contract and transaction, and to require only one stamp, in the following cases: where a sale and mortgage were simultaneously agreed upon and carried into effect by one and the same deed (*x*); where a bond and covenant to pay money, and also where a lease contained a power of attorney, and the deed and power in each case related to the same subject-matter; where a conveyance of land was coupled with a declaration of trust as to stock ancillary to such conveyance (*y*); where a lease under seal also contained a covenant to insure (*z*); where a surety became bound with his principal, and by the same bond the principal bound himself to indemnify the surety against loss (*a*); where a transfer deed of shares also contained a covenant on the part of the purchaser to observe the rules of the company (*b*); where indentures of apprenticeship divided a seven years' binding into two distinct periods, to be served with two different masters, and contained separate covenants with the several masters (*c*); where a deed of surrender of a lease also contained a covenant on the part of the surrenderee to grant a new lease (*d*).

Agreements and leases (*e*) on one sheet of paper must have both a lease and an agreement stamp, unless the agreement is strictly ancillary to the lease, and the two are necessarily connected together and form part of one entire contract (*f*). Where leasehold and copyhold premises were put up to auction in two separate lots, and the purchaser signed a memorandum agreeing to purchase the two lots at separate prices, it was held that two agreement stamps were necessary (*g*). If an agreement for a lease also contains an

(*s*) *Anon.*, Salk. 162.
(*t*) *Hadgett* v. *Inland Rev. Com.*, 3 Ex. D. 46.
(*u*) *Freeman* v. *Inland Rev. Com.*, L.R. 6 Ex. 101; 40 L.J. Ex. 85.
(*x*) *Rushbrook* v. *Hood*, 5 C.B. 131; 17 L.J. C.P. 58.
(*y*) *Doe* v. *Fereday*, 12 Ad. & E. 23; 11 L.J. Q.B. 19.
(*z*) *Wilson* v. *Smith*, 12 M. & W. 401; 13 L.J. Ex. 113.
(*a*) *Annandale* v. *Pattison*, 9 B. & C. 919; 8 L.J. (O.S.) K.B. 66.
(*b*) *Wolseley* v. *Cox*, 2 Q.B. 321; 11 L.J. Q.B. 9.
(*c*) *Rex* v. *Louth*, 8 B. & C. 247; 6 L.J. (O.S.) M.C. 107.
(*d*) *Doe* v. *Phillips*, 11 Ad. & E. 796; 3 P. & D. 603.
(*e*) As to leases, see also sect. 77 (2), *post*, p. 1216.
(*f*) *Wharton* v. *Walton*, 7 Q.B. 474; 14 L.J. Q.B. 321.
(*g*) *Watling* v. *Horwood*, 12 Jur. 48.

agreement on the part of the intended lessor to give the lessee the option of purchasing the premises, separate agreement stamps are not necessary; but, if the agreement to sell includes more premises than are comprised in the agreement for the lease, or relates to other and different premises, there are then two several contracts, and there must be two agreement stamps (*h*). There may be a variety of stipulations and engagements entered into at the same time by divers parties, forming the several parts of one contract, together constituting one transaction, and requiring consequently but one stamp (*i*). "Where a debtor compounds with his creditors, and where each creditor signs the same deed covenanting either to give further day of payment or to take a certain sum as a composition, . . . every covenant is in fact a separate covenant and the several deed of each creditor who signs the deed; but, the whole being only one transaction, a separate stamp for each person is never required" (*k*). An agreement by several persons to subscribe to one common fund, or to do certain things in furtherance of one common purpose, requires but one stamp, although the parties may have several interests, and subject themselves to separate liabilities (*l*). Where the members of a mutual insurance club all executed the same power of attorney, severally authorising the persons therein named to sign the club policies for them, it was held that this was one transaction, and that the instrument required but one stamp (*m*).

Appropriated stamps.—By sect. 10 (1), a stamp which, by any word or words on the face of it, is appropriated to any particular description of instrument, is not to be used, or, if used, is not to be available for any instrument of any other description. (2) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid, is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated.

Facts affecting duty to be set forth.—By sect. 5, all the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument, under a penalty of 10*l.* for certain offences mentioned.

Valuation of foreign or colonial money, or stock and marketable securities.—By sect. 6 (1), where an instrument is chargeable with *ad valorem* duty in respect of any money in any foreign or colonial

(*h*) *Lovelock* v. *Franklyn*, 8 Q.B. 379; 16 L.J. Q.B. 182; *Worthington* v. *Warrington*, 5 C.B. 635; 17 L.J. C.P. 117.

(*i*) *Rex* v. *Louth*, 8 B. & C. 247; 6 L.J. (O.S.) M.C. 107; *Stead* v. *Liddard*, 8 Moore, 2; 1 Bing. 196; 1 L.J. (O.S.) C.P. 52.

(*k*) Mansfield, C.J., *Bowen* v. *Ashley*, 1 B. & P. N.R. 278; *Ramsbottom* v. *Davis*, 4 M. & W. 584; 8 L.J. Ex. 80.

(*l*) *Davis* v. *Williams*, 13 East, 232; *Goodson* v. *Forbes*, 6 Taunt. 171; 1 Marsh. 525.

(*m*) *Allen* v. *Morrison*, 8 B. & C. 565; 7 L.J. (O.S.) K.B. 106.

currency, or any stock, or of any marketable security (*n*), such duty shall be calculated on the value of such money in British currency, according to the current rate of exchange on the day of the date of the instrument, or of the stock or security according to the average price thereof. The Finance Act, 1899, amends this by fixing a rate of exchange according to which the *ad valorem* duty shall be calculated in the case of all such instruments, except bills of exchange and promissory notes (*o*).

Effect of statement of value.—By sect. 6 (2), where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with such statement, it is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

Denoting stamp.—By sect. 11, where the duty with which an instrument is chargeable depends in any manner upon the duty paid upon another instrument, the payment of the last-mentioned duty shall, upon application to the commissioners, and production of both the instruments, be denoted in such manner as the commissioners think fit.

Reception in evidence of unstamped instruments.—By sect. 14 (1), upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator or referee, of any omission or insufficiency of the stamp thereon; and, if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of 1*l.*, be received in evidence, saving all just exceptions on other grounds.

The section then directs the officer of the court to account for the duties and penalties, and provides for the denoting of the payment of the duty and penalty upon the instrument (sub-sects. 2 and 3).

By sect. 14 (4), save as aforesaid, an instrument executed in any part of the United Kingdom (*p*), or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any

(*n*) See as to the meaning of these terms, sect. 122, *ante*, p. 1191.

(*o*) 62 & 63 Vict. c. 9, s. 12.

(*p*) *E.g.*, executed in England upon a sale in Australia: *Wright* v. *Inland Rev. Com.*, 11 Exch. 458; 25 L.J. Ex. 49.

purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed (*q*); see sect. 38 (1), p. 1236.

This section is an amendment of sect. 16 of the former Act extending the provision to arbitrators and referees, and making it the duty of the judge, arbitrator, or referee to take the objection (*r*). The presumption is that an instrument has been duly stamped in the absence of evidence to the contrary (*s*). There is no appeal from the decision of a judge as to the sufficiency of the stamp (*t*).

Sects. 12, 13, provide for the mode to be pursued in order to procure the commissioners to express their opinion as to the duty, the effect of such a proceeding, and the mode of appealing from the commissioners' assessment.

Use of adhesive stamps.—By sect. 7, any stamp duties of an amount not exceeding two shillings and sixpence upon instruments which are permitted by law to be denoted by adhesive stamps not appropriated by any word or words on the face of them to any particular description of instrument, and any postage duties of the like amount, may be denoted by the same adhesive stamps.

Cancellation of adhesive stamps.—By sect. 8 (1), an instrument the duty upon which is required, or permitted by law, to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel the adhesive stamp, cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp, and renders the same incapable of being used for any other instrument or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time. If there are several stamps, the cancellation must extend to all; see sect. 8 (2). (3) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in manner aforesaid, shall incur a fine of 10*l.*

Sect. 9 imposes a fine of 50*l.* for frauds in relation to adhesive stamps and duties; see also sect. 25 (3) of the Stamp Act, 1870 (unrepealed). Sect. 121 provides for the recovery of

(*q*) See *Clarke* v. *Roche*, 3 Q.B.D. 170; 47 L.J. Q.B. 147; *Ashling* v. *Boon*, (1891) 1 Ch. 568; 60 L.J. Ch. 306; *Birchall* v. *Bullough*, (1896) 1 Q.B. 325; 65 L.J. Q.B. 252; *Coolgardie Gold Fields, In re*, (1900) 1 Ch. 475; 69 L.J. Ch. 868.

(*r*) A new trial will not be granted by reason of a misruling of the judge, &c., as to stamp: Order XXXIX. r. 8.

(*s*) *Marine Ins. Co.* v. *Haviside*, L.R. 5 H.L. 624; 42 L.J. Ch. 173.

(*t*) *Blewitt* v. *Tritton*, (1892) 2 Q.B. 327; 61 L.J. Q.B. 773.

penalties; sect. 27 of the Stamp Act, 1870 (unrepealed), for the making of affidavits and declarations in pursuance of the Act; and sect. 28 of the Stamp Act, 1870 (also unrepealed), for the recovery of money received by any person for the purpose of paying duty, and not so appropriated.

Of the restamping of altered contracts.—If, after a contract has been entered into and executed, the parties vary the terms thereof either by an alteration in the body of the written instrument, or by an indorsement, qualifying and restricting or extending its operation, and neglect to have the writing restamped, they will be unable to recover upon either contract (*u*). If the first agreement is altered, and turned into another and different agreement, and the plaintiff brings his action thereon, and then finds that the substituted contract cannot be enforced by reason of its being unstamped, he cannot resort back to the contract which was abandoned by consent, and seek to recover upon it in its original state. If a bill of exchange or a promissory note is altered in any material particular, it becomes a new security, and must be re-stamped (*x*); but, whilst a contract is *in fieri*, and before it is completely executed by all parties, and perfected, an alteration may be made without rendering a new stamp necessary (*y*). Before a promissory note has been negotiated, it may be converted into a bill of exchange, or altered as to its date, or the time that it has to run, in furtherance of the original intention of all parties, and to correct a mistake (*z*). And a subsequent alteration of a written agreement in a point not material, made by consent of all parties, does not render a fresh stamp necessary, such as an alteration made for the mere purpose of adding the style or address of the parties, or adding the words "or order" accidentally omitted on a bill of exchange (*a*); or altering the name of the port whence the certificate of a ship's registry was granted, a wrong port having been inserted by mistake (*b*); or rectifying a clerical error in the name, in declaring the interest on a policy (*c*); or altering a place at which a bill is made payable, with the consent of the acceptor (*d*); or inserting it when it has been accidentally omitted; or the insertion by the *bonâ fide* holder of a bill of his name in a blank left to

(*u*) *Reed* v. *Deere*, 7 B. & C. 265; 3 C. & P. 624.

(*x*) *Knill* v. *Williams*, 10 East, 431; *Bathe* v. *Taylor*, 15 East, 412.

(*y*) *Jones* v. *Jones*, 1 C. & M. 721; 2 L.J. Ex. 249; *Spicer* v. *Burgess*, 1 C.M. & R. 129; 3 L.J. Ex. 285; *Wright* v. *Inshaw*, 1 Dowl. N.S. 802; 6 Jur. 857.

(*z*) *Webber* v. *Maddocks*, 3 Campb. 1; *Kennerley* v. *Nash*, 1 Stark. 452; *Downes* v. *Richardson*, 5 B. & Ald. 674; 1 D. & R. 332.

(*a*) *Byrom* v. *Thompson*, 11 Ad. & E. 31; 9 L.J. Q.B. 26; *Farquhar* v. *Southey*, Moo. & M. 14; 2 C. & P. 497.

(*b*) *Cole* v. *Parkin*, 12 East, 471.

(*c*) *Robinson* v. *Touray*, 1 M. & S. 217; 3 Campb. 160; *Sawtell* v. *Loudon*, 5 Taunt. 359; 1 Marsh. 99.

(*d*) *Jacob* v. *Hart*, 6 M. & S. 142; 2 Stark. 45; *Walter* v. *Cubley*, 2 Cr. & M. 151; 3 L.J. Ex. 2.

be filled up by the name of the payee; for the issuing of the bill in blank conveys an implied authority to the holder to insert the name; and the insertion thereof merely completes the contract, and carries into effect the original intention (*e*).

If a bill of exchange or a promissory note, however, is altered in any material particular, it becomes a new security, and must be re-stamped (*f*). This will be the case if the parties by indorsement agree to enlarge the time for the fulfilment of the contract (*g*), or if a fresh signature is added at the bottom of a promissory note, after it has been negotiated, so as to make the note the joint note of two promisors, instead of the note of one person only, or if the date has been altered (*h*).

Of the admissibility in evidence for collateral purposes of unstamped, or wrongly stamped, documents.—An unstamped writing "may be given in evidence for the purpose of showing that it is a mere piece of waste paper, from the very circumstance of its being unstamped, or to serve some collateral purpose" (*i*). An unstamped policy has been received in evidence to support an action for the penalties (*k*), and an unstamped contract to prove a fraud (*l*), and an unstamped guarantee to show that the giving of it up was a sufficient consideration for a promise (*m*). A memorandum on the back of an unstamped promissory note of the payment of a certain sum of money for interest has been allowed to be given in evidence as an admission of a certain principal sum being due (*n*). Memoranda of payments, not given in evidence or sought to be set up as an acquittance or discharge of a debt, but in order to prove an over-payment, have been held admissible unstamped (*o*); and, although an unstamped receipt for money cannot be given in evidence as an acquittance or discharge of a debt, yet it may be looked at by a witness to refresh his memory upon the subject of the receipt of the money (*p*).

When a stamped contract is in the hands of one of the parties

(*e*) *Crutchley* v. *Clarence*, 2 M. & S. 90.

(*f*) *Knill* v. *Williams*, 10 East, 431; *Bathe* v. *Taylor*, 15 East, 412; *Tidmarsh* v. *Grover*, 1 M. & S. 735; *Walton* v. *Hastings*, 4 Campb. 223; 1 Stark. 215; *Cowie* v. *Halsall*, 4 B. & Ald. 197; 3 Stark. 36.

(*g*) *Bacon* v. *Simpson*, 3 M. & W. 78; 7 L.J. Ex. 34; *Stephens* v. *Lowe*, 2 M. & Sc. 44; 9 Bing. 32; 1 L.J. C.P. 150. See *Yates* v. *Evans*, 61 L.J. Q.B. 446.

(*h*) *Cardwell* v. *Martin*, 9 East, 190; 1 Campb. 79, 180; *Bowman* v. *Nichol*, 5 T.R. 537; *Perring* v. *Hone*, 12 Moore, 145; 5 L.J. (O.S.) C.P. 33.

(*i*) *Smart* v. *Nokes*, 13 L.J. C.P. 79; 7 Sc. N.R. 786; *Coppock* v. *Bower*, 4 M. & W. 361; 8 L.J. Ex. 9; *Williams* v. *Gerry*, 10 M. & W. 226; 11 L.J. Ex. 389; *Enthoven* v. *Hoyle*, 13 C.B. 394; 21 L.J. C.P. 100; *Matheson* v. *Ross*, 2 H.L.C. 300; 13 Jur. 307.

(*k*) *Holland* v. *Duffin*, Peake, 81.

(*l*) *Keable* v. *Payne*, 8 Ad. & E. 555; 7 L.J. Q.B. 218; *Holmes* v. *Sixsmith*, 7 Exch. 802; 21 L.J. Ex. 313.

(*m*) *Haigh* v. *Brooks*, 10 Ad. & E. 309; 9 L.J. Q.B. 194.

(*n*) *Manly* v. *Peel*, 5 Esp. 121.

(*o*) *Clark* v. *Hougham*, 3 D. & R. 323; 1 L.J. (O.S.) K.B. 249.

(*p*) *Rambert* v. *Cohen*, 4 Esp. 213; *Catt* v. *Howard*, 3 Stark. 3; *Jacob* v. *Lindsay*, 1 East, 460; *Maugham* v. *Hubbard*, 8 B. & C. 14; 6 L.J. (O.S.) K.B. 229.

to an action, who refuses to produce it, the court will allow secondary evidence of the contents to be given through the medium of an unstamped draft or copy (*q*); and, if a contract is proved to be in the hands of the defendant in an action, and the latter refuses to produce it after notice, the court will presume it to be duly stamped, unless the contrary be shown (*r*); and the same presumption will be adopted where a contract has been lost (*s*).

Stamp duties on contracts executed abroad.—Our courts of law do not, as previously mentioned, take notice of the revenue laws of foreign states. Where an action was brought in this country for the recovery of money lent in France, and unstamped receipts for the money were produced in proof of the loan, evidence to show that by the law of France such receipts required stamps to render them evidence was rejected (*t*). But, if the law of the country in which the contract is made renders the contract null and void if it is not stamped, it cannot be enforced here if it has not the foreign stamp (*u*). Promissory notes made abroad and negotiated here are subjected to our stamp duties (*x*).

(*q*) *Munn* v. *Godbold*, 11 Moore, 49; 4 L.J. (O.S.) C.P. 54; *Braythwayte* v. *Hitchcock*, 10 M. & W. 494; 12 L.J. Ex. 38.

(*r*) *Crisp* v. *Anderson*, 1 Stark. 35.

(*s*) *Rex* v. *Long Buckby*, 7 East, 45; *Pooley* v. *Goodwin*, 4 Ad. & E. 94; 5 N. & M. 466; *Hart* v. *Hart*, 1 Hare, 1; 11 L.J. Ch. 9; *Closmadeuc* v. *Carrel*, 18 C.B. 36; 35 L.J. C.P. 216. See *Marine Insurance Co.* v. *Haviside*, *ante*, p. 1198.

(*t*) *James* v. *Catherwood*, 3 D. & R. 190.

(*u*) *Bristow* v. *Sequeville*, 5 Exch. 279; 19 L.J. Ex. 289.

(*x*) See *ante*, p. 1107, Bills of Exchange.

CHAPTER II.

OF THE STAMPS APPROPRIATE TO PARTICULAR CONTRACTS.

Stamp duties on deeds.—Deeds of any kind whatsoever which are not specifically described in the schedule of the Stamp Act, 1891, are liable to a duty of 10*s.* (*a*). The mere fact of a contract having a seal placed against the signatures of the parties does not, as we have seen, make the contract a deed. A contract, therefore, does not require a deed stamp merely because there is a seal attached to it (*b*). "The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it; he must, so to speak, 'hit the bird in the very eye.' No intendments can be made in favour of the liability" (*c*). If an old deed appears on the face of it to have been stamped, and the parchment is worn and the stamp obliterated, so that the nature and amount of it cannot be ascertained, the document is admissible in evidence; and it is for the parties who seek to impeach the deed to show, either that it was not stamped at all, or that it was stamped with a wrong stamp (*d*).

Progressive duty, according to the number of words contained in a deed, used to be imposed upon all deeds, but by the Stamp Act, 1891, the duties thereinafter mentioned are granted, and there is no mention made of progressive duties, which are therefore abolished (*e*).

Attested copies—duplicates and counterparts.—Attested or authenticated copies or extracts of certain documents mentioned are charged with the same duty as the original instruments in the

(*a*) 54 & 55 Vict. c. 39. By 46 & 47 Vict. c. 52, s. 144, every deed, &c., relating solely to property which is part of the estate of the bankrupt, and which after the execution of such deed, &c., is, or remains, the estate of the bankrupt, or of the trustee, and every power of attorney, &c., or other instrument relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, is exempted from stamp duty (except in respect of fees under that Act). This section is extended to companies wound up by order of the Court by the Finance Act, 1895 (58 Vict. c. 16), s. 16.

(*b*) *Chanter* v. *Johnson*, 14 M. & W. 408; 14 L.J. Ex. 289; *Brown* v. *Vawser*, 4 East, 584.

(*c*) *Per cur.*, *Phillips* v. *Morrison*, 12 M. & W. 740; 13 L.J. Ex. 213.

(*d*) *Doe* v. *Coombs*, 3 Q.B. 687; 12 L.J. Q.B. 36.

(*e*) See the preamble to the Act, and sect. 1.

case of an instrument chargeable with any duty not amounting to 1*s.*, and in any other case with a duty of 1*s.* (*f*). But copies or extracts of or from any law proceedings are exempt. With respect to copies and extracts, it is also enacted by sect. 63 of the Stamp Act, 1891, that an attested or otherwise authenticated copy or extract of or from—(1) an instrument chargeable with any duty; (2) an original will, testament, or codicil; (3) the probate or probate copy of a will or codicil; (4) letters of administration or a confirmation of a testament, may be stamped at any time within fourteen days after the date of the attestation or authentication, on payment of the duty only. Duplicates or counterparts of any instrument chargeable with stamp duty, not amounting to 5*s.*, are subjected to the same duty as is charged on the original instrument: and, in any other case, the stamp duty on the duplicate or counterpart is 5*s.*

By sect. 72, the duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor), is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart.

A copy or extract certified of or from any register of births, baptisms, marriages, deaths, or burials is chargeable with one penny duty; and see sect. 64 of the Act.

Conveyances or transfers on sale of any property (except certain stocks) (*g*) are subject to the *ad valorem* duty specified in the schedules to the Act varying from 6*d.*, where the value of the consideration does not exceed 5*l.*, to 1*l.* 10*s.* 0*d.*, where the value exceeds 275*l.*; and for any conveyance or transfer of any kind not thereinbefore described, to a duty of 10*s.* By sect. 54, the term "conveyance on sale" includes every instrument, and every decree or order of any court, or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction (*h*).

(*f*) See the schedule, tit. "Copy."

(*g*) See the schedule, tit. "Conveyance or transfer."

(*h*) See *Inland Rev. Com.* v. *Glasgow & S. W. Ry.*, 12 App. Cas. 315; 56 L.J. P.C. 82; *G. W. Ry.* v. *Inland Rev. Com.*, (1894) 1 Q.B. 507; 63 L.J. Q.B. 405; *Huntington* v. *Inland Rev. Com.*, (1896) 1 Q.B. 422; 65 L.J. Q.B. 297; *Chesterfield Brewery* v. *Inland Rev. Com.*, (1899) 2 Q.B. 7; 68 L.J. Q.B. 204; *Bristol (Marquess)* v. *Inland Rev. Com.*, (1901) 2 K.B. 336; 70 L.J. K.B. 759; *G. N. Ry.* v. *Inland Rev. Com.*, (1901) 1 K.B. 416; 70 L.J. K.B. 336. By the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6, the term "conveyance on sale" is to include a decree or order for foreclosure: see *Inland Rev. Com.* v. *Tod*, (1898) A.C. 399; 67 L.J. P.C. 42.

This includes an agreement for the sale of the goodwill of a business (*i*).

By sect. 55 (1), where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security (*k*), the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security; (2) where the consideration, or any part of the consideration, for a conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security.

By sect. 56 (1), where the consideration, or any part of the consideration, for a conveyance on sale, consists of money payable periodically for a definite period, not exceeding twenty years (*l*), so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such total amount; (2) where the consideration, or any part of the consideration, for a conveyance on sale, consists of money payable periodically for a definite period exceeding twenty years (*l*), or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of such instrument; (3) where the consideration, or any part of the consideration, for a conveyance on sale, consists of money payable periodically (*m*) during any life or lives, the conveyance is to be charged, in respect of that consideration, with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument; (4) provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing the payments, is to be charged with any duty in respect of such provision, and no separate instrument made in that case for securing the payments is to be charged with any higher duty than 10*s*.

By sect. 57, where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or sub-

(*i*) *Inland Rev. Com.* v. *Angus*, 23 Q.B.D. 579; and see sect. 59, *post*, p. 1221.

(*k*) See *Foster* v. *Inland Rev. Com.*, (1894) 1 Q.B. 516; 63 L.J. Q.B. 173.

(*l*) These words are new.

(*m*) Where part of the consideration was to be paid by instalments of 1,000*l*. each at intervals of six months, it was held to be a periodical payment within the corresponding section, and not a deferred payment merely: *Limmer Asphalte Co.* v. *Inland Rev. Com.*, L.R. 7 Ex. 211; 41 L.J. Ex. 106.

ject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (*n*).

By sect. 58 (1), where property contracted to be sold for one consideration for the whole, is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration; (2) where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified; (3) where there are several instruments of conveyance for completing the purchaser's title to property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but such last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument; (4) where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser; (5) where a person having contracted for the purchase of any property, but not having obtained a conveyance, contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty, in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration; (6) where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him,

(*n*) *Inland Rev. Com.* v. *Tod*, *ante*, p. 1203; *Swayne* v. *Inland Rev. Com.*, (1900) Q.B. 172; 69 L.J. Q.B. 63.

which is chargeable with *ad valorem* duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty. And see *post*, p. 1221, as to agreements to be deemed conveyances (sect. 59). By the Finance Act, 1900 (*o*), a conveyance on sale made for any consideration in respect whereof it is liable to *ad valorem* duty, and in further consideration of a covenant to make, or of the purchaser having made, substantial improvements or additions to the property, or of any covenant relating to the subject matter of the conveyance, shall not be chargeable with any duty in respect of such further consideration.

By sect. 60, where, upon the sale of any annuity or other right not before in existence, such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance or sale (*p*).

By sect. 61 (1), in the cases hereinafter specified the principal instrument is to be ascertained in the following manner: (a) where any copyhold or customary estate is conveyed by a deed, no surrender being necessary, the deed is to be deemed the principal instrument; (b) in other cases of copyhold or customary estates, the surrender or grant, if made out of court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in court, is to be deemed the principal instrument; (c) where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument: (2) in any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

By sect. 62, every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property.

(*o*) 63 Vict. c. 7, s. 10.

(*p*) As to stamp on undertaking to leave minerals unworked, see *G. N. Ry.* v. *Inland Rev. Com.*, (1901) 1 K.B. 416; 70 L.J. K.B. 336.

Provided that a conveyance or transfer made for effectuating the appointment or retirement of a trustee is not to be charged with any higher duty than 10*s.* (*q*).

By sect. 117, every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence, or insufficiency, shall be void (*r*).

Contracts not operating as transfers and conveyances of the legal estate in property were not liable to the *ad valorem* stamp, although they might operate upon the equitable estate (*s*). Agreements in writing, consequently, for the sale of land or veins or beds of coal, which did not transfer the land or the coal to the purchaser, by reason of their not having been made under seal, needed only to be stamped with a common agreement stamp (*t*). A contract amounting to a purchase and sale of the goodwill of a business requires an *ad valorem* stamp as a conveyance (*u*); and so do simple contracts operating as transfers of fixtures or growing crops, or of any description of property, not being simple contracts for the purchase and sale of goods and chattels (*x*). Where by a marriage settlement the defendant, in consideration of a sum of money paid by the intended wife's father as a marriage portion, and also in consideration of the marriage, covenanted to pay an annuity to the plaintiff, to the use of the intended husband and wife, it was held that the transaction was not a purchase or a sale of an annuity within the language of the schedule to the 13 & 14 Vict. c. 97 (repealed), and that the *ad valorem* stamp was not requisite (*y*). And, where a person who was entitled to the reversion of stock after the death of the party entitled for life, agreed to pay the latter an annuity, in consideration of his permitting the stock to be sold and the proceeds of the sale to be received by such reversioner for his own benefit, it was held that the transaction was not a sale

(*q*) The Stamp Act, 1891, schedule, tit. "Duplicate"; 2 Ed. 7, c. 7, s. 9.

(*r*) The Finance Act, 1895 (58 Vict. c. 16), s. 12, makes stamp duty payable in cases of property vested by Act of Parliament or purchased under statutory powers. The section applies both to real and personal property: *Att.-Gen.* v. *Eastbourne Corp.*, (1902) 1 K.B. 403; 71 L.J. K.B. 181.

(*s*) See now sect. 59, *post*, p. 1221; *Inland Rev. Com.* v. *Angus*, 23 Q.B.D. 579.

(*t*) *Phillips* v. *Morrison*, 12 M. & W. 742; 13 L.J. Ex. 212; *Rex* v. *Ridgwell*, 6 B. & C. 665; 5 L.J. (O.S.) M.C. 67; *Wilmot* v. *Wilkinson*, 6 B. & C. 511; 5 L.J. (O.S.) K.B. 196.

(*u*) *Potter* v. *Inland Rev. Com.*, 10 Exch. 147; 23 L.J. Ex. 345.

(*x*) *Horsfall* v. *Key*, 2 Ex. 778; 17 L.J. Ex. 266; *Cattle* v. *Gamble*, 5 Bing. N.C. 46; 8 L.J. C.P. 162; *Att.-Gen.* v. *Brown*, 3 Exch. 662; 18 L.J. Ex. 336.

(*y*) *Massy* v. *Nanney*, 3 Bing. N.C. 480; 6 L.J. C.P. 185.

of an annuity in the ordinary acceptation of the term, and that the deed was properly stamped with a common deed stamp (*z*). An indenture granting a licence to carry on, with asphalte supplied by the licensor, the business of asphalte paving, &c., with a covenant to supply asphalte, was held not to require a conveyance stamp, no property, or any exclusive right to use the asphalte, being in fact conveyed by the indenture (*a*). A licence to construct a jetty subject to special terms of a private Act was held not to be a conveyance (*b*).

Mortgages (*c*), bonds, debentures, covenants (except a marketable security otherwise charged with duty), warrants of attorney to confess and enter up judgment, and foreign securities of any kind, are liable, when they are the only, or principal, or primary security (other than an equitable mortgage, see *infra*), for the payment or repayment of money not exceeding 300*l.*, to an *ad valorem* duty ranging from 3*d.* to 7*s.* 6*d.*, and exceeding 300*l.*, to a duty of 2*s.* 6*d.* for every 100*l.* or fractional part of 100*l.* When they are the collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance where the principal or primary security is duly stamped, they are liable to a duty of 6*d.* for every 100*l.* or fractional part of 100*l.* An equitable mortgage is subject to a duty of 1*s.* for every 100*l.* and any fractional part of 100*l.*

Transfers, assignments, dispositions, or assignations of the above, except a marketable security, or of any money secured thereby, or by any warrant of attorney or judgment, are liable to a duty of 6*d.* for every 100*l.* or fractional part, exclusive of interest, which is not in arrear; and, where any further money is added to the money already secured, the same amount of duty is payable as if for a principal security. Re-conveyances, releases, discharges, surrenders, re-surrenders, warrants to vacate, or renunciations of any of the above securities, or of the benefit of them, or of the money thereby secured, are liable to a duty of 6*d.* upon every 100*l.* or fractional part of 100*l.* (*d*).

By the Stamp Act, 1891, s. 86 (1), the term "mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable,

(*z*) *Blandy* v. *Herbert*, 9 B. & C. 396; 7 L.J. (O.S.) K.B. 223.

(*a*) *Limmer Asphalte Co.* v. *Inland Rev. Com.*, L.R. 7 Ex. 211; 41 L.J. Ex. 106; *Sweetmeat Automatic Delivery Co.* v. *Inland Rev. Com.*, (1895) 1 Q.B. 484; 64 L.J. Q.B. 84.

(*b*) *Conservators of River Thames* v. *Inland Rev. Com.*, 18 Q.B.D. 279; 56 L.J. Q.B. 181.

(*c*) *Harris* v. *Birch*, 9 M. & W. 593; 11 L.J. Ex. 219.

(*d*) See the schedule, tit. "Mortgage." As to exemption of re-conveyance under Building Societies Act, see *Old Battersea Building Soc.* v. *Inland Rev. Com.*, (1898) 2 Q.B. 294; 67 L.J. Q.B. 696.

or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; and includes—(a) conditional surrender by way of mortgage, further charge, wadset, and heritable bond, disposition, assignation, or tack in security, and eik to a reversion of or affecting any lands, estate, or property, real or personal, heritable or moveable, whatsoever: and (b) any deed containing an obligation to infeft any person in an annual rent, or in lands or other heritable subjects in Scotland, under a clause of reversion, but without any personal bond or obligation therein contained for payment of the money or stock intended to be secured: and (c) any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts in full satisfaction thereof, or who exceed five in number: and (d) any defeazance, letter of reversion, back bond, declaration, or other deed or writing for defeating or making redeemable, or explaining or qualifying, any conveyance, transfer, disposition, assignation, or tack of any lands, estate, or property whatsoever, apparently absolute, but intended only as a security; and (e) any agreement (other than an agreement chargeable with duty as an equitable mortgage), contract, or bond accompanied with a deposit of title deeds for making a mortgage, wadset, or any other security or conveyance as aforesaid of any lands, estate, or property comprised in the title deeds, or for pledging or charging the same as a security: and (f) any deed whereby a real burden is declared or created on lands or heritable subjects in Scotland: and (g) any deed operating as a mortgage of any stock or marketable security (*e*). (2) For the purpose of this Act the expression "equitable mortgage" means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security) (*f*), or creating a charge on such property.

By sect. 87 (1), a security for the transfer or re-transfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of the stock; and a transfer, assignment, disposition, or assignation

(*e*) As to debentures, see *Rowell* v. *Inland Rev. Com.*, (1897) 2 Q.B. 194; 66 L.J. Q.B. 528; *City of London Brewery Co.* v. *Inland Rev. Com.*, (1899) 1 Q.B. 121; 68 L.J. Q.B. 978; *Knight's Deep* v. *Inland Rev. Com.*, (1900) 1 Q.B. 217; 69 L.J. Q.B. 66.

(*f*) See sect. 23, *post*, p. 1212.

of any such security, and a re-conveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security, is to be charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of the stock.

By sect. 87 (2), a security for the payment of any rentcharge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid (*g*).

By sect. 87 (3), a transfer of a duly stamped security, and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security (*h*).

By sect. 87 (4), where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of court roll of the surrender or grant, if made in court. (5) Where any copyhold or customary lands or hereditaments are mortgaged, together with other property, for securing the same money or the same stock, the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of court roll of the surrender or grant, as the case may be, is not to be charged with any higher duty than 10*s*. (6) An instrument chargeable with *ad valorem* duty as a mortgage is not to be charged with any further duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or limited in any other manner than to a purchaser, or in trust for, or according to the direction of, a purchaser.

By sect. 88 (1), a security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be

(*g*) See *Mersey Docks and Harbour Board* v. *Inland Rev. Com.*, (1897) 2 Q.B. 316; 66 L.J. Q.B. 697.

(*h*) See *Wale* v. *Inland Rev. Com.*, 4 Ex.D. 270; 48 L.J. Ex. 574; *City of London Brewery Co.* v. *Inland Rev. Com.*, *ante*, p. 1209.

ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited. (2) Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover; but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made. (3) Provided that no money to be advanced for the insurance of any property comprised in the security against damage by fire, or for keeping up any policy of life insurance comprised in the security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in such security upon the dropping of any life whereon the property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty.

By sect. 89, the exemption from stamp duty conferred by 6 & 7 Will. 4, c. 32, for the regulation of benefit building societies, shall not extend to any mortgage to be made after the 31st July, 1868, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding 500*l.*

Marketable securities and foreign and colonial share certificates.—By sect. 82 (1), marketable securities for the purpose of the charge of duty thereon (see definition, sect. 122, *ante*, p. 1191) include—(a) A marketable security, made or issued by or on behalf of any company or body of persons corporate or unincorporate formed or established in the United Kingdom; and (b) A marketable security by or on behalf of any foreign state or government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security), bearing date or signed after the third day of June one thousand eight hundred and sixty-two, (i.) Which is made or issued in the United Kingdom (*i*), or (ii.) Which, though originally issued out of the United Kingdom, has been, after the sixth day of August one thousand eight hundred and eighty-five, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom, or (iii.) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; and (c) A marketable security by or on behalf of any colonial government which if the borrower were a foreign government would be a foreign security (hereinafter called a colonial government security) (*k*).

(*i*) See *Revelstoke (Lord)* v. *Inland Rev. Com.*, (1898) A.C. 565; 67 L.J. Q.B. 855.

(*k*) As to the meaning of "marketable

By sect. 83, every person who in the United Kingdom makes, issues, assigns, transfers, negotiates, or offers for subscription any foreign security or colonial government security not being duly stamped, shall incur a fine of 20*l.* By the Finance Act, 1895 (*l*), where foreign securities within the meaning of ss. 82 and 83 of the Stamp Act, 1891, are issued in the United Kingdom and the interest thereon is not payable in the United Kingdom, and such evidence of the amount of the securities as the commissioners require is produced to them, the commissioners may accept payment of the amount of stamp duty which would be payable if all the securities were duly stamped and on such payment may dispense with the necessity of the securities being stamped.

By sect. 84, the commissioners may at any time, without reference to the date thereof, allow any foreign security or colonial government security to be stamped without the payment of any penalty, upon being satisfied, in any manner that they may think proper, that it was not made or issued, and has not been transferred, assigned, or negotiated within the United Kingdom.

By sect. 23, it is enacted (1) that every instrument under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer or foreign or colonial share certificate or any security for money transferable by delivery by way of security for any loan, shall be deemed to be an agreement and be charged with duty accordingly, and (2) the same duty is made chargeable in the case of an instrument under hand qualifying or making redeemable a duly stamped transfer of any registered stock or marketable security. (3) A release or discharge of any such instrument is not liable to *ad valorem* duty.

A deed of assignment of goods and chattels as an additional security for the payment of a principal sum and interest thereon, already secured by a warrant of attorney, was held to be sufficiently stamped with a common deed stamp (*m*); and so also was a deed executed and indorsed on a former mortgage deed, as a further security for the sum thereby secured (*n*), and a declaration of trust

security," see *Brown, Shipley & Co.* v. *Inland Rev. Com.*, (1895) 2 Q.B. 598; 64 L.J. M.C. 241; *Knight's Deep* v. *Inland Rev. Com.*, (1900) 1 Q.B. 217; 69 L.J. Q.B. 66. As to composition for stamp duty upon transfer of Canadian and colonial stock, see sect. 114 of the Act, which is extended by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 39, to the stock of any foreign state or government which is inscribed in the books of the Bank of England, and by the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 5, to certain stock of British protectorates. As to stamp duty on other foreign or colonial securities, see the Finance Act, 1899 (62 & 63 Vict. c. 9), s. 4.

Sect. 83, sub-sect. (2), and sect. 85 of the Stamp Act, 1891, were repealed by the Customs and Inland Revenue Act, 1893 (56 Vict. c. 7), s. 4.

(*l*) 58 Vict. c. 16, s. 14.

(*m*) *Pierpoint* v. *Gower*, 5 Sc. N.R. 605; 12 L.J. C.P. 55.

(*n*) *Robinson* v. *Macdonnell*, 5 M. & S. 228.

of a surrender of copyholds by way of security (*o*). A security for contingent future payments was held to be as much within the words and meaning of the former statute as a security for certain future payments (*p*).

Covenants (*q*).—Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of or the title to the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid, is liable to a duty equal to the amount of the *ad valorem* duty payable in respect of the consideration or mortgage money, where that does not exceed 10*s.*, and in any other case 10*s.* (*r*).

Exchanges, partitions, &c.—By sect. 73, where, upon the exchange of any real or heritable property for any other real or heritable property, or upon the partition or division of any real or heritable property, any consideration exceeding in amount or value 100*l.* is paid or given, or agreed to be paid or given, for equality, the principal or only instrument whereby the exchange or partition or division is effected is to be charged with the same *ad valorem* duty as a conveyance on sale for the consideration, and with that duty only; and where in any such case there are several instruments for completing the title of either party, the principal instrument is to be ascertained, and the other instruments are to be charged with duty in the manner hereinbefore provided in the case of several instruments of conveyance (*s*).

In any other case the instrument effecting the exchange is liable to a duty of 10*s.* (*t*).

Settlements.—Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled, in any manner whatsoever, is liable for

(*o*) *Haywood* v. *Bibby*, 11 M. & W. 812; 12 L.J. Ex. 404.

(*p*) *Canning* (*Lord*) v. *Raper*, 1 E. & B. 164; 22 L.J. Q.B. 87.

(*q*) As to bonds for securing payments at certain periods, see *Jones* v. *Inland Rev. Com.*, (1895) 1 Q.B. 484; 64 L.J. Q.B. 84; *Clifford* v. *Inland Rev. Com.*, (1896) 2 Q.B. 187; 65 L.J. Q.B. 582; *Lewis* v. *Inland Rev. Com.*, (1898) 2 Q.B. 290; 67 L.J. Q.B. 694; *National Telephone Co.* v. *Inland Rev. Com.*, (1900) A.C. 1; 69 L.J. Q.B. 43.

(*r*) As to covenant to execute a mortgage, see *United Realization Co.* v. *Inland Rev. Com.*, (1899) 1 Q.B. 361; 68 L.J. Q.B. 218.

(*s*) See sect 58, *ante*, p. 1205. As to exchange of shares, see *Coats* v. *Inland Rev. Com.*, (1897) 2 Q.B. 423; 66 L.J. Q.B. 732.

(*t*) See the schedule, tit. "Exchange."

every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled, to a duty of 5*s.*

Instruments of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power, or the grant of representation of any will or testamentary instrument creating the power are exempted from duty (*u*).

By sect. 104 (1), where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby the settlement is made or agreed to be made is to be charged with *ad valorem* duty in respect of that money. (2) Provided as follows: (a) Where in the case of a policy, no provision is made for keeping up the policy, the *ad valorem* duty is to be charged only on the value of the policy at the date of the instrument; (b) If in any such case the instrument contains a statement of the said value, and is stamped in accordance with the statement, it is, so far as regards the policy, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

By sect. 105, an instrument chargeable with *ad valorem* duty as a settlement in respect of any money, stock, or security is not to be charged with any further duty by reason of containing provision for the payment or transfer of the same money, stock, or security, or by reason of containing, where the money, stock, or security is in reversion, or is not paid or transferred upon the execution of the instrument, provision for the payment (*x*) by the person entitled in possession to the interest or dividends of the money, stock, or security, during the continuance of such possession, of any annuity or yearly sum not exceeding interest at the rate of 4*l.* per centum per annum upon the amount or value of the money, stock, or security.

By sect. 106 (1), where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of the property exceeds 10*s.*, one only of such instruments is to be charged with the *ad valorem* duty. (2) Where a settlement is made in pursuance of a previous agreement upon which any *ad valorem* settlement duty exceeding 10*s.* has been paid in respect of any pro-

(*u*) See *Russell* v. *Inland Rev. Com.*, (1902) 1 K.B. 142; 71 L.J. K.B. 201.

(*x*) The language of this section is, in great part, new.

perty, the settlement is not to be charged with *ad valorem* duty in respect of the same property. (3) In each of the aforesaid cases the instruments not chargeable with *ad valorem* duty are to be charged with the duty of 10*s.* (*y*).

Revocations of uses and trusts of any property by any writing not being a will are liable to a duty of 10*s.* (*z*).

Releases or renunciations (*a*) of any property, or of any right or interest in any property, in any other case except upon a sale (see "Conveyance") or by way of security (see "Mortgage"), are liable to a duty of 10*s.* (*b*).

A lease or tack for any definite term not exceeding a year of any dwelling house, or part, at a rent not exceeding the rate of 10*l.* per annum, is liable to a duty of 1*d.*; and for any definite term less than a year of a furnished dwelling house or apartments where the rent exceeds 25*l.* to a duty of 2*s.* 6*d.*; and for any other lands, tenements, or heritable subjects, except or otherwise than as aforesaid, the same duty as a lease for a year at the rent reserved. A lease or tack for any other definite term, or for any indefinite term, of any lands, tenements, or heritable subjects, where the consideration consists of money, stock, or security, requires the same duty as a conveyance on a sale for the same consideration; and, where the consideration is a rent at a rate or average rate not exceeding 5*l.* up to 100*l.*, it is liable to a duty varying according to the rate of the rent, and according to the duration of the term, whether it is more or less than thirty-five years or one hundred years. Leases of any other kind whatsoever not hereinbefore described are liable to a duty of 10*s.*

By sect. 75 (1), an agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects, for any term not exceeding thirty-five years, or for any indefinite term, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement. (2) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped, is to be charged with the duty of 6*d.* only.

By sect. 76 (1), where the consideration, or any part of the consideration, for which a lease or tack is granted or agreed to be granted, consists of any produce or other goods, the value of the produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty.

(*y*) See *Onslow* v. *Inland Rev. Com.*, (1891) 1 Q.B. 239; 60 L.J. Q.B. 138.

(*z*) Schedule, tit. "Revocation."

(*a*) "Renunciation" in this connection is a term of Scotch and not of English law; see *G. N. Ry.* v. *Inland Rev. Com.*, (1901) 1 K.B. 416; 70 L.J. K.B. 336.

(*b*) Schedule, tit. "Release."

(2) Where it is stipulated that the value of the produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with, or has the option of paying after any permanent rate of conversion, the value of the produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at the given sum, or according to the permanent rate. (3) A lease or tack or agreement for a lease or tack made either wholly or partially for any such consideration, if it contains a statement of the value thereof, and is stamped in accordance with the statement, is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is otherwise shown that the statement is incorrect, and that the lease or tack or agreement is in fact not duly stamped.

By sect. 77 (1), a lease or tack or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of or relating to the same subject-matter. (2) A lease made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration (*c*). (3) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than 35*s*. (4) A lease for a definite term exceeding thirty-five years granted under the Trinity College (Dublin) Leasing and Perpetuity Act, 1851, is not to be charged with any higher duty than would have been chargeable thereon if it had been a lease for a definite term not exceeding thirty-five years. (5) An instrument whereby the rent reserved by any other instrument chargeable with duty and duly stamped as a lease or tack is increased is not to be charged with duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.

By sect. 78 (1), the duty upon an instrument chargeable with duty as a lease or tack of—(a) any dwelling-house or tenement, or

(*c*) See *British Electric Traction Co.* v. *Inland Rev. Com.*, (1902) 1 K.B. 441; 71 L.J. K.B. 92.

part of a dwelling-house or tenement, for a definite term not exceeding a year, at a rent not exceeding the rate of 10*l.* per annum; or (b) any furnished dwelling-house or apartments for any definite term less than a year: and upon the duplicate or counterpart of any such instrument: may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed; (2) every person who executes, or prepares, or is employed in preparing, any such instrument (except letters or correspondence) which is not, at or before the execution thereof, duly stamped, shall incur a fine of 5*l.*

Where the expenditure of money in improvements constitutes the consideration for the lease, it is not a lease by way of fine or premium within the meaning of the former statutes (*d*). The granting of a lease in consideration of a premium is a sale of an interest in the land for a term of years; and the premium must be "truly expressed and set forth in words at length" in the deed (*e*).

A contract for the sale of vesture and herbage and growing grass for a certain sum is properly stamped as a lease granted in consideration of a sum of money by way of fine or premium (*f*).

Every contract which operates as a demise of realty for any determinate term is in contemplation of law a lease (*g*). A mere acknowledgment of an antecedent tenancy, or of an existing tenancy, does not require a lease stamp (*h*). A lease for a term of forty-five years at a substantial rent for the first twenty-three years, and at a peppercorn rent during the remaining twenty-two years, is not a lease exceeding thirty-five years at a yearly rent (*i*).

Agreements for leases are charged with the same duty as leases (*k*).

Assignments and surrenders of leases—Agreements to surrender.—Every assignment of a lease made upon any other occasion than a sale or mortgage is subjected to duty as a conveyance (*l*). Every surrender not being of copyholds and not chargeable with duty as a conveyance on sale or mortgage is chargeable with a duty of 10*s.* (*m*).

Surrender of copyholds.—A surrender or grant made out of court,

(*d*) *Nicholls* v. *Cross*, 14 M. & W. 42; 14 L.J. Ex. 244.

(*e*) *Doe* v. *Lewis*, 10 B. & C. 675; 8 L.J. (O.S.) K.B. 300. As to lease of telephone, see *Sweetmeat Automatic Delivery Co.* v. *Inland Rev. Com.*, (1895) 1 Q.B. 484; 64 L.J. Q.B. 84.

(*f*) *Cattle* v. *Gamble*, 5 Bing. N.C. 46; 8 L.J. C.P. 162.

(*g*) *Burton* v. *Reevell*, 16 L.J. Ex. 86; 16 M. & W. 311.

(*h*) *Eagleton* v. *Gutteridge*, 11 M. & W. 465; 12 L.J. Ex. 359; *Glen* v. *Dungey*, 4 Ex. 61; 18 L.J. Ex. 359; *Doe* v. *Wiggins*, 4 Q.B. 367; 12 L.J. Q.B. 177.

(*i*) *Pearson* v. *Inland Rev. Com.*, L.R. 3 Ex. 242; 37 L.J. Ex. 171.

(*k*) See sect. 75, *ante*, p. 1215.

(*l*) See sect. 62, *ante*, p. 1206; and see the duties chargeable on conveyances, *ante*, p. 1203.

(*m*) See the schedule, tit. "Surrender."

or the memorandum thereof, or the copy of the court roll of any surrender or grant made in court, is liable to a duty of 10*s*.

By sect. 65 (1), no instrument is to be charged more than once with duty by reason of relating to several distinct tenements in respect whereof several fines or fees are due to the lord or steward of the manor; (2) the copy of court roll of a surrender or grant made out of court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, or the memorandum thereof, is duly stamped, of which fact the certificate of the steward of the manor on the face of the copy shall be sufficient evidence; (3) the entry upon the court rolls of a surrender or grant shall not be admissible or available as evidence of the surrender or grant unless the surrender or grant, if made out of court, or the memorandum thereof, or the copy of court roll of the surrender or grant, if made in court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of the entry shall be sufficient evidence.

By sect. 66 (1), all the facts and circumstances affecting the liability to duty of the copy of court roll of any surrender or grant made in court, or the amount of duty with which any such copy of court roll is chargeable, are to be fully and truly stated in a note to be delivered to the steward of the manor before the surrender or grant is made.

By sect. 66 (2), the steward of every manor shall refuse—(a) to accept in court any surrender, or to make in court any grant, until such a note as is required by this section has been delivered to him; or (b) to enter on the court rolls, or accept any presentment of, or admit any person to be tenant under or by virtue of, any surrender or grant made out of court, or any deed which is not duly stamped; and in any case in which he does not so refuse shall incur a fine of 50*l*.; (3) if any person with intent to defraud her Majesty—(a) makes in court any surrender before such a note as aforesaid has been delivered to the steward of the manor; or (b) being employed or concerned in or about the preparation of any such note as aforesaid, neglects or omits fully and truly to state therein all the above-mentioned facts and circumstances, he shall incur a fine of 50*l*.

By sect. 67, the steward of every manor shall, within four months from the day on which any surrender or grant is made in court, make out a duly stamped copy of court roll of such surrender or grant, and have the same ready for delivery to the person entitled thereto, and in default of so doing shall incur a fine of 50*l*.; and the duty payable in respect of the copy of court roll shall be a debt to his Majesty, from the steward, whether he has received it or not,

and if he has not received the duty the same shall also be a debt to his Majesty, from the person entitled to the copy.

By sect. 68, the steward of any manor may, before he accepts in court any surrender or makes in court any grant, demand the payment of his lawful fees in relation to the surrender or grant, together with the duty payable on the copy of court roll thereof, and may refuse to proceed in any such matter or to deliver the copy of court roll to any person until such fees and duty are paid.

Every agreement which operates as a surrender must be stamped as a surrender (*n*).

Contracts of apprenticeship.—Instruments of apprenticeship, except parish apprenticeships and those in Ireland where premium does not exceed 10*l.* (*o*), are liable to a duty of 2*s.* 6*d.*

By sect. 25, every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment (except articles of clerkship to a solicitor or law agent or writer to the signet specifically charged with duty), is to be deemed an instrument of apprenticeship.

The following exemption from duty is contained in the general exemptions at the end of the schedule of the Stamp Act, 1891 :— Instruments of apprenticeship, bonds, contracts, and agreements entered into in the United Kingdom for or relating to the service in any of his Majesty's colonies or possessions abroad of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or labourer.

If the contract is only a contract of hiring and service, it must be stamped with an agreement stamp, unless it is under seal and requires a deed stamp, or unless it is a contract "for the hire of labourers, artificers, manufacturers, or menial servants," and as such exempt from all stamp duty (*p*). In calculating the amount of the duty regard must be had only to the value of what is given, directly or indirectly, to the master as consideration for the taking of the apprentice. If the friends of the latter covenant to provide meat, lodging, and clothing, this is not a benefit rendered to the master, nor anything given to him, but to the apprentice himself, and it cannot be made the subject of stamp duty under the Act (*q*) ; nor can a reservation to the master of a portion of the apprentice's earnings, the master being otherwise entitled to the whole (*r*). But, if any friends of the apprentice make a secret bargain with the master, to give him some consideration beyond

(*n*) *Williams* v. *Sawyer*, 6 Moore, 226 ; 3 Br. & B. 70.

(*o*) See *Rex* v. *Halesworth*, 3 B. & Ad. 717 ; *R.* v. *Skeffington*, 3 B. & Ald. 382.

(*p*) See *post*, p. 1222.

(*q*) *R.* v. *St. Petrox*, 4 T.R. 196 ; *R.* v. *Aylesbury*, 3 B. & Ad. 569 ; 1 L.J. M.C. 38.

(*r*) *R.* v. *Bradford*, 1 M. & S. 151.

what is expressed upon the face of the deed of apprenticeship, the contract is void (*s*). Money promised or agreed to be paid by a person not competent to contract or to make a valid payment amounts to nothing, and will not invalidate the deed (*t*); nor will the insertion therein of a greater sum than was actually paid (*u*).

Charter-parties, which expression includes (sect. 49 (1)) any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing, between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of the ship or vessel, are subjected to a stamp duty of 6*d.* (*x*).

By sect. 49 (2), the duty upon a charter-party may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract.

By sect. 50, where a charter-party is first executed out of the United Kingdom, without being duly stamped, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument so stamped shall be deemed duly stamped.

By sect. 51, a charter-party may be stamped with an impressed stamp after execution upon the following terms; that is to say, (1) within seven days after the first execution thereof, on payment of the duty and a penalty of 4*s.* 6*d.*; (2) after seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of 10*l.*; and shall not in any other case be stamped with an impressed stamp.

A guarantee for the due performance of a charter-party does not require to be stamped as a charter-party (*y*).

Transfers of ships.—Instruments for the sale, transfer, or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel, are exempted from duty (*z*).

Agreements.—Any agreement or memorandum of agreement made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically

(*s*) *R.* v. *Amersham*, 4 Ad. & E. 508; 5 L.J. M.C. 49.
(*t*) *R.* v. *Bourton*, 9 B. & C. 872.
(*u*) *R.* v. *Reynsham*, 5 East, 309.
(*x*) Schedule, tit. "Charter-party," and sect. 49 (1).
(*y*) *Rein* v. *Lane*, L.R. 2 Q.B. 144; 36 L.J. Q.B. 81.
(*z*) See the general exemptions at the end of the schedule.

charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument, is liable to a duty of 6*d*. (*a*).

Although a writing may not be evidence of the whole contract, yet, if it is evidence of a material part of it, and a necessary part in the proof of the contract, it requires a stamp (*b*). By sect. 22, the duty of 6*d*. upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed. As to mortgages and securities deemed to be agreements, see *ante*, p. 1208.

By sect. 59 (1), any contract or agreement made in England or Ireland under seal or under hand only, or made in Scotland with or without any clause of registration for the sale of any equitable estate or interest in any property whatsoever (*c*), or for the sale of any estate or interest in any property, except lands, tenements, hereditaments or heritages (*d*), or property locally situate out of the United Kingdom (*e*), or goods, wares, or merchandise, or stock or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold. (2) Where the purchaser has paid the said *ad valorem* duty and before having obtained a conveyance or transfer of the property, enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the *ad valorem* duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten shillings or of sixpence, as the case may require. (3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the commissioners, upon application, either shall denote the payment of the *ad valorem* duty upon the conveyance or transfer, or shall transfer the *ad valorem* duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped.

(*a*) Schedule, tit. "Agreement."

(*b*) *Ramsbottom* v. *Mortley*, 2 M. & S. 445; *Glover* v. *Halkett*, 2 H. & N. 487; 26 L.J. Ex. 416. See *Carlill* v. *Carbolic Smoke Ball Co.*, (1892) 2 Q.B. 484; 61 L.J. Q.B. 696.

(*c*) See *Farmer* v. *Inland Rev. Com.*, (1898) 2 Q.B. 141; 67 L.J. Q.B. 775; *Chesterfield Brewery* v. *Inland Rev. Com.*, (1899) 2 Q.B. 7; 68 L.J. Q.B. 204.

(*d*) See *West London Syndicate* v. *Inland Rev. Com.*, (1898) 2 Q.B. 507; 67 L.J. Q.B. 956.

(*e*) See *Brooke* v. *Inland Rev. Com.*, (1896) 2 Q.B. 356; 65 L.J. Q.B. 657; *Smelting Co. of Australia* v. *Inland Rev. Com.*, (1897) 1 Q.B. 175; 66 L.J. Q.B. 137; *Inland Rev. Com.* v. *Muller's Margarine Co.*, (1901) A.C. 217; 70 L.J. K.B. 677; *Danubian Sugar Factories* v. *Inland Rev. Com.*, (1901) 1 K.B. 245; 70 L.J. K.B. 211.

(4) Provided that where any such contract or agreement is stamped with the fixed duty of ten shillings or of sixpence, as the case may require, the contract or agreement shall be regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or recover damages for the breach thereof. (5) Provided also that where any such contract or agreement is stamped with the said fixed duty, and a conveyance or transfer made in conformity with the contract or agreement is presented to the commissioners for stamping with the *ad valorem* duty chargeable thereon within the period of six months after the first execution of the contract or agreement, or within such longer period as the commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same, and the said contract or agreement, shall be deemed to be duly stamped. Nothing in this proviso shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof. (6) Provided also, that the *ad valorem* duty paid upon any such contract or agreement shall be returned by the commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect, so as to operate as or be followed by a conveyance or transfer.

Exemptions (*f*).—The provision with respect to agreements is subject to the following exemptions:—(1) Agreement or memorandum the matter whereof is not of the value of 5*l*. (2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant. (3) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise. (4) Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom (*g*).

Firemen and stokers employed on board merchant vessels worked by steam, and placed under the orders of the engineer, are to be considered as artificers and labourers, and not seamen; and contracts for the hiring and service of such persons, so to be employed, are exempt from stamp duty (*h*). All agreements between the master and seamen of any ship, if made in the form sanctioned by the Board of Trade, are exempt from stamp duty (*i*). And so are indentures of apprenticeship to the sea service (*k*), and to the

(*f*) As to exemptions in favour of friendly societies, see 58 & 59 Vict. c. 26, s. 5.

(*g*) See also sect. 23, *ante*, p. 1212.

(*h*) *Wilson* v. *Zulueta*, 14 Q.B. 405; 19 L.J. Q.B. 49.

(*i*) 57 & 58 Vict. c. 60, s. 721.

(*k*) Sect. 108 (1).

fishery service (*l*), a master's bond (*m*), contract tickets (*n*), passage broker's bonds (*o*), and salvage bonds for the King's ships (*p*).

Exemption of agreements relating to the sale of goods and chattels.—A written agreement by a debtor to sell and deliver goods, and by a creditor to receive them, in satisfaction and discharge of an existing debt, is an agreement "for or relating to the sale of chattels" within the exemption of the Stamp Act (*q*). But a contract under seal for the sale and purchase of goods and chattels is not exempt from the stamp duty on deeds. If the parties to a contract of purchase and sale choose to resort to a solemn and formal contract under seal, such contract, if executory, must be stamped with a deed stamp; and, if it operates as an immediate transfer of the thing sold to the purchaser, it must have an *ad valorem* conveyance stamp before it can be given in evidence in any court of justice (*r*). *Fructus industriales*, such as growing crops of turnips, potatoes, and corn, being considered, as previously mentioned, goods and chattels (*ante*, p. 25), are within the exemption of the statute; and simple contracts as to them need not, consequently, be stamped to be admissible in evidence. A contract with a water company for the supply of water is a contract for "the sale of goods, wares, and merchandise" within the exemption, and does not, consequently require a stamp; and it is immaterial whether the subject-matter of the sale exists at the time of the making of the contract, or whether it has afterwards to be made, manufactured, or provided (*s*). An agreement to make a complicated machine with wheels and springs, according to a certain specification, is an agreement relating to the sale of goods within the exemption, unless the contract provides for the erection of it in a dwelling-house, or upon the soil and freehold as a fixture, in which case it is a contract for the performance of work and labour and the supply of materials, and not a contract of sale (*t*). An agreement for the sale and purchase of a ship comes within the exemption, as being a contract relating to the sale of goods and chattels (*u*); and the transfer of the ship itself is expressly exempted from all stamp duty (see p. 1220). A memorandum relating to the sale of goods, such as a bill of parcels, is admissible in evidence to establish a sale, and show who was the purchaser of the goods, although it

(*l*) 57 & 58 Vict. c. 60, s. 395 (7).
(*m*) Sect. 309 (2).
(*n*) Sect. 320 (4).
(*o*) Sect. 342 (2).
(*p*) Sect. 563.
(*q*) *Chatfield* v. *Cox*, 18 Q.B. 321; 21 L.J. Q.B. 279.
(*r*) *Clayton* v. *Burtenshaw*, 5 B. & C. 41; 7 D. & R. 800.
(*s*) *West Mid. Water Co.* v. *Suwerkropp*, M. & M. 408; 4 C. & P. 87; *Gurr* v. *Scudds*, 11 Ex. 190.
(*t*) *Pinner* v. *Arnold*, 2 Cr. M. & R. 616; 5 L.J. Ex. 1.
(*u*) *Meering* v. *Duke*, 2 M. & R. 121; 6 L.J. (O.S.) K.B. 211.

has an unstamped receipt at the bottom of it (*x*). An agreement to participate in the profit and loss of a fishing adventure, or to take a share in the outfit of a ship, is not an agreement for the sale of goods, and is not, consequently, within the exemption (*y*); but an agreement to take a share of certain goods purchased, and participate in the profit and loss of a re-sale, is an agreement relating to the sale of goods within the exemption (*z*).

An agreement relating to the sale of goods comes within the exemption, notwithstanding the introduction into it of collateral matter (*a*). An agreement to cancel a bargain for the purchase of particular goods, and make a new arrangement respecting them, falls within the exemption (*b*); and so also does a warranty contained in a receipt for the price of a horse (*c*), and an agreement to take a share in a horse already purchased (*d*). If, however, the writing is introduced for the purpose of proving an agreement independent of the contract for the sale of goods, it will not be admitted in evidence without being stamped with an agreement stamp. And, if the contract established by the writing is an entire contract for something more than a sale of goods, such as an agreement for the sale of chattels and the goodwill of a business (*e*), or for the sale and purchase of a patent article, and a licence to exercise and enjoy the patent right of using such article, it does not fall within the exemption of the statute (*f*).

Stamp duty on guarantees and indemnities—Exemption of guarantees for the payment of goods.—Any memorandum in writing signed by the defendant, undertaking to be answerable for the debt or default of another, is an agreement within the meaning of the Stamp Acts (*g*). But guarantees for the payment of goods sold to a third party are within the exemption of the statute, and need not consequently be stamped to be admissible in evidence (*h*); and so are agreements by brokers to indemnify their principals and employers against loss on the re-sale of goods purchased by them (*i*), provided the primary object of the writing is a purchase or sale of goods, and the guarantee or indemnity against loss is secondary and subsidiary thereto (*k*). If the primary object of the written undertaking or guarantee, however, be the obtaining of money upon a

(*x*) *Millen* v. *Dent*, 10 Q.B. 846; 16 L.J. Q.B. 374.
(*y*) *Leigh* v. *Banner*, 1 Esp. 403.
(*z*) *Venning* v. *Leckie*, 13 East, 7.
(*a*) *Tooke* v. *Meering*, Dans. & Ll. 35.
(*b*) *Whitworth* v. *Crockett*, 2 Stark. 431.
(*c*) *Skrine* v. *Elmore*, 2 Camp. 407.
(*d*) *Marson* v. *Short*, 2 Bing. N.C. 118; 4 L.J. C.P. 270.
(*e*) *South* v. *Finch*, 3 Bing. N.C. 506.
(*f*) *Chanter* v. *Dickinson*, 5 M. & Gr. 253; 12 L.J. C.P. 147.
(*g*) *Glover* v. *Halkett*, 2 H. & N. 487; 26 L.J. Ex. 416.
(*h*) *Warrington* v. *Furbor*, 8 East, 242; *Martin* v. *Wright*, 6 Q.B. 917; 14 L.J. Q.B. 142; *Sadler* v. *Johnson*, 16 M. & W. 775; 16 L.J. Ex. 178.
(*i*) *Curry* v. *Edensor*, 3 T.R. 524.
(*k*) *Southgate* v. *Bohn*, 16 M. & W. 34; 16 L.J. Ex. 51.

pledge of goods, it does not come within the exemption, although it may authorize the party making the advance to sell the goods when they come to hand, in satisfaction and discharge of the sum borrowed (*l*). Guarantees not relating exclusively to the sale of goods and chattels must be stamped with an agreement stamp (*m*).

Stamps on delivery orders.—Delivery orders (*ante*, p. 498) are charged with a stamp duty of 1*d.*

By sect. 69 (1), the term "delivery order" means any document or writing entitling, or intended to entitle, any person therein named, or his assigns, or the holder thereof, to the delivery of any goods, wares, or merchandise of the value of 40*s.* or upwards, lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such document or writing being signed by or on behalf of the owner of such goods, wares, or merchandise, upon the sale or transfer of the property therein. (2) A delivery order is to be deemed to have been given upon a sale of, or transfer of the property in, goods, wares, or merchandise of the value of 40*s.* or upwards, unless the contrary is expressly stated therein. (3) The duty upon a delivery order may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

By sect. 71, the duty upon a delivery order is, in the absence of any special stipulation, to be paid by the person to whom the order is given, and any person from whom a delivery order chargeable with duty is required may refuse to give it, unless or until the amount of the duty is paid to him.

By sect. 70 (1), if any person (a) untruly states, or knowingly allows to be untruly stated, in a delivery order, either that the transaction to which it relates is not a sale or transfer of property, or that the goods, wares, or merchandise to which it relates are not of the value of 40*s.*; or (b) makes, signs, or issues any delivery order chargeable with duty, but not being duly stamped; or (c) knowingly, either himself, or by his servant or any other person, procures or authorizes the delivery of, any goods, wares, or merchandise mentioned in any delivery order which is not duly stamped, or which contains to his knowledge any false statement with reference either to the nature of the transaction, or the value of the goods, wares, or merchandise, he shall incur a fine of 20*l.*; (2) but a delivery order is not, by reason of the same being unstamped, to be deemed invalid in the hands of the person having the custody of, or delivering out, the goods, wares, or merchandise

(*l*) *Smith* v. *Cator*, 2 B. & Ald. 778.
(*m*) *Wharton* v. *Walton*, 7 Q.B. 474; 14 L.J. Q.B. 321.

therein mentioned, unless such person is proved to have been party or privy to some fraud on the revenue in relation thereto.

Warrants for goods are liable to a duty of 3*d.* (*n*). Any document or writing given by any inland carrier acknowledging the receipt of goods conveyed by such carrier, or a weight note issued together with a duly stamped warrant, and relating solely to the same goods, is exempted from duty.

By sect. 111 (1), the term "warrant for goods" means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of such goods, wares, or merchandise (*o*).

By sect. 111 (2), the duty upon a warrant for goods may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

By sect. 111 (3), every person who makes, executes, or issues, or receives or takes by way of security or indemnity, any warrant for goods not being duly stamped, shall incur a fine of 20*l.*

Contract notes for the sale and purchase of stock or shares.—Every contract note for or relating to the sale or purchase of any stock or marketable security (*p*) of the value of 5*l.* and under the value of 100*l.* is charged with a duty of 1*d.*, and of the value of 100*l.* and upwards is charged with the duty of 6*d.*; but a transfer of government stock itself does not require a stamp (*q*).

The duty on a contract note may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the note is executed (*r*). The amount of duty may be added to the charge for brokerage or agency, and any person effecting a sale or purchase as broker or agent, without making a contract note, or any person making or executing a note not stamped, is liable to a penalty of 20*l.* (*s*), and no person can claim brokerage, &c., unless the note is stamped.

Share warrants (*t*) issued under the provisions of the Companies Act, 1867, are liable to a duty of an amount equal to three times

(*n*) Schedule, tit. "Warrant for goods."

(*o*) And see sect. 69 (3), *supra*.

(*p*) For the meaning of the words "stock" and "marketable security," see sect. 122, *ante*, p. 1191; and as to mortgages of stocks and marketable securities, see *ante*, p. 1208.

(*q*) *Walker* v. *Bartlett*, 18 C.B. 848; 25 L.J. C.P. 263; see the general exemptions at the end of the schedule, Stamp Act, 1891. Transfers of shares registered in a colonial register under the Companies Colonial Registers Act, 1883, and executed out of the United Kingdom, do not require a stamp: 46 & 47 Vict. c. 30, s. 3, sub-s. (7).

(*r*) Sect. 52 (3), (4).

(*s*) Sect. 53.

(*t*) See the schedule, tit. "Share warrants," and 62 & 63 Vict. c. 9, s. 4.

the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share specified in the warrant if the consideration for the transfer were the nominal value of such share.

By the Stamp Act, 1891, sect. 107, if a share warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary or other principal officer of the company, shall incur a fine of 50*l.*

Stock certificates to bearer.—By sect. 108, for the purposes of this Act the expression "stock certificate to bearer" includes every stock certificate to bearer issued after the third day of June one thousand eight hundred and eighty-one, under the provisions of the Local Authorities Loans Act, 1875, or of any other Act authorising the creation of debenture stock, county stock, corporation stock, municipal stock, or funded debt, by whatever name known.

By sect. 109 (1), where the holder of a stock certificate to bearer has been entered on the register of the local authority as the owner of the share of stock described in the certificate, the certificate shall be forthwith cancelled so as to be incapable of being reissued to any person. (2) Every person by whom a stock certificate to bearer is issued without being duly stamped shall incur a fine of 50*l.* (*u*).

Orders or authorities for the transfer of mining shares of any mining company conducted on the cost-book system, or any notice to the purser or officer of any such transfer, are charged with a duty of 6*d.*

By sect. 110 (1), the duty may be denoted by an adhesive stamp to be cancelled by the person by whom the authority is executed; and by sub-sect. (2) a penalty of 20*l.* is imposed, if the order is not duly stamped.

Scrip certificates or other documents (1) entitling any person to become the proprietor of any share of any company or proposed company, or (2) issued or delivered in the United Kingdom, and entitling any person to become the proprietor of any share of any foreign or colonial company or proposed company; or denoting or intended to denote the right of any person as a subscriber in respect of any loan raised or proposed to be raised by any company or proposed company, or by any municipal body or corporation, or issued or delivered in the United Kingdom, denoting or intending to denote the right of any person as a subscriber in respect of any

(*u*) These sections are extended to any instruments to bearer issued by any company or body of persons in the United Kingdom: Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.

loan raised or proposed to be raised by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company: and letters of allotment or renunciation, or any other document having the effect of a letter of allotment (1) of any share of any company or proposed company, or (2) in respect of any loan raised or proposed to be raised by any such company, or by any municipal body or corporation, or (3) issued or delivered in the United Kingdom, of any share of any foreign or colonial company or proposed company, or in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial government, state, company, municipal body or corporation, are respectively chargeable with the stamp duty of 1*d.*

By sect. 79 (1), every person who executes, grants, issues, or delivers out any document chargeable with duty as a letter of allotment, letter of renunciation, or scrip certificate, or as scrip, before the same is duly stamped, shall incur a fine of 20*l.* (2) The stamp duty of 1*d.* on a letter of renunciation may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the letter of renunciation is executed.

Contracts for the sale and purchase of land and interests in land, not being under seal, and not operating as an actual transfer of the property or interest agreed to be bought and sold, must be stamped as agreements (*x*); and so also must all contracts for the sale and purchase or acquisition of incorporeal hereditaments (*ante*, p. 592) (*y*). And contracts for the sale and purchase of the growing produce of fruit-trees, growing grass, growing timber, underwood, or hops, not sold with a view to its immediate severance and removal from the soil as a chattel, and where, consequently, the right to the land for a limited time for the benefit and sustenance of the growing crop passes by the contract, must be stamped with the *ad valorem* duty on conveyances on sales (*z*); but, if the growing produce is sold with a view to its immediate severance and removal as a chattel, the contract is then a contract for the sale and purchase of goods and chattels (*a*), and as such is exempt from stamp duty.

Contracts for the sale of fixtures (*ante*, p. 592), if they amount to an actual transfer of the interest of the fixtures, must be stamped with an *ad valorem* stamp as conveyances (*b*). But, if the contract does not amount to an actual transfer of the right of

(*x*) *Rex* v. *Ridgwell*, 6 B. & C. 655; 5 L.J. (O.S.) M.C. 67.

(*y*) *Phillips* v. *Morrison*, 12 M. & W. 740; 13 L.J. Ex. 212; *Waddington* v. *Bristow*, 2 B. & P. 452.

(*z*) *Cattle* v. *Gamble*, 5 Bing. N.C. 46; 8 L.J. C.P. 162.

(*a*) *Washbourn* v. *Burrows*, 1 Ex. 107; 16 L.J. Ex. 266.

(*b*) *Horsfall* v. *Key*, 2 Ex. 778; 17 L.J. Ex. 267.

property in the fixtures, and right of severance, it is properly stamped as an agreement (*c*).

Contracts of hiring and service between "labourers, artificers, manufacturers, or menial servants," and their employers, are, as we have already seen, expressly exempted from all stamp duty (*d*); but all other contracts of hiring and service must be stamped with the ordinary agreement stamp. A contract for the hiring of a clerk is not within the exemption, and must consequently be stamped (*e*).

Contracts for the letting and hiring of taskwork (*ante*, pp. 799, 820), or for the performance of work by the job or task, must, if the remuneration to be paid for the work is of the value of 5*l.* or upwards, be stamped as agreements (*f*), unless the contract can be shown to be a contract for the hire of "labourers, artificers, manufacturers, or menial servants," within the exemption. A contract by a builder for the erection of a house, according to certain plans and specifications, for an agreed sum of money (*ante*, p. 813), must be stamped as an agreement. If a contract is entered into for the sale of certain goods and chattels and fixing them up in a dwelling-house, such as a contract for the purchase and sale of coppers, grates, and stoves, bells, locks, &c., and one sum is to be paid for the goods and another for the work of fixing them, the contract, so far as it relates to the sale of the goods, will be exempt from stamp duty; but the provision as to the erection of the articles in the dwelling-house will require a stamp, if the remuneration for the work amounts to 5*l.* The sum to be paid for the work cannot be added to the price of the goods so as to raise the value of the subject-matter of the contract. If one entire sum only is to be paid *in solido*, the contract would probably be considered to be a contract for work and labour and the supply of materials, and would then require a stamp, if the sum to be paid amounted to 5*l.* (*ante*, p. 1222). No contract, made pursuant to the Highway Acts, relating to the making, maintaining, or repairing of highways, is chargeable with any higher duty than 6*d.* (*g*).

Calculation of the value of an agreement.—In calculating the value of the subject-matter of the contract, regard must be had to the consideration or immediate inducement for the undertaking or

(*c*) *Chanter* v. *Dickinson*, 5 M. & Gr. 253; 12 L.J. C.P. 147; *Wick* v. *Hodgson*, 12 Moore, 213; 5 L.J. (O.S.) C.P. 55.

(*d*) A contract for the hiring of a farm bailiff at a salary, and a certain portion of the clear annual profits, does not require a stamp: *Reg.* v. *Wortley*, 15 Jur. 1137; 21 L.J. M.C. 44.

(*e*) *Dakin* v. *Watson*, 2 Cr. & Dix. Cir. Rep. 225.

(*f*) *Hegarty* v. *Milne*, 14 C.B. 627; 23 L.J. C.P. 151.

(*g*) See the Stamp Act, 1891, schedule, tit. "Agreement."

promise sought to be enforced, and not to the value of the thing *concerning* which the contract has been made; for, if the consideration does not amount to 5*l.* in value, the written memorandum of the promise does not fall within the operation of the Stamp Acts, although the subject-matter of it, or the thing to which it relates may far exceed that value, and the breach of it may consequently give rise to a claim for damages far surpassing 5*l.* Thus, where a wharfinger receives merchandise to be warehoused and shipped under a special agreement, the value of the matter of the agreement is not the value of the merchandise, but the price of the wharfage and charge on shipment which the wharfinger is to receive as the consideration for his promise (*h*). So, where a parcel is delivered to a carrier to be carried under a special contract, the value of the "matter of the contract" is the price of the carriage, and not the value of the parcel (*i*). So, in the case of agreements for leases, the value of the "matter of the agreement" is not the value of the land, nor the value of the occupation, but the amount of rent reserved and agreed to be paid (*k*). And, in the case of an agreement to confess a judgment, the value of "the matter of the agreement" is not the amount of the judgment, but the debt and costs to be recovered (*l*). And, where there is an agreement to pay interest on a bill, the value of the subject-matter of the agreement is the amount of interest agreed to be paid, and not the amount of the bill (*m*).

Contracts of uncertain value not measurable by any pecuniary standard, such as a contract of marriage, do not require a stamp (*n*). If, at the time of the making of the agreement, the subject-matter of it does not appear to be of the value of 5*l.*, a stamp does not become necessary merely because the value subsequently turns out to be a little more than 5*l.* (*o*).

Bare offers and proposals, not acceded to and accepted in writing, and not amounting to evidence of a concluded contract, are in general admissible in evidence without a stamp; such as a builder's or artificer's estimate of the cost of certain work, and his offer or proposal to do it upon certain terms (*p*); a schoolmaster's printed prospectus of the terms upon which he provides board and instruction for his pupils (*q*); a landlord's unsigned particulars of the

(*h*) *Chadwick* v. *Sills*, R. & M. 15; *Baldwin* v. *Alsager*, 13 M. & W. 365; 14 L.J. Ex. 34.

(*i*) *Latham* v. *Rutley*, R. & M. 13.

(*k*) *Doe* v. *Wiggins*, 4 Q.B. 367; 12 L.J. Q.B. 177; *Doe* v. *Amos*, 2 M. & R. 180; 6 L.J. (O.S.) K.B. 226.

(*l*) *Ames* v. *Hill*, 2 B. & P. 150.

(*m*) *Semple* v. *Steinau*, 8 Ex. 622; 22 L.J. Ex. 224; *Pemberton* v. *Vaughan*, 10 Q.B. 87; 16 L.J. Q.B. 161; *Taylor* v. *Steele*, 16 M. & W. 665; 16 L.J. Ex. 177.

(*n*) *Orford* v. *Cole*, 2 Stark. 351.

(*o*) *Liddiard* v. *Gale*, 4 Ex. 816; 19 L.J. Ex. 160; *Cox* v. *Bailey*, 6 Sc. N.R. 793; 6 M. & Gr. 193.

(*p*) *Penniford* v. *Hamilton*, 2 Stark. 475.

(*q*) *Clay* v. *Crofts*, 20 L.J. Ex. 361; *Edgar* v. *Blick*, 1 Stark. 464.

terms upon which he lets his land (*r*); letters containing mere offers or proposals of salary or hire, to be paid for work to be done, or services to be rendered afterwards, although they are assented to and acted upon (*s*).

Bare admissions and acknowledgments also, not amounting to written evidence of a contract, and not constituting in themselves the evidence of the contract, are in general admissible in evidence without a stamp: such as an "I O U 200*l.* for value received," or a simple acknowledgment of a loan or a debt not containing upon the face of it an express promise of payment (*t*); or a statement of accounts containing upon the face of it a simple admission or acknowledgment of a certain balance being due from the defendant to the plaintiff (*u*); or a mere attornment in writing from a tenant to his landlord, unaccompanied by any terms or conditions (*x*); or a proviso inserted in a stamped receipt to the effect that the acceptance of the rent should not operate as a waiver of a previous notice to quit (*y*); or a simple acknowledgment of an advance of money on furniture; or a *cognovit* containing no words or terms of agreement (*z*). But, if there be any terms or conditions for the payment of money by instalments or otherwise, it is an agreement within the statute. If, therefore, to an I O U for 40*l.* be added the words, "to be paid on the 22nd instant," the instrument must be stamped as a promissory note (*a*). An undertaking by an attorney to recover the amount of a bill deposited with him, or to re-deliver the same to the plaintiff, or a mere acknowledgment of a duty which a party takes upon himself to perform, or a mere memorandum of deposit of bills, to get discounted or return on demand, is not "evidence of a contract" within the meaning of the Stamp Acts (*b*).

A mere acknowledgment that a party holds wine or goods as a bailee or depositary is admissible in evidence without a stamp (*c*). And so is a mere acknowledgment of a tenancy upon sufferance, although it contains upon the face of it an agreement to give immediate possession to the landlord (*d*). A draft agreement,

(*r*) *Ramsbottom* v. *Tunbridge*, 2 M. & S. 434; *Ramsbottom* v. *Mortley*, *ib.* 445; *Hawkins* v. *Warre*, 3 B. & C. 690; 5 D. & R. 520.

(*s*) *Hudspeth* v. *Yarnold*, 9 C.B. 625; 19 L.J. C.P. 321.

(*t*) *Israel* v. *Israel*, 1 Campb. 499; *White* v. *North*, 3 Ex. 689; 18 L.J. Ex. 316; *Hyne* v. *Dewdney*, 21 L.J. Q.B. 278; *Melanotte* v. *Teasdale*, 13 M. & W. 216; 13 L.J. Ex. 358.

(*u*) *Goodyear* v. *Simpson*, 15 M. & W. 16; 15 L.J. Ex. 191.

(*x*) *Doe* v. *Smith*, 8 Ad. & E. 255; 7 L.J. Q.B. 158.

(*y*) *Doe* v. *Fuller*, Tyr. & Gr. 17.

(*z*) *Huxley* v. *O'Connor*, 8 C. & P. 204; *Ames* v. *Hill*, 2 B. & P. 150; *Reardon* v. *Swabey*, 4 East, 188.

(*a*) *Brooks* v. *Elkins*, 2 M. & W. 74; 6 L.J. Ex. 6.

(*b*) *Langdon* v. *Wilson*, 7 B. & C. 640, n. (b); 6 L.J. (O.S.) K.B. 177; *Mullett* v. *Huchison*, 7 B. & C. 639; 6 L.J. (O.S.) K.B. 176.

(*c*) *Blackwell* v. *M'Naughtan*, 1 Q.B. 127.

(*d*) *Barry* v. *Goodman*, 2 M. & W. 769; 6 L.J. Ex. 188.

having on the back of it, "we approve of the draft," signed by the plaintiff and defendant, was admitted in evidence, for the purpose of proving an admission of the parties (*e*). Any mere admission, indeed, or acknowledgment in writing, amounting simply to a link in the chain of evidence by which a contract or agreement is sought to be established, may be given in evidence without a stamp, such as an advertisement in the newspapers, intended to establish the simple fact of a dissolution of partnership (*f*), or an unsigned statement of the terms upon which lands are let (*g*), or of the mode in which the value of certain articles, growing crops, &c., should be calculated and ascertained (*h*), or a mere written consent to the institution of certain legal proceedings, or a mere consent to the performance of any other act, matter, or thing (*i*).

A mere acknowledgment of the terms upon which a bill of exchange has been deposited (*k*), or an acknowledgment of the receipt of title deeds by way of deposit as a security for the repayment of money, is not an agreement within the meaning of the Stamp Acts, and does not require an agreement stamp. Therefore, where a document stamped as a promissory note contained, beside the ordinary promise to pay, a memorandum of a deposit of counterpart leases as a collateral security for the payment of the amount of the note, it was held that an agreement stamp was not necessary in addition to the promissory note stamp (*l*). But if the admission or acknowledgment is coupled with a promise or undertaking, it becomes then either a promissory note or an agreement, and must be stamped accordingly. A mere attornment in writing does not require a stamp (*m*); but, if it is expressed to be made upon certain terms and conditions: if it proceeds to state the amount of rent and the mode of payment, and to set forth the terms of the tenancy, and is signed and witnessed, it is evidence of an agreement chargeable with duty (*n*). And whenever the writing constitutes in itself the sole evidence of the contract sought to be enforced, it is inadmissible without a stamp, whether it has or has not been signed by the parties against whom it is offered in evidence (*o*).

Acknowledgments of debts in writing, given in evidence for the purpose of barring the Statute of Limitations, are expressly ex-

(*e*) *Doe* v. *Pedgriph*, 4 C. & P. 312; *Frazer* v. *Bunn*, 8 C. & P. 704.
(*f*) *Jenkins* v. *Blizard*, 1 Stark. 418.
(*g*) *Bolton* (*Lord*) v. *Tomlin*, 5 Ad. & E. 856; 6 L.J. K.B. 45.
(*h*) *Marshall* v. *Powell*, 9 Q.B. 779; 16 L.J. Q.B. 5.
(*i*) *Hill* v. *Johnson*, 3 C. & P. 456.
(*k*) *De Porquet* v. *Page*, 15 Q.B. 1073; 20 L.J. Q.B. 28.
(*l*) *Fancourt* v. *Thorne*, 9 Q.B. 312; 15 L.J. Q.B. 344; *Pyle* v. *Partridge*, 15 M. & W. 20; 15 L.J. Ex. 129.
(*m*) *Doe* v. *Edwards*, 5 Ad. & E. 95; 5 L.J. K.B. 238.
(*n*) *Cornish* v. *Searell*, 8 B. & C. 471; 6 L.J. (O.S.) K.B. 254; *Doe* v. *Frankis*, 11 Ad. & E. 792; 9 L.J. Q.B. 177.
(*o*) *Chadwick* v. *Clark*, 1 C.B. 700; 14 L.J. C.P. 233.

empted from the operation of the Stamp Acts (*p*). But, if the writing amount to a promissory note, it cannot be received in evidence without a promissory note stamp (*q*).

Bare licences and authorities not amounting in themselves to evidence of a contract may likewise be given in evidence without a stamp, such as an authority to discharge a debt or pay money, or to institute legal proceedings, or to sell goods, or to leave apartments without notice (*r*), or to make a second distress (*s*), or to continue a distress on the land, the landlord giving time for payment (*t*), or a minute of a resolution of a company authorizing the appointment of a clerk, and fixing the amount of his salary, or authorizing the acceptance of a tender for work to be done upon certain terms (*u*), or an authority or request to provide board and lodging for an illegitimate child (*x*). But, if there is no other evidence of the contract but what is afforded by the written memorandum, then the memorandum must be stamped as an agreement (*y*).

Simple contracts of deposit and pledge.—An agreement for the deposit of goods and chattels, bills of lading, or dock warrants, as a security for the repayment of money advanced, is sufficiently stamped with a common 6*d.* agreement stamp, and does not require, unless it is accompanied with a deposit of title-deeds, the *ad valorem* mortgage stamp (*z*). A mortgage stamp is required only where there is a regular conveyance by way of security for the repayment of money, and not where there has been merely a deposit of goods, or of some documents relating to goods, as a bill of lading or dock warrant (*a*). If the document does not amount to an agreement, but to a mere admission or acknowledgment of the deposit as a security for the payment of the money, no stamp at all is required, unless it contains a promise for the payment of money, in which case it must be stamped as a promissory note (*b*).

Bank notes for money not exceeding 1*l.* require a stamp of 5*d.*; exceeding 1*l.* and not 2*l.*, 10*d.*; exceeding 2*l.* and not 5*l.*, 1*s.* 3*d.*;

(*p*) 9 Geo. 4, c. 14, s. 8; *Morris* v. *Dixon*, 4 Ad. & E. 845; 5 L.J. K.B. 155.

(*q*) *Jones* v. *Ryder*, 4 M. & W. 35; 7 L.J. Ex. 216; *Parmiter* v. *Parmiter*, 3 De G. F. & J. 461; 30 L.J. Ch. 508.

(*r*) *Parker* v. *Dubois*, 1 M. & W. 30; 5 L.J. Ex. 90; *Humphreys* v. *Briant*, 4 C. & P. 157; *Diplock* v. *Hammond*, 5 De G. M. & G. 320; 23 L.J. Ch. 550; *Bethell* v. *Blencowe*, 3 Sc. N.R. 568—573; 10 L.J. C.P. 243.

(*s*) *Hill* v. *Ramm*, 6 Sc. N.R. 571; *Pyle* v. *Partridge*, 15 M. & W. 20; 15 L.J. Ex. 129.

(*t*) *Fishwick* v. *Milne*, 4 Ex. 825; 19 L.J. Ex. 153.

(*u*) *Vaughton* v. *Brine*, 1 Sc. N.R. 258; 9 L.J. C.P. 326; *Lucas* v. *Beach*, 1 Sc. N.R. 350; 1 M. & S. 417.

(*x*) *Beeching* v. *Westbrook*, 8 M. & W. 411; 10 L.J. Ex. 464.

(*y*) *Bowen* v. *Fox*, 2 M. & R. 167; 6 L.J. (O.S.) K.B. 235.

(*z*) See the Stamp Act, 1891, schedule, tit. "Mortgage," and also sect. 86, *ante*, p. 1208.

(*a*) *Harris* v. *Birch*, 9 M. & W. 594; 11 L.J. Ex. 219; *Attenborough, In re*, 11 Exch. 463; 25 L.J. Ex. 22.

(*b*) *Pyle* v. *Partridge*, *supra*; *Fancourt* v. *Thorne*, 9 Q.B. 312; 15 L.J. Q.B. 344.

exceeding 5*l.* and not 10*l.*, 1*s.* 9*d.*; exceeding 10*l.* and not 20*l.*, 2*s.*; exceeding 20*l.* and not 30*l.*, 3*s.*; exceeding 30*l.* and not 50*l.*, 5*s.*; exceeding 50*l.* and not 100*l.*, 8*s.* 6*d.*

By sect. 29, the term "banker" means any person carrying on the business of banking in the United Kingdom. The term "bank note" includes—(a) any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding 100*l.* to the bearer on demand; and (b) any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding 100*l.* on demand, whether the same be so expressed or not, and in whatever form, and by whomsoever, such bill or note is drawn or made.

By sect. 30, a bank note issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorized to issue unstamped bank notes, may be from time to time re-issued without being liable to any stamp duty by reason of the re-issuing.

By sect. 31 (1), if any banker, not being duly licensed or otherwise authorized to issue unstamped bank notes, issues, or permits to be issued, any bank note not being duly stamped, he shall incur a fine of 50*l.*; (2) if any person receives or takes in payment or as a security any bank note, issued unstamped contrary to law, knowing the same to have been so issued, he shall incur a fine of 20*l.*

Bills of exchange and promissory notes.—Bills of exchange payable on demand, or at sight or on presentation, are liable to a duty of 1*d.*, and so are bills of exchange expressed to be payable at a period not exceeding three days after date or sight (*c*). Bills of exchange of any other kind whatsoever (except a bank note) and all promissory notes (except a bank note) drawn, or expressed to be payable, or actually paid, or indorsed, or in any manner negotiated in the United Kingdom for any sum of money not exceeding 5*l.*, require a stamp of 1*d.*; exceeding 5*l.* and not 10*l.*, 2*d.*; 10*l.* and not 25*l.*, 3*d.*; 25*l.* and not 50*l.*, 6*d.*; 50*l.* and not 75*l.*, 9*d.*; 75*l.* and not 100*l.*, 1*s.*; exceeding 100*l.*, 1*s.* for every 100*l.*, or part of 100*l.* (*d*). By the Finance Act, 1899 (*e*), the duty payable on bills of exchange drawn and expressed to be payable out of the United Kingdom, when actually

(*c*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 10 (2).

(*d*) The Stamp Act, 1891, schedule, "Bill of Exchange;" *Bradlaugh* v. *De Rin*, L.R. 5 C.P. 473; 39 L.J. C.P. 254.

(*e*) 62 & 63 Vict. c. 9, s. 10 (1).

paid or indorsed or negotiated in any manner within the United Kingdom, shall be reduced to 6*d.* where the amount exceeds 50*l.* and not 100*l.*, and 6*d.* more for every 100*l.* and fraction of 100*l.*

By sect. 32, the term "bill of exchange" for the purposes of this Act includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression "bill of exchange payable on demand" includes—(a) an order for the payment of any sum of money by bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and (b) an order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also any order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf (*f*).

By sect. 33 (1), the term "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money (*g*); (2) a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money (*h*).

By sect. 34 (1), the fixed duty of 1*d.* on a bill of exchange payable on demand, or at sight or on presentation, may be denoted by an adhesive stamp, which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power. (2) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

By sect. 35 (1), every person into whose hands any bill of exchange or promissory note, drawn or made out of the United Kingdom, comes in the United Kingdom before it is stamped

(*f*) See sect. 97 (3) of the Bills of Exchange Act, *ante*, p. 1108; *London Clearing Bankers* v. *Inland Rev. Com.*, (1896) 1 Q.B. 542; 67 L.J. Q.B. 372.

(*g*) See *Smith* v. *Dean*, 69 L.J. Q.B. 331.

(*h*) *Mortgage Insurance Corporation* v. *Inland Rev. Com.*, 21 Q.B.D. 352; 57 L.J. Q.B. 174; *British India Co.* v. *Inland Rev. Com.*, 7 Q.B.D. 165; 50 L.J. Q.B. 517.

shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays, the bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto; (2) provided as follows: (a) if at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person; (b) if at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed; (3) but neither of the foregoing provisoes is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp. Presenting a foreign bill for acceptance was held to be not negotiating it within the meaning of the corresponding section of the former Act (*i*). And the holder of a foreign bill payable on demand might stamp it properly by affixing to it and cancelling a stamp before presenting it for payment (*k*).

By sect. 36, a bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purposes of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom.

By sect. 37 (1), where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of 40*s.* if the bill or note be not then payable according to its tenor, or of 10*l.* if the same be so payable; (2) except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

By sect. 38 (1), every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall incur a fine of 10*l.*, and the person who takes or receives from any other person any such bill or note not being duly stamped

(*i*) *Sharples* v. *Bickard*, 2 H. & N. 57; 26 L.J. Ex. 302.

(*k*) *Boyse, In re*, 33 Ch.D. 613; 56 L.J. Ch. 135.

shall not be entitled to recover thereon, or to make the same available for any purpose whatever (*l*). (2) Provided that if any bill of exchange payable on demand or at sight or on presentation is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of 1*d*., and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct such duty from the said sum, and such bill is, so far as respects the duty, to be deemed valid and available. (3) But the foregoing proviso is not to relieve any person from any fine or penalty he may have incurred in relation to such bill.

By sect. 39, when a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and, upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

The stamp duty upon a protest of any bill of exchange or promissory note, where the duty on the bill or note does not exceed 1*s*., is the same as the duty upon the bill or note, and in every other case the stamp duty is 1*s*. (*m*); and by sect. 90, the duty upon a notarial act and upon the protest by a notary public may be denoted by an adhesive stamp, &c.

Any words in writing, importing a promise to pay a sum certain, are a promissory note within the meaning of the Stamp Acts, and must be stamped accordingly, unless the promise is to pay a sum already secured by a duly stamped promissory note (*n*). But, if the amount is uncertain, or the money is made payable on terms and conditions rendering the contract a special agreement, it should have an agreement stamp (*o*). Bills of exchange cannot be re-issued after they have once been paid without a fresh stamp (*p*); but a party paying an accommodation bill after maturity, on

(*l*) See sect. 14, *ante*, p. 1197. A promissory note insufficiently stamped cannot be admitted in evidence to prove the receipt of the money for which it was given: *Ashling* v. *Boon*, (1891) 1 Ch. 568; 60 L.J. Ch. 306; but it may be used for the purpose of refreshing a witness's memory: *Birchall* v. *Bullough*, (1896) 1 Q.B. 325; 65 L.J. Q.B. 252. The section does not affect post-dated cheques: *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B. 715; 64 L.J. Q.B. 99.

(*m*) See the schedule, tit. "Protest."

(*n*) *Drury* v. *Macaulay*, 16 M. & W. 146; 16 L.J. Ex. 3; *Ellis* v. *Mason*, 7 Dowl. P.C. 598; *Wheatley* v. *Williams*, 1 M. & W. 533; *Shrivell* v. *Payne*, 8 Dowl. P.C. 441; *Walker* v. *Roberts*, Car. & Marsh. 590; *Shelton* v. *James*, 5 Q.B. 199; 13 L.J. Q.B. 90.

(*o*) *Cholmeley* v. *Darley*, 14 M. & W. 344; 14 L.J. Ex. 328.

(*p*) 55 Geo. 3, c. 184, s. 10.

behalf of the acceptor, may bring an action against the drawer without having the bill re-stamped; for there is no re-issue of the bill in such a case. To make a fresh stamp necessary there must be a payment by the party ultimately liable (*q*). A mere authority to pay money does not require a bill of exchange stamp (*r*).

Post-dated cheques.—The date upon the face of a cheque or draft must be taken to be the date of the issue of the instrument; and, if the stamp is conformable therewith, the cheque or draft is admissible in evidence, although it was post-dated; but the maker is liable to a penalty (*s*).

What instruments are bills of exchange within the Stamp Acts.—It was the object of the legislature to treat as bills of exchange, and to subject to stamp duty, all such drafts and orders as, being payable on a contingency, or out of a particular fund, would not otherwise, in strictness of law, have fallen under that denomination (*t*). If no sum whatever is expressed in the order, and the total amount directed to be paid is indefinite, there is nothing to determine the amount of the stamp duty; and the instrument cannot consequently be stamped at all (*u*).

The duties upon bills of exchange and promissory notes are subject to the following exemptions: (1.) Bill or note issued by the Bank of England or the Bank of Ireland. (2.) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers. (3.) Letter written by a banker in the United Kingdom on any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf. (4.) Letter of credit granted in the United Kingdom authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom. (5.) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England or by the Accountant-General of the Supreme Court of Judicature in Ireland. (6.) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for

(*q*) *Thomas* v. *Fenton*, 16 L.J. Q.B. 362; *Lazarus* v. *Cowie*, 3 Q.B. 459; 11 L.J. Q.B. 310; *Jewell* v. *Parr*, 22 L.J. C.P. 253; 13 C.B. 914.

(*r*) *Hamilton* v. *Spottiswoode*, 4 Ex. 210; 18 L.J. Ex. 393.

(*s*) *Williams* v. *Jarrett*, 5 B. & Ad. 32; 2 L.J. K.B. 156; *Whistler* v. *Forster*, 14 C.B. N.S. 248; 32 L.J. C.P. 161; *Austin* v. *Bunyard*, 6 B. & S. 687; 34 L.J. Q.B. 217; *Bull* v. *O'Sullivan*, L.R. 6 Q.B. 209; 40 L.J. Q.B. 141; *Gatty* v. *Fry*, 2 Ex.D. 265; 46 L.J. Ex. 605; *Clarke* v. *Roche*, 3 Q.B.D. 170; 47 L.J. Q.B. 147. See sect. 13, Bills of Exchange Act, *ante*, p. 1110.

(*t*) *Firbank* v. *Bell*, 1 B. & Ald. 36; *Butts* v. *Swan*, 4 Moore, 485; 2 B. & B. 78.

(*u*) *Crowfoot* v. *Gurney*, 2 M. & Sc. 473; 2 L.J. C.P. 21; *Jones* v. *Simpson*, 2 L.J. (O.S.) K.B. 22; 2 B. & C. 318.

the payment of any dividend or interest on any share in the government or parliamentary stocks or funds. (7.) Bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy. (8.) Bill drawn (according to a form prescribed by his Majesty's orders by any person duly authorized to draw the same) upon and payable out of any public account for any pay or allowance of the army or auxiliary forces, or for any other expenditure connected therewith. (9.) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for payment of money out of a public account. (10.) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue. (11.) Coupon or warrant for interest attached to and issued with any security with any agreement or memorandum for the renewal or extension of time for payment of a security (*x*).

Bills of lading (*ante*, pp. 548, 907) of any goods, merchandise, or effects to be exported or carried coastwise, require a 6*d.* stamp.

By sect. 40, they are not to be stamped after execution, and a fine of 50*l.* is imposed upon every person who makes or executes a bill of lading not duly stamped (*y*).

Contracts of insurance.—A policy of sea insurance is liable to a duty of 1*d.*—(1.) Where the premium or consideration does not exceed the rate of 2*s.* 6*d.* per centum of the sum insured. (2.) In any other case—(a) for or upon any voyage in respect of every full sum of 100*l.*, and also any fractional part of 100*l.* thereby insured, 3*d.*; (b) for time in respect of every full sum of 100*l.*, and also any fractional part of 100*l.* thereby insured, where the insurance shall be made for any time not exceeding six months, 3*d.*; where the insurance shall be made for any time exceeding six months and not exceeding twelve months, 6*d.*

By sect. 91, for the purposes of this Act, the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.

By sect. 92 (1), for the purposes of this Act the expression "policy of sea insurance" means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or

(*x*) See *Rothschild* v. *Inland Rev. Com.*, (1894) 2 Q.B. 142.

(*y*) The Stamp Act, 1891, schedule, tit. "Bills of lading."

vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other (*z*) risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance. (2) Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for sea insurance.

By sect. 93 (1), a contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act Amendment Act, 1862 (*zz*)) shall not be valid unless the same is expressed in a policy of sea insurance.

(2) No policy of sea insurance made for time shall be made for any time exceeding twelve months (*a*).

(3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months (*b*).

By sect. 94, where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

By sect. 95 (1), a policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following; that is to say, (a) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover: (b) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only. (2) Provided that a policy of sea insurance shall for the purpose of production in

(*z*) The word *other* was *land* in the former statute, 47 & 48 Vict. c. 62, s. 8.

(*zz*) Sect. 55 is repealed; see now 57 & 58 Vict. c. 60, s. 506.

(*a*) *Royal Exchange Assur. Corp.* v. *Sjorforsakrings Aktiebolaget Vega*, (1902) 2 K.B. 384; 71 L.J. K.B. 739. As to policy of sea insurance containing continuation clause, see 1 Ed. 7, c. 7, s. 11.

(*b*) *Home Mar. Ins. Co.* v. *Smith*, (1898) 2 Q.B. 351; 67 L.J. Q.B. 777.

evidence be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of 100*l.*

Legal alterations in policies may be made under certain restrictions.—By sect. 96, nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration.

Penalty on assuring unless policy duly stamped.—By sect. 97 (1), If any person (a) becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or (b) makes or effects, or knowingly procures to be made or effected, any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium, or consideration for any sea insurance, or enters into any contract for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or (c) is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies of sea insurance, or whereby the duties may be evaded, he shall for every such offence incur a fine of 100*l.* (2) Every broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy of sea insurance upon material not duly stamped, shall for every such offence incur a fine of 100*l.*, and shall not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge shall be deemed to be paid without consideration, and shall remain the property of his employer. (3) If any person makes or issues, or causes to be

made or issued, any document purporting to be a copy of a policy of sea insurance, and there is not at the time of the making or issue in existence a policy duly stamped whereof the said document is a copy, he shall for such offence in addition to any other fine or penalty to which he may be liable incur a fine of 100*l.*

Contracts of insurance against accidents or sickness, or damage to property.—By the Stamp Act, 1891, there is imposed upon every policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury, or by way of indemnity against loss or damage of or to any property, a stamp duty of 1*d.* (*c*).

By sect. 98 (1), for the purposes of this Act the expression "policy of life insurance" means a policy of insurance upon any life or lives or upon any event or contingency relating to or depending upon any life or lives except a policy of insurance against accident; and the expression "policy of insurance against accident," means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury, and includes any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication containing the notice only from accident or violence or otherwise than from a natural cause. (2) A policy of insurance against accident is not to be charged with any further duty than one penny by reason of the same extending to any payment to be made during sickness or incapacity from personal injury (*d*). By the Finance Act, 1895 (*e*), "a policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury" is to include a notice or advertisement in a newspaper or other publication which purports to insure such payment. And by the Finance Act, 1899 (*f*), the expression "policy of insurance against accident" is to include policies of insurance or indemnity against employers' liability when the annual premium does not exceed 1*l.*

By sect. 99, the duty of one penny upon a policy of insurance other than a policy of sea insurance or life insurance may be

(*c*) Schedule, tit. "Policy of insurance."

(*d*) As to what is a policy of insurance, see *Mortgage Insurance Co.* v. *Inland Rev. Com.*, 21 Q.B.D. 352; 57 L.J. Q.B. 630; and as to composition of stamp duty upon policies of insurance against accidents, see sect. 116 of the Act as amended by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 13.

(*e*) 58 Vict. c. 16, s. 13.

(*f*) 62 & 63 Vict. c. 9, s. 11. See *Lancashire Insurance Co.* v. *Inland Rev. Com.*, (1899) 1 Q.B. 353; 68 L.J. Q.B. 143.

denoted by an adhesive stamp, which is to be cancelled by the person by whom the policy is first executed.

Contracts of insurance upon any life or lives.—Policies of insurance upon any life or lives, or upon any event or contingency relating to, or depending upon, any life or lives (except accidents) (*g*) are charged, where the sum insured does not exceed 10*l.*, with a stamp duty of 1*d.*; and where it exceeds 10*l.* but not 25*l.*, 3*d.*; and where it exceeds 25*l.* and not 500*l.*, with a stamp duty of 6*d.* for every 50*l.* and every fractional part of 50*l.*; and, where it exceeds 500*l.* and not 1,000*l.*, then for every 100*l.*, and any fractional part of 100*l.*, 1*s.*; and when it exceeds 1,000*l.*, then for every 1,000*l.*, and any fractional part of 1,000*l.*, 10*s.* (*h*).

By sect. 19 (1), the term "insurance" includes assurance, and the term "policy" includes every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced.

By sect. 100, every person who (1) receives, or takes credit for any premium or consideration for any insurance other than a sea insurance, and does not, within one month after receiving, or taking credit for the premium or consideration, make out and execute a duly stamped policy of insurance; or (2) makes, executes, or delivers out, or pays or allows in account, or agrees to pay or allow in account, any money upon or in respect of any policy other than a policy of sea insurance which is not duly stamped, shall incur a fine of 20*l.*

By sect. 118 (1), no assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped. (2) If any payment is made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to his Majesty from the person by whom the payment is made.

Receipts given for or upon the payment of money amounting to 2*l.* or upwards are liable to a stamp duty of 1*d.* The following are the exemptions:—(1.) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for. (2.) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment. (3.) Receipt given for or upon

(*g*) See sect. 98, *ante*, p. 1242. (*h*) See the schedule, tit. "Policy."

the payment of any parliamentary taxes or duties, or of money to or for the use of his Majesty. (4.) Receipt given by an officer of a public department of the State for money paid by way of imprest or advance, or in adjustment of an account, where he derives no personal benefit therefrom. (5.) Receipt given by any agent for money imprested to him on account of the pay of the army. (6.) Receipt given by any officer, seaman, marine, or soldier, or his representatives, for or on account of any wages, pay, or pension, due from the Admiralty or army pay office. (7.) Receipt given for any principal money or interest due on an exchequer bill. (8.) The eighth exemption was repealed by the Stamp Act, 1895 (*i*), and the duty on a receipt written upon a bill of exchange or promissory note is now to be charged, but the name of a banker or payee, written on a duly stamped bill or note in the ordinary course of business, is not to be taken as a receipt chargeable with stamp duty. (9.) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland. (10.) Receipt given for the consideration money for the purchase of any share in any of the government or parliamentary stocks or funds, or in the stocks and funds of the Secretary of State in Council of India, or of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share of the said stocks or funds respectively. (11.) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned (*k*). (12.) Receipt given for any allowance by way of drawback or otherwise upon the exportation of any goods or merchandise from the United Kingdom. (13.) Receipt given for the return of any duty of customs upon certificates of over entry. (14.) Receipt given by an officer of a County Court for money received by him from a party to any proceeding in the Court. (15.) Receipt given by or on behalf of a clerk to justices for money received in respect of a fine (*l*).

By sect. 101 (1), the term "receipt" includes any note, memorandum, or writing whatsoever whereby any money amounting to 2*l.* or upwards, or any bill of exchange or promissory note for money amounting to 2*l.* or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount

(*i*) 58 Vict. c. 16, s. 9.

(*k*) See *London and Westminster Bank* v. *Inland Rev. Com.*, (1900) 1 Q.B. 166; 69 L.J. Q.B. 102.

(*l*) These two last exemptions were added by the Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 8.

either in payment or as a security, or by purchase or otherwise, of 2*l.* or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person (*m*). (2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

By sect. 102, a receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say, (1) within fourteen days after it has been given, on payment of the duty and a penalty of 5*l.*; (2) after fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of 10*l.*; and shall not in any other case be stamped with an impressed stamp.

By sect. 103, if any person (1) gives a receipt liable to duty and not duly stamped; or (2) in any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or (3) upon a payment to the amount of 2*l.* or upwards gives a receipt for a sum not amounting to 2*l.*, or separates or divides the amount paid with intent to evade the duty; he shall incur a fine of 10*l.*

If the receipt appears to be an acknowledgment of the receipt of money paid by way of gift and gratuity, and not in discharge of a debt, claim, or demand, it is not within the statute (*n*). A memorandum or acknowledgment of the receipt of money or bills or securities, by way of deposit, does not require a receipt stamp; for the words of the former Stamp Acts (which are very similar to the present Act), "every receipt or discharge given for or upon the payment of money," clearly apply to writings given as a discharge of money antecedently due, and not to an acknowledgment that money has been deposited to be accounted for on demand (*o*). If a receipt for money and an agreement are written on the same piece of paper, the receipt is admissible in evidence if it has a receipt stamp, although there be no agreement stamp (*p*).

(*m*) See *Att.-Gen.* v. *Carlton Bank*, (1899) 2 Q.B. 158; 68 L.J. Q.B. 788.

(*n*) *Boyle* v. *Brandon*, 13 M. & W. 738; 14 L.J. Ex. 344.

(*o*) *Tomkins* v. *Ashby*, 9 D. & R. 545; 6 B. & C. 542; 5 L.J. (O.S.) K.B. 246; *Levy* v. *Alexander*, 19 L.J. Ex. 113; 4 Ex. 485; and see the exemptions, *ante*, p. 1243.

(*p*) *Grey* v. *Smith*, 1 Campb. 387.

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